

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

+ **RFA No.41/2001**

% 25th January, 2011

RAGHUBIR SINGH Appellant
Through: Ms. Neelam Rathore, Advocate

VERSUS

RAGHUNATH RAI & ORS. Respondents
Through: Mr. Sanjay Goswami,
Advocate for the R.1.

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)

+CM No.9254/2010(u/S.151 CPC) in RFA No.41/2001

There is no opposition to this application.

Abatement is set aside.

CM stands disposed of.

CM Nos.1671/10 & 7235/10 (u/O22 R.4 with O.22 R.11 & S.151 CPC)

There is no opposition to these applications. These applications are allowed and the legal heirs of respondents no. 2 and 6 are brought on record. CM's stand disposed of

RFA No.41/2001 & CM No.7236/2010 (u/S.5 of the Limitation Act)

1. The challenge by means of this first appeal under Section 96 of

the Code of Civil Procedure, 1908 is to the impugned judgment and decree dated 19.8.2000 whereby the suit of the appellant/plaintiff for declaration and permanent injunction was dismissed firstly on the ground that the same was not maintainable in terms of the proviso to Section 34 of the Specific Relief Act, 1963 inasmuch as appellant/plaintiff had only claimed declaration although the appellant was out of possession. The second ground for dismissing the suit was that by the compromise decree dated 19/12/1962 declaring that the all the parties had equal 1/4th share in the property, was passed with the knowledge of the appellant/plaintiff who could not therefore challenge the same at a later stage by the filing of suit after 14 years in 1976.

2. The dispute pertains to the property being plot no. 21, block no.4, Kalkaji, New Delhi. The case of the appellant/plaintiff was that he was the owner of the subject property inasmuch as he purchased the same in auction conducted by the Ministry of Rehabilitation, Government of India. It is claimed that he purchased the property for a sum of Rs.3050/-. It was also the case of the appellant that he constructed on the suit property subsequently in around the year 1967. The defence of the respondents/defendants was that though originally the property was purchased in the name of appellant/plaintiff, however, the appellant/plaintiff was only a *benamidar* and appellant was asked to participate in the auction because the father, late Sh.Gurudita Ram was already having a government built property and therefore there was a possibility of the auction being not successful in his name. It was also the contention of the

respondents/defendants that the father of the parties incurred costs of construction on the plot. The case of the respondents/defendants is also that the father expected that the plaintiff/appellant may one day seek to appropriate the property solely to himself and therefore got the suit for declaration filed in which the father was a party along with one of the son and in which the compromise decree was passed so as to give certainty and finality of equal shares in the property to all the parties.

3. After the pleadings were complete, the Trial court framed issues and the relevant issues necessary for disposal of this appeal are issue nos.1 and 4 which read as under:

“1. Whether the suit as framed, is not maintainable in that the plaintiff is not in exclusive possession of the suit property? OPP

4. Whether the judgment passed in December, 1962, in suit No.668/62, is liable to be set aside on the ground that fraud and deception was practiced on the plaintiff, in that:

(a) that a fraudulent representation was made in the earlier suit that the plaintiff had share to the extent of $\frac{3}{4}$ th in the suit property and that the defendant was only a benami holder of the property to the extent of $\frac{1}{4}$ th;

(b) that the summons of the earlier suit were in fact not served on the plaintiff and that the plaintiff's father manoeuvred to make the report on the summons that the plaintiff was not available at home and that he would produce him in the court on the date of hearing;

(c) that by practicing duress, alleging that warrant of arrest had been issued against the plaintiff by the court of the Civil Judge, the plaintiff was made to accompany his father to put in appearance in the court; and

(d) that the plaintiff was prevailed upon by his father to admit the claim in the earlier suit. OPP”

4. So far as issue no.1 is concerned, the Trial Court has held the suit to be barred by virtue of the proviso to 34 of the Specific Relief Act because it was held that the appellant/plaintiff had filed the suit for mere declaration and injunction without claiming the consequential relief of possession. Admittedly the plaintiff was not in possession of that part of the property which was with the respondent no.1/defendant no.1.

