

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

% *Date of Judgment: 23.03.2011*

+ **RSA No.102/2002 & CM. Nos. 288-289/2002**

SHRI LAKH RAJ KAPOOR Appellant
Through: Mr.Harjinder Singh Sethi &
Mr.Vijender Singh Sethi, Advocates.

Versus

SHRI BAL KISHAN KAPOOR Respondent
Through: Mr. Vinay Sabharwal, Advocate.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J. (Oral)

1 Present appeal has impugned the judgment and decree dated 21.05.2002 which had endorsed the findings of the trial Judge dated 20.09.1999 whereby the suit filed by the plaintiff Bal Kishan Kapoor seeking possession, damages and mesne profits qua the suit property i.e. property bearing No16/22, Geeta Colony, Delhi had been decreed in his favour.

2 The case of the plaintiff is that he is the registered owner of the aforementioned suit property. The father of the defendant Gopal Das (grandfather of the plaintiff) was the lessess of quarter No. 8-A, Block No. 20-A, Tilak Nagar, New Delhi which had been allotted to him in his refugee capacity. The defendant is thus the uncle of the plaintiff. Since he did not have any place to live and because of

close relationship, the plaintiff had permitted the defendant to occupy the suit property; it was a permissive user. The defendant had however started acting contrary to the interest of the plaintiff. His license was terminated vide notice dated 02.08.1997. In spite of requests to vacate the suit property, the defendant did not vacate it.

3 In written statement a twin defence was set up by the defendant. It was stated that a family settlement dated 20.11.1963 had been entered into between the parties by virtue of which the aforementioned portion of the suit property had been allotted to the defendant; it had fallen to his share. Further the defendant was living in his property since 1956; he had perfected his title by adverse possession; the plaintiff was not entitled to seek possession of the suit property.

4 On the pleadings of the parties, the trial Judge had framed seven issues. They read as under:-

- 1. Whether the suit of the plaintiff is within time?*
- 2. Whether there is no cause of action for filing the present suit?*
- 3. Whether the defendant has become owner of the suit property by adverse possession?*
- 4. Whether the plaintiff is entitled to the possession claimed?*
- 5. Whether the plaintiff is entitled to the damages? If so, at what rate and for what period?*
- 6. Whether the plaintiff is entitled to the injunction claimed?*
- 7. Relief."*

5 The issue qua adverse possession was issue No. 3. Entitlement of the plaintiff to claim back the suit property was dealt with in issue No. 4. Oral and documentary evidence was examined which included the testimony of the witnesses of the

plaintiff as also of the defendant. The family settlement had been proved as Ex. DW-2/1. Impugned judgment had noted that the aforementioned property was the self-acquired property of the father of the plaintiff; the defendant had also not set up a claim that it was a part of the family corpus; such a self-acquired property could not form the basis of a family arrangement, even otherwise it would be hit by Section 17 of the Registration Act. On the question of adverse possession, the Court had noted that the defendant could not prove adverse possession; such a possession has to be hostile qua the owner; no such evidence was led; no detail had been furnished as to when the defendant came in possession and since when he started acting hostile and contrary to the interest of the plaintiff. These are two concurrent findings which have been returned by two fact finding courts below.

6 Relevant extract of the finding returned in the impugned judgment reads as follows:-

"12 Now coming to the appeal on merits, two important pleas were taken in defence to the suit as well as in the present appeal. Firstly, that the suit property had fallen to the share of the defendant in a family settlement dated 2.11.63 and secondly, that due to long uninterrupted possession of the property by the defendant in his own right, the defendant had become owner by adverse possession. I shall be taking up the pleas one by one.

