

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 158/2000**

% 20th January, 2011

SH. SUKHBIR SINGH

Through: Appellant
Mr. Som Dutt Sharma,
Advocate.

VERSUS

SMT. BHAGYAWANTI & OTHERS

Through: Respondents
Mr. V.K. Tandon, Advocate
for the respondent Nos.1
to 5 and 7 to 14.
Mr. Madan Lal Sharma,
Advocate for the
respondent Nos.6 and 15.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? **Yes**
3. Whether the judgment should be reported in the Digest? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of the regular first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment and decree dated 29.1.2000 whereby the suit of the appellant/plaintiff has been dismissed as not maintainable by treating certain issues as preliminary issues. It has been held by the impugned judgment that the suit is barred both under Section 34 of the Specific Relief Act, 1963 and

Section 185 of the Delhi Land Reforms Act, 1954.

2. At the outset, I must note that it is conceded by the counsel appearing on behalf of the respondents that the dismissal of the suit as not maintainable on the basis of Section 185 of the Delhi Land Reforms Act, 1954 is not correct because the lands in question are governed by the Punjab Land Revenue Act, 1887 and as per Section 45 of the Punjab Land Revenue Act, 1887 a suit lies in a civil Court challenging the mutation of the record of rights. The only issue, therefore, to be considered by me, in this appeal, is whether the suit is not maintainable as per proviso to Section 34 of the Specific Relief Act, 1963.

3. The appellant and the respondents are legal heirs of late Sh. Udai Singh. They are either the sons or the daughters or the widow of pre-deceased son or the legal heirs of pre-deceased son. The daughter-in-law of Udai Singh was defendant No.15 in the trial Court and respondent No.15 in the present appeal. Respondent No.15 is the wife of respondent No.6/defendant No.6. Sh. Darshan Singh.

4. Late Sh. Udai Singh had properties being agricultural land in village Barwala, Delhi as also residential house therein, and agricultural land in village Alipur, Delhi. Sh. Udai Singh is said to have died leaving behind his registered Will dated 6.11.1996. On the basis of this registered Will, the appellant/plaintiff got a lesser share in the properties of Udai Singh as compared to his other brothers and therefore the subject suit was filed in which the appellant has claimed the following reliefs:-

“i. That a decree of declaration to the effect that the will dated 6.11.96 executed by the deceased Shri Uday Singh in

favour of the defendants be declared as null and void and be cancelled and the consequential order of mutation dated 13.1.98 based on the above will sanctioned by the Tehsildar vide Mutation order no.3025 in favour of the defendants and plaintiffs be also declared void.

b) a decree of declaration to the effect that the sale deed dated 9.11.95 executed by the defendant no.15 in favour of the defendant no.6 purported to have been sold land situated in vill. Alipur as mentioned in para 2 of the plaint measuring 21 bigha 9 biswas being document no.17175 Vol. no.1 Addl. Vol.no.8184 pages 134 to 137 dated 9.11.95 and the unregistered general power of attorney dated 31.3.93 be declared null and void and be cancelled and the consequence order of mutation dt. 11.1.96 bearing Mutation no.1709 based on the above mentioned sale deed sanctioned by the Tehsildar Delhi in favour of the defendant no.6 be also declared void and without jurisdiction.

c) a decree of partition be also passed pertaining to the suit property situated in vill. Barwala and Vill. Alipur as mentioned in para no.2.

d) as a consequential relief the defendants and their agents, servants and representatives be restrained by means of a decree of permanent injunction from selling, alienating, transferring or disposing or creating any third party interest on the suit land in any manner whatsoever pertaining to the suit land as mentioned in para no.2 of the plaint situated in Vill. Barwala and Vill. Alipur, Delhi.

e) The costs of the suit and or any other order or direction or relief be also passed in favour of the plaintiff and against the defendants."

5. The cause of action in the suit is for declaration of the Will dated 6.11.1996 of late Sh. Udai Singh to be null and void for the reason that Udai Singh was not the sole owner of the land and the lands were in fact ancestral and thus were of the Hindu Undivided Family. One of the reliefs as prayed in the plaint is for cancellation of the mutation order of the authorities dated 13.1.1998 on the basis of which lands in village Barwala have been mutated in different shares as per the Will dated 6.11.1996 of late Sh. Udai Singh. Another part of cause of action in the plaint was that it was alleged that respondent No.15/defendant No.15

(who is the wife of one of the son namely Sh. Darshan Singh/respondent No.6/defendant No.6) forged a power of attorney of late Sh. Udai Singh in her favour dated 13.3.1993 and acting on the said power of attorney respondent No.15/defendant No.15 is alleged to have transferred the lands in village Alipur to her husband respondent No.6/defendant No.6 under a sale deed dated 1.11.1995 and pursuant to the sale deed, these lands of village Alipur being 21 Bigha and 2 Biswas have been mutated in the name of respondent No.6/defendant No.6.

I may note that during the pendency of the suit the appellant/plaintiff gave up his relief of partition on 18.1.2000 and which has been so noted in the impugned order.

