

R-16

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

%

Judgment Reserved on: 20.01.2011
Judgment Delivered on: 25.01.2011

+

R.S.A.No.228/2003 & CM No.792/2003

SHRI SAEEDUDDIN

.....Appellant

Through: Mr.Amarjit Singh, Advocates

Versus

SHRI KARIMUDDIN & ORS.

.....Respondents

Through: Mr.R.K.Shukla, Advocates for
respondents no.7 to 15.

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.

1. The present appeal has impugned the judgment and decree dated 25.9.2003 which had endorsed the finding of the trial judge dated 08.2.2000 whereby the suit of the plaintiff Saeeduddin seeking partition and rendition of accounts qua his 1/3rd share in the property bearing No.141, Khureji Khas, Delhi had been dismissed.

2. Plaintiff had filed the aforementioned suit. His contention was that Karimmuddin and Allauddin, defendants no.1 and 2 had purchased the suit property i.e. the property bearing No.141, Municipal No.105, constructed on land measuring 266 sq. yards from Smt. Khimiya widow of Abdul Gani. This purchase was made for a consideration of ₹71,000/- on 10.5.1982. Defendants no.1 and 2 later on transferred 1/3rd of their share in the suit property in

favour of the plaintiff on a consideration of ₹23,700/-. Symbolic possession of his 1/3rd share has also been given to the plaintiff on 10.9.1984. Plaintiff was thus the co-owner of 1/3rd share in the said property along with defendants no.1 and 2. Defendants no.3 to 6 were the tenants in the suit property; they had attorned themselves to defendants no.1 and 2 and had been paying rent to them. Defendants no.7 to 15 had been impleaded as parties in terms of the orders of the High Court dated 02.02.1984 passed in Civil Revision No.328/1993. They were claiming right in this property on the basis of a forged will dated 08.5.1983 purported to have been executed by Khimiya pursuant to which a collusive decree had been passed on 27.8.1984. It is contended that the defendants no.7 to 15 are not in possession of the suit property. Plaintiff had requested defendants no.1 and 2 to partition his share of the suit property but they had not acceded to his request. Present suit was accordingly filed.

3. In written statement filed by defendants no.1 and 2, they denied that they had executed any document in favour of the plaintiff; ownership of the plaintiff was specifically denied; they denied that they had received any amount in lieu of any transfer of share in favour of the plaintiff. They did not deny the fact that they were collecting rent from defendants no.3 to 6 under the authority of their wives who were the co-owners of the suit property.

4. Defendants no.3 & 6 had denied that they had attorned to defendants no.1 and 2 as their landlords or that they had paid any rent to them. Defendants no.4 and 5 admitted their tenancy with Khimiya as also the fact that they were paying rent to defendants no.1 and 2. Possession of the plaintiff was denied.

5. Defendants no.7 to 15 filed a joint written statement. Their case was that they are the owners of 1/2 portion of the suit property i.e. of 1/2 of 266 sq. yards which had belonged to Salamuddin who was their father; half portion was in the share of Smt. Khimiya. It was stated that defendants no.7 to 10 had inherited this half share of Khimiya on the basis of her will dated 08.5.1983. The remaining half portion had been inherited by defendants no.11 to 15 by way of succession after the death of Salamuddin. Their case was that in the proceeding titled as RCA No.21/1983 Salamuddin Vs. Khimiya the aforementioned defendants had been brought on record as the only legal representatives of Smt.Khimiya on the basis of her will dated 08.5.1983. An application of the present defendants i.e. defendants no.1 and 2 namely Karimuddin and Allauddin under Order 22 Rule 10 of the Code of Civil Procedure (hereinafter referred to as 'the Code') had been dismissed on 14.11.1983. Defendant no.7 to 15 now claimed ownership of the suit property on the basis of the decree dated 27.8.1984 which had conferred rights upon defendants no.7 to 10 in terms of the will of Khimiya dated 08.5.1983. Suit was liable to be dismissed.