13. It has been urged by the Ld counsel for the defendant, (Appellant herein) that the Ld trial Court had erred in coming to the conclusion that the suit property was self acquired property of Chaudhary Ram Kapoor or that it could not be divided by family settlement. The trial Court, it is argued, committed grave error in holding that memorandum of the family settlement required registration Under Section 17 of the Registration Act, 1908 and was thus inadmissible in evidence. In support of his contention, the Ld Counsel for the defendant has placed reliance on the latest judgment of Delhi High Court in Jasbir Singh Bajaj vs. Gurdeep Singh Bajaj & Ors. (2001) DLT 169. There is no dispute about the proposition of law that a bonafide family dispute can be settled by a family settlement: the said settlement can be oral or in writing. If, a settlement is orally arrived at and subsequently reduced into writing just to keep a note of it, it does not require to be registered because of Section 49 of the

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Registration Act but if the family arrangement reduced into writing with the purpose of using that writing as a proof of what they had arranged the document would required registration. In Jasbir Singh Bajaj (supra) oral settlement was arrived at between the parties on 15.10.86, and the property was divided by meets and bounds. Subsequently on 31.12.86 whatever arrangement had taken place was reduced into writing. It was under these circumstances that the Hon'ble High Court after relying upon Tek Bahadur Bhujil Vs. Devi Singh Bhujil & Ors. AIR 1966 SC 292 held that the family settlement was a memorandum of earlier settlement and did not require registration. A perusal of the statement of defendant Lekh Raj Kapoor DW-2 would go to show that he himself had stated that "under this settlement my brother gave me back portion of 38 sq. yds." It was further the case of the defendant that defendant was residing with Late Chaudhary Ram Kapoor as a member of his family and he was being treated like his own son. He also received education while residing with Chaudhary Ram Kapoor – plaintiff's father. It was no where the case of the defendant that any settlement prior to 20.11.63 was arrived at between Late Chaudhary Ram Kapoor and the same was only reduced into writing on 20.11.63. Even, if the document of family settlement Exit. DW2/1 whose English transcript is mark X is treated as it is, it simply shows that certain properties including back portion of the quarter was given to the defendant on 20.11.63 itself. Thus, it definitely required registration Under Section 17 of the registration Act as the defendant derived title from this document. The Ld trial Court rightly relied upon Maturi Pullaiah and another Vs. Maturi Narasimham and others AIR 1966 SC 1836 & Brahamanath Singh and other Vs. Chandrakali Kuer and another AIR 1961 Patna 79 and held that the family settlement in question did require registration and was inadmissible in evidence being hit by Section 17 read with Section 49 of the Registration Act, 1908.

14. *Moreover, the property can be divided or distributed by way of family arrangement/settlement where there is bonafide dispute regarding title to the property between the members of a joint family antecedent to the family arrangement. In other words, each and every member must have some interest in the property which is the subject matter of family settlement. In this particular case, the plaintiff has led ample evidence on record to prove that the suit property written statement the self acquired property of Chaudhary Ram Kapoor. It is no where the case of the defendant that the property was allotted to Chaudhary Ra, Kapoor out of the claim of the family property left in Pakistan. Rather the case of the plaintiff to the extent that quarter No. 8-A, Block 20-A was allotted to Shri Gopal Dass farther was not disputed. Thus, can self acquired property be divided by family arrangement by owner of the property, Such a document, in my view, would amount to gift of the property and not resolution of the bonafide family dispute and is compulsorily registrable Under Section 17 of the Registration Act.*

15. *Now I turn to the question whether the defendant has become owner of the suit property by adverse possession. The case of the defendant throughout*

had been that he was brought n the suit property by Chaudhary Ram Kapoor who used to treat him like his son. The plaintiff has led evidence as to when the defendant started acting contrary to the interest of the plaintiff. The plaintiff had then asked the defendant to vacate the portion under his occupation. The plaintiff had also testified that the defendant had been putting him off on one pretext or the other and thereafter started harassing him by disrupting the supply of electricity to his portion. A police report was also lodged in respect of disruption of the electric supply to the plaintiff's portion and ultimately a legal notice dated 2.8.87 Ext PW1/2 was served upon the defendant revoking the permissive possession of the defendant revoking the permissive possession of the defendant. No evidence has been led by the defendant to show that he was acting as to on which particular date he had started acting hostile and contrary to the interest of the interest of the plaintiff/plaintiff's father. In State Bank of Travancor Vs. Arvindan Kunju Panicker and others AIR 1996 SC 996 it was held that in the absence of any evidence to show that the person or his successor in interest asserted any hostile title to the suit property to the knowledge of the true owners at any time before the suit his possession cannot be said to be adverse possession. In Roop Singh Vs. Ram Singh AIR 2000 SC 1485 the defendant had entered into possession as a tenant and subsequently claimed adverse possession. It was held by the Hon'ble Supreme Court that if the defendant got the possession of the suit land as a lessee or under the Batai Agreement then from permissive possession it is for him to establish by cogent and convincing evidence to snow hostile animus and possession adverse to the knowledge of the real owner. It was held that mere possession for a long time does not result in converting permissive possession into adverse possession. As stated by me hereinabove, the defendant has failed to show as to since when he had openly claimed possession hostile to the true owner, of course, the defendant has established himself to be in long possession of the suite property yet long permissive possession cannot become adverse possession. The failed to establish that he was in defendant had failed to establish that he was in defendant had failed to establish that he was adverse possession of the suit property.