6. The aforesaid facts make it clear that the appellant claims ownership rights with respect to the lands in village Barwala and village Alipur, New Delhi. It is prayed in the plaint that the Will of late Sh. Udai Singh be declared as null and void as also the general power of attorney and the consequential sale deed executed by respondent No.15 in favour of respondent No.6 with respect to the lands in village Alipur. Challenge is also laid to the two mutation orders, one on the basis of will of Sh. Udai Singh and other on the basis of the sale deed executed by respondent No.15 in favour of respondent No.6. In sum and substance, the plaintiff seeks ownership rights in the subject lands. The declaration is therefore for ownership rights in the subject land by seeking quashing of the Will as also the mutation orders based on the sale deed and the Will.

7. The proviso to Section 34 of the Specific Relief Act, 1963

provides that the Court will not grant a decree of declaration if the plaintiff is entitled to a further relief as arising from the relief claimed of declaration but does not claim the same. In the present case, any relief of declaration with respect to either the Will of late Sh. Udai Singh or the sale deed in favour of respondent No.6 or the two mutation orders will not grant effective relief to the appellant/plaintiff because if the plaintiff claims ownership rights, surely, he is bound to ask for possession of the properties of which he claims ownership because admittedly possession of the lands is not with the plaintiff/appellant. Possession is a further relief in terms of proviso to Section 34 of the Specific Relief Act, 1963 to the relief of declaration which has been prayed for by the plaintiff and which relief of declaration would not lead to any effective benefit unless possession is also claimed by the plaintiff. I may also, at this stage, note that in terms of Order 2 Rule 1 of the CPC every suit shall suffer so far as possible be framed so as to grant final decision upon the subject and disputes and to prevent further litigation concerning them. The proviso to Order 2 Rule 1 CPC is also in the same spirit as the proviso to Section 34 of the Specific Relief Act, 1963.

8. Though it is not disputed on behalf of the appellant/plaintiff that the appellant/plaintiff is not in actual physical possession of the lands in village Barwala and village Alipur, what is contended by the learned counsel for the appellant is that once the properties are proved by him to be HUF properties, the other family members who are in possession of the properties are holding the same for and on behalf of the appellant/plaintiff

and therefore he need not ask for the relief of possession. I am afraid the argument of the learned counsel for the appellant is misconceived because a coparcener and a co-owner will remain in possession for and on behalf of the other co-owners only till ouster is pleaded and proved. Here the ouster is admitted by the appellant/plaintiff himself because ouster means that the ownership rights of coparcener and co-owner are denied by the other coparceners/co-owners. The very fact that the appellant/plaintiff in his plaint has stated that the mutation of the lands in village Barwala have taken place in different shares in favour of the different family members pursuant to the Will dated 6.11.1996, therefore, admittedly ouster is complete as against the appellant/plaintiff with respect to those lands which have been mutated in the name of other family members. So far as the lands in village Alipur are concerned, once again, the ouster against the appellant/plaintiff is complete because the appellant/plaintiff admits that pursuant to the alleged illegal sale deed executed in favour of the respondent No.6/defendant No.6 on the basis of a forged power of attorney in favour of respondent No.15/defendant No.15, there is in fact taken place mutation order mutating these lands in village Alipur in the name of respondent No.6./defendant No.6. Once again therefore qua the land in village Alipur, the ouster of the appellant/plaintiff is an admitted fact.

9. It has been held by a learned Single Judge of this Court in the judgment reported as ***C. Lal & Sons Vs. Wasudhir Foundation & Ors.*** **66 (1997) DLT 766** that where a suit is barred under certain provisions

of the Specific Relief Act, 1963, and which were Sections 38(1) and 41(J) in the said case, this issue could be decided as a preliminary issue under Order 14 Rule 2 CPC because a bar to the maintainability of a suit on the basis of the said provisions of the Specific Relief Act, 1963 is a legal bar as envisaged under Order 14 Rule 2 CPC.

In the present case also the bar to the suit is pleaded on the basis of proviso to Section 34 of the Specific Relief Act, 1963 and it is therefore a legal/statutory bar to the maintainability of the suit. There is no evidence required in the present case because the contents of the plaint are being taken as correct and there are no disputed questions of fact requiring trial. The impugned judgment as also the present judgment is therefore proceeding by taking contents of the plaint to be correct.

In another case reported as ***Virender Gopal Vs. Municipal Corporation of Delhi AIR 2007 Delhi 183*** a Division Bench of this Court has held that a preliminary issue was rightly decided by holding the suit as barred under the proviso to Section 34 of the Specific Relief Act, 1963 because possession of the suit land in the said case was found to be with the defendant and the plaintiff has merely sued for declaration and injunction without claiming the relief of possession.

10. The aforesaid judgments of ***C.Lal & Sons(supra)*** and ***Virender Gopal(supra)*** squarely apply in the facts of the present case on the basis of the admitted possession which emerges in the plaint. The suit is therefore clearly barred by virtue of the proviso to Section 34 of the Specific Relief Act, 1963 and therefore by the impugned judgment and

decree the preliminary issue has been rightly decided by dismissing the suit as not maintainable.

9. The appeal is therefore misconceived and is therefore dismissed, leaving the parties to bear their own costs. Interim orders are vacated. Trial Court record be sent back.

JANUARY 20, 2011
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VALMIKI J. MEHTA, J.