Before this Court learned counsel for the appellant argued that this issue that the suit was maintainable and it was not barred under the proviso to Section 34 was already earlier decided in the suit vide order dated 31.8.1979. Before I discuss the contents of the order dated 31.8.1979 I must state that the argument so raised on the basis of the order dated 31.8.1979 are not found in the impugned judgment and decree and the appellant therefore ought to have made a specific ground for challenge to the impugned judgment and decree that this issue was argued on such basis in the suit, however, reference to the grounds of appeal in this court show that no such ground has been raised. I am quite clear therefore that this issue which was not urged before the Trial Court and has been urged before this Court for the first time in the stage of appeal cannot be permitted. Though this itself is enough to disallow the appellant to raise this argument, additionally, I note that, this argument on the basis of the order dated 31.8.1979 lacks substance because the order dated 31.8.79 only decided the issue in a suit which was simpliciter for declaration, whether, court fee is payable at ad valorem or fixed. It was decided that since the relief was simpliciter for a declaration, ad velorem court fee was not required. The

issue with regard to the suit being barred by the proviso to Section 34 of the Specific Relief Act on the ground that the plaintiff was out of possession and therefore was bound to claim the possession was not an issue which was pronounced upon by the order dated 31.8.1979.

I therefore reject the argument that the order dated 31.8.79 decided the issue that the suit was maintainable although, the appellant/plaintiff did not claim the consequential relief of possession.

The Trial Court has dealt with this issue which reads as under:

“Issue no.1:-

The burden of proving the aforesaid issue was upon defendant. At the time of hearing arguments Sh.R.C.Chopra, defendant counsel stated that as it is admitted case of the plaintiff that defendant no.1 is in occupation of the portion of the suit premises, therefore, besides the relief of declaration, plaintiff should have also prayed recovery of the possession of the portion of the premises in the occupation of defendant no.1 and as plaintiff did not seek the aforesaid relief therefore, suit of plaintiff is barred under Section 34 of the Specific Relief Act, 1963. In support of his arguments, defendant counsel took me through the aforesaid provisions of law and relied upon AIR 1972, Supreme Court 2685, Air 1974 Calcutta 283, AIR 1977 Orissa 12 and 48(1992) Delhi Law Times 522. Plaintiff counsel Sh.S.K.Kalia on the other hand submitted that as the defendant no. 1 as well as their father did not come into the possession of the portion in their occupation on the basis of decree, therefore, their occupation in the portion of the house had no legal force or sanctity. He further submitted that as in this case, decree in favour of the defendant was only in respect of the plot, therefore, plaintiff was not required to file the suit for declaration and possession. Plaintiff counsel further argued that otherwise also, as plaintiff is in possession of most of the property and defendant no.1 is in permissive possession of the portion in his occupation, therefore, as the plaintiff did not require the possession of the said portion, in occupation of defendant no. 1 at the time of filing of suit, therefore, he was not required to seek possession of the same. The plaintiff counsel therefore submitted that suit of plaintiff is not

barred U/s.34 of Specific Relief Act.

After patiently hearing the arguments of both the parties as well as going through the citations filed by parties, my decision is as under:-

Section 34 of the Specific Relief Act states as under :-

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief;

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

In Kumud Ranjan Banerjee vs. Maqabendra Banerjee, AIR, 1974 Cal.342 at p.343; while describing the object of the proviso of the aforesaid section it was held as under:-

“Proviso to Sec.34 of the Specific Relief Act 1963, lays down that no court shall make any such declaration where the plaintiff being able to seek further relief than mere declaration of title omits to do so. The object of this proviso is to avoid multiplicity of suits. Where the plaintiff is entitled to some consequential relief directly flowing from the right or title of which he seeks declaration in the suit, he must seek such relief alongwith the declaration. It is not open to him to seek a declaration in the first instance and a consequential relief at a later stage by two separate suits. This provisions is mandatory and enjoins the court not to pass a declaratory decree where the plaintiff omits to seek further relief to which he is entitled as a natural consequence of the declaration.”

In Anurudha Padhan vs. Chhai Padha, AIR 1981 Orissa 74 at page-75, it was also held as under:-

From a reading of the proviso alongwith the main

section it is clear that the further relief contemplated in the proviso is a relief which was available to the plaintiffs at the time of institution of the suit and which he omitted to ask for. The further relief must be a relief in relation to the legal right as to property which the plaintiff is entitled to and it must also be a relief appropriate to an necessarily consequent on the right asserted.

In view of the aforesaid citations, we have to see whether at the time of filing of the suit any further relief, besides the relief of declaration was available to the plaintiff of or not. It is the admitted case of the plaintiff that defendant no. 1 is in occupation of the part of the premises since 1968. The present suit was filed in the year 1976. Therefore, it is very clear that at the time of filing of the suit the relief of possession in respect of the premises in occupation of defendant no. 1 was very much available to the plaintiff. now, as the plaintiff has failed to seek relief of possession from defendant no. 1 therefore, suit of plaintiff is clearly his by the proviso of Section 34 of the Specific Relief Act. I am supported in my aforesaid observation in view of the direct authority of the Hon'ble Supreme Court, on the aforesaid point, in case Ram Saran and Anr. Vs. Smt. Ganga Devi reported in aIR 1972 Supreme Court 2685 wherein it was held as under:-

“Where the defendant is in possession of some of the suit properties and the plaintiff in his suit does not seek possession of those properties but merely seeks a declaration that he is the owner of the suit properties the suit is not maintainable.”