16. It has been urged by the Ld Counsel for the defendant that during the pendency of the proceedings, the plaintiff has transferred the property to third person without disclosing this fact to the court and thus the plaintiff has no cause of action to continue with the appeal. The Ld Counsel heavily relied upon a recent decision of our own High Court in Madan Lal Vaid Vs. Nand Kumar Walia and Anrs. 96 (2002) DLT 119. I have perused the authority cited at the bar. As per facts of the said case, the plaintiff had filed a suit for partition and possession and on the date of filling the suit, the plaintiff was not the owner of the property but had sold the same to his son and daughter. It is no where the case of the defendant here. It is only in the grounds of appeal that the defendant (appellant herein) has pleaded that the respondent had illegally transferred the suit property to some third person through whom the caveat had been filed by

the plaintiff through one Shri Balbir Singh as a General Attorney. Even if, Balbir Singh has got some interest in the property subsequent to the filing of the suit or decision of the suit nothing prevents him if he is protecting his interest on the basis of General Power of Attorney executed by the plaintiff in his favour.

17. Since permissive possession of the defendant had been withdrawn, there was cause of action for filing the present suit. The Ld trial Court has rightly assessed the mesne profit @ Rs. 500/- per month and there is no serious challenge to the same. The suit of the plaintiff is also within time as the permissive possession was revoked vide notice dated 2.8.87 Ext. PW ½ and immediately the suit was filed.

18. I do not find any error or infirmity in the judgment and decree dated 20.9.99, passed by the Ld Civil Judge. The appeal is without any merit."

7 In no manner, can it be said that this finding is perverse. This court is not a third fact finding court.

8 Substantial questions of law have been embodied at page 11 of the body of the appeal. They read as under:-

"(a) Whether the defendant/appellant who had become the owner in respect of portion of the suit property measuring 38 sq. yards by way of family settlement duly executed admittedly by late Chaudhary Ram Kapoor, could still be evicted by a decree of possession from the suit property, as has been done in the present case?

(b) Whether the defendant/appellant who had been living in the suit property continuously without any interference, obstruction or interruption from anyone from the year 1956 for a long period of about more than 46 years could still be evicted by way of decree for possession as has been done in the present case?

(c) Whether the suit property which was allotted to late Chaudhary Ram Kapoor, the brother of the appellant defendant being a Refugee from Pakistan on account of the living of the said Chaudhary Ram Kapoor and the defendant etc. in the grave yard of Paharganj, and it was thus a joint family property and was duly partitioned under the family settlement even then could the defendant be subjected to decree for possession from the suit property belonging to him?

(d) The family settlement which was reduced in writing by way of document in question appearing on the records of the learned trial court, could still be said to be inadmissible in evidence for want of registration under Section 17 of the Indian Registration Act even though the same was not required to be registered under the law?

(e) Whether the defendant who had become the owner of the suit property by way of adverse possession, being the alternate plea taken by the defendant as he had been living in the suit property since year 1956 without any obstruction or interruption from anyone including so called owner, could still be evicted by decree of possession from the suit property?"

9 No such substantial question of law has arisen. There is no merit in this appeal. Appeal as also pending applications are dismissed in limine.

INDERMEET KAUR, J.

MARCH 23, 2011

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