In view of the aforesaid discussions, it is held that suit of plaintiff is not maintainable being barred under the proviso of 34 of the Specific Relief Act.”

5. I do not find any illegality or perversity in the this discussion or conclusion of the court below. This argument of the appellant is therefore rejected.
6. The second argument, and which was the argument extensively pressed before this court, was that the consent decree declaring equal 1/4th

share of the parties was not binding on the appellant/plaintiff because the appellant/plaintiff had no knowledge of the said compromise decree dated 19.12.1962. I may note that although, the Trial Court has not discussed the issue of the suit being barred by limitation, I feel that the suit would also be barred by limitation because a challenge to a decree of 1962 cannot be laid in the year 1976. Article 113 of the Limitation Act, 1963 provides a residual article for a suit which is not otherwise covered by any of the articles then the period of limitation is 3 years from the date of cause of action. In fact Article 59 specifically provides for a period of three years to set aside a decree. In this case, once it is held, an aspect which I will discuss immediately hereinafter, that the appellant/plaintiff was very much aware of the consent decree dated 19.12.1962, the appellant/plaintiff ought to have filed a suit for challenging the decree dated 19.12.1962 within 3 years from 19.12.62. The suit therefore filed in 1976 for challenging the decree of 1962 is therefore clearly time barred.

In the present case, while dealing with issue no.4, the Trial Court held that the appellant/plaintiff was all along aware of the consent decree of 1962 i.e. from the very date the same was passed on 19.12.1962 because not only the appellant/plaintiff appeared in the Court, he also signed his statement, for passing of the consent decree declaring equal share of the parties. The Trial Court has also referred to and relied upon the statement of the Advocate, Sh.Khem Chand Kalra who appeared as DW2 who confirmed that he was the Advocate through whom the plaintiffs had filed the suit and he was present in the Court when the appellant/plaintiff had appeared on

19.12.1962 and signed the statement for passing of the consent decree. The Trial Court has discussed this issue in the following portion of the impugned judgment, and to which no fault can be found:-

“Now we have to see whether plaintiff actually made the aforesaid statement before the court of Sh.B.M.Aggarwal, on 19.12.62 or not. Here I would like to discuss the contents of the plaint of suit No. 668/62. In para 6 of the aforesaid plaint, plaintiffs of the aforesaid case had stated “Each of the three plaintiffs and also the defendant have contributed equally towards the amount paid on account of price of the above plot, therefore, each of the plaintiff and defendant is entitled to 1/4th share in the said plot.” The prayer clause of the aforesaid suit stated that a decree with cost be passed declaring that each of three plaintiffs is the owner and in possession of the 1/4th share in the plot no.21, block-4, Kalkaji, New Delhi. Now, I would discuss the proceedings of the court dated 19.12.62 which are in the hand of Sh.B.M.Aggarwal the Hon’ble Sub-judge. In the proceedings the statement of the plaintiff Raghubeer Singh was recorded. The said statement reads like this-

“I have read the plaint. The same is correct. Decree in terms of the plaint may kindly be passed

RO&AC

Sd/-
(RAGHUBIR SINGH)
19/12/1962.

Sd/-
B.M.Aggarwal
19.12.62

On the basis of aforesaid statement, Sh.B.M.Aggarwal decreed the suit of plaintiff as prayed.

From the afore discussed proceedings it is clear that there is no such statement of the plaintiff here-in that he did not know anything about the case and whatever his father had said is all correct. Hence, the case set up by plaintiff describing the situation under which he gave the statement is not at all proved. On the other hand, the proceedings of the court of Sh.B.M.Aggarwal clearly show that no fraudulent representation was made to the court. My aforesaid belief that no fraudulent representation was made in the court of

Sh.B.M.Aggarwal or no fraud was played upon the plaintiff is fortified in view of the following reasons:-

1) Except the oral evidence of the plaintiff that on 19.12.1962, his father came to the office and asked him to accompany to the court as defendant no.1 had got issued non-bailable warrants against him, there is no other convincing evidence on the record. In my considered opinion, plaintiff was supposed to summon the relevant record of his office that actually on 19.12.62, his father came to the office. Plaintiff failed to do so. Defendant No. 1, on the other hand, in order to rebut the plaintiff's case has produced DW2 KishanLal Kalra, who had filed the case in the court of Sh.B.M.Aggarwal. He has already stated above, clearly deposed that he knew both the parties as they were distantly related to him; that on 19.12.62, plaintiff came to the court separately where his statement was recorded in his presence by Sh.B.M.Aggartwal, Sub Judge in his own hand; that thereafter defendant signed his statement in his present and thereafter, in the presence of plaintiff and defendant, Ld. Judge announced the order. From the cross-examination of aforesaid witness, plaintiff counsel could not extract anything in support of the case of plaintiff. Thus, the proceedings of the court of Sh.B.M.Aggarwal coupled with the statement of DW2 clearly leads to the inference that plaintiff made the statement in the court of Sh.B.M.Aggarwal voluntarily and without any pressure.

ii) It is the admitted case of the plaintiff that he attended the court of Sh.B.M.Aggarwal, the then Sub Judge, on 19.12.62 where his statement was recorded. For the sake of presumption, if it is presumed that he actually did not read his statement recorded by Sh.B.M.Aggarwal, then at least, later on he could have enquired about the proceedings of the case himself or through his advocate. In my considered opinion, in situations like this, any ordinary educated person, first of all, would not put his signatures on his statement without reading it and secondly, if by chance, he has signed the same without reading it, then at least subsequently, he would make enquiries as to what had happened in the court. The very fact that plaintiff did not make any subsequent enquiry as to what had transpired in the court of Sh.B.M.Aggarwal on 19.12.62 clearly shows that he signed his statement voluntarily.

iii) The aforesaid proceedings of the court of Sh.B.M.Aggarwal does not suggest at all that actually

anything wrong was done on the aforesaid date.

iv) Plaintiff case is that for the first time, he came to know about the judgment dated 19.12.62 on 17.11.76, after receiving letter from the office of land and development, Nirman Bhawan about mutation of names of defendant no.1 and 2 and legal heirs of deceased father but, the following sequence of events show that plaintiff was aware about the judgment before 17.11.76."

7. I do not find any illegality or perversity by the Trial Court when it arrived at such a finding and it did not lie in the mouth of the appellant/plaintiff to canvass and urge that he was not aware of the consent decree to which he was a party and which was passed on 19.12.1962. The Trial Court has rightly disbelieved the contention of the plaintiff/appellant on the ground that even assuming he was under some mistaken belief on account of misrepresentation of his father, then he was bound, in any case as soon as practicable after 19.12.1962, to make efforts to know what were the contents of the order passed on 19.12.1962 but the appellant/plaintiff failed to do so. Obviously, this was because the plaintiff all along has always been aware right from the 1962 of the consent decree to which he was a party. In fact, the conduct of the plaintiff in thereafter allowing the respondent no.1/defendant no.1 to come and live in a portion of the property by giving him possession is clearly indicative of his knowledge of the contents of the consent decree dated 19.12.1962 and which gave right to the respondent no.1/defendant no.1 of 1/4th ownership in the subject property. Quite clearly therefore it would be on such basis that the plaintiff/appellant would not have objected to the residence of respondent no.1/defendant no.1 in a portion of the suit property.

8. Learned counsel for the appellant also argued that the fact of the matter is that it was plaintiff/appellant who had given the entire consideration and purchased the property. Learned counsel for the appellant also contended that the sanction of the construction was thereafter obtained in the name of the appellant/plaintiff who had made the construction. It is also argued that the appellant has been thereafter paying the necessary electricity charges and the property tax. In this regard, all that I may state is that there are two versions with respect of the ownership of the disputed property, that is whether the consideration was paid by the appellant/plaintiff or it was paid by the late father of the parties and evidence on which two versions was led by the parties respectively. Whatever be the position, I need not dwell at length on this fact because the fact of the matter is that the consent decree of 19.12.1962 would hold the field because the rights of the parties were crystallized by virtue of the said decree dated 19.12.1962, and which remained unchallenged till 1976 when the subject suit was filed. So far as the payment of electricity charges, and property tax charges are concerned once again there are two contesting versions because whereas the appellant/plaintiff claimed that he paid the property tax and the electricity charges, the case of the respondents/defendants was that the payment was made in the name of the appellant/plaintiff because the property stood in his name, however, they contributed to the extent of their share in such payment.

9. I may state that a civil case is decided on balance of probabilities and there are some points in favour of one party and some points in favour

of the other party. The Court arrives at a judgment after taking into consideration the pros and cons of the case of each party and finally in terms of the balance of probabilities decides where this case tilts. I do not find that the Trial Court has committed any grave error or there is no illegality or perversity in holding that the plaintiff was not entitled to the relief of declaration and injunction because after all plaintiff/appellant cannot deny the consent decree dated 19.12.1962.

10. In view of the above, I do not find any merit in this appeal which is therefore dismissed, leaving the parties to bear their own costs.

JANUARY 25, 2011
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VALMIKI J. MEHTA, J.