6. The following six issues framed by the trial judge.

1. Whether this court has no pecuniary jurisdiction to entertain the suit? OPD
2. Whether the suit is bad for want of proper court fee? OPD
3. Whether the plaintiff is entitled to partition in respect of the suit property and one third share thereof? OPP
4. Whether the plaintiff is entitled to rendition of account to the extent of one third share? OPP
5. Whether the plaintiff is entitled to the recovery of interest pendente lite till the date of the recovery at the rate of 18%? OPP

7. Plaintiff had examined himself as PW-1. He had proved

general power of attorney (GPA), agreement to sell, affidavit and receipt (Ex.PW-1/1 to Ex.PW-1/4) purported to have been executed in his favour by defendants no.1 and 2. PW-2 had identified the signatures on the aforementioned documents. The attesting witness to the GPA was examined as PW-4. Defendants also examined five witnesses in defence. Defendants no.1 and 2 denied that they had executed any document in favour of the plaintiff; it was not disputed that defendant no.1 had purchased this property from Khimiya on 10.5.1982. DW-2 had proved Ex.DW-2/P-1 i.e. the document of title executed by Khimiya in favour of defendants no.1 and 2. DW-7/1 Hakimuddin had deposed that the property was originally owned by Khimiya and Salamuddin. Salamuddin had filed a suit against Khimiya; this was a suit for declaration and injunction. The judgment Ex.P-1 of this suit was delivered on 21.8.1982. Suit of Salamuddin had been dismissed. Appeal was filed against the said judgment. During the pendency of the appeal Khimiya expired on 21.5.1983. Defendants no.7 to 10 were substantiated as legal representative of Khimiya on the basis of her will dated 08.5.1983. Vide compromise decree Ex.DW-7/1A on the compromise application Ex. DW-7/1B the matter was settled between Salamuddin and the legal representatives of Khimiya. This compromise decree Ex.DW-7/1A has evidenced that Salamuddin became the absolute owner of property No.141, Khureji Khas, Delhi.

8. The contention of the plaintiff that the decree Ex.DW-7/1A dated 27.8.1984 was not binding upon the plaintiff was repelled. This finding of the trial judge is contained in para 33 and reads as follows:

“Ld. Counsel for the plaintiff had argued that the decree Ex.DW-7/1A is not binding on the plaintiff. I have given my thoughtful consideration to this submissions and I have formed opinion that plaintiff is bound by the judgment. It has been proved on record that defts. No.1 &2 had moved an application in RCA No.21/83 to be substituted as respondent in place of Smt.Khimiya who expired on 21.5.83 during the pendency of the appeal. Their application was based on the agreement to sell executed by Smt. Khimiya in their favour Defendant No.7 to 10 also made similar application on the basis of the Will dt.8.5.83, after considering both the applications ld. ADJ, Delhi vide its order dt.14.11.83 Ex.PW-7/1-C rejected the application of defts. No.1 &2 on the ground that the agreement to sell and GPA does not transfer the interest and the property in their favour and the application of the defendants No.7 to 10 was allowed. Admittedly the defts. No.1 &2 did not prefer any appeal, revision etc. against the said order in the higher courts. Therefore, so far as the right claimed on the basis of the GPA and agreement to sell in favour of defts. No.1 &2 is concerned, the same has become final by a judicial pronouncement. Counsel for the plaintiff argued that the plaintiff is not bound by the said order as he was not a party in that suit. It is the case of the plaintiff that he has purchased one third share from defts. No.1 and 2. Therefore, he is on the same footing as defts. No.1 and 2. He has also stepped in the shoes of defts. No.1 & 2. Since the judicial pronouncement qua defts. No.1 and 2 is final, the same is binding on plaintiff as well.”

Trial judge held that the plaintiff not being a owner or co-owner in the suit property suit was dismissed.

9. This finding of the trial judge was affirmed by the first appellate Court. This contention was again raised before the appellate Court which had also dismissed this argument of the appellant. Relevant discussion emanates from para 9 to 11 of the impugned judgment; they read as follows:

“9 Appellant challenges the claim of respondent No. 7 to 15 to the suit property based on judgment exbt.DW-7/1A and compromise exbt. DW-1/7B by contending that aforesaid compromise and judgment is based upon collusion and fraud and the trial court has erred in relying upon aforesaid documents to hold that respondents No. 7 to 15 are the owners of the suit premises. It is contended that in the alleged compromise, half of

the suit property was to fall in the share of respondents in RCA No. 21/83 who are the sons of the appellant therein and remaining half was to come to the share of the appellant therein but in the judgment Exbt. DW-7/1A, appellant therein has been declared to be owner of the entire suit property. To rebut this, it is pointed that in the compromise application exbt. DW-7/1B, it is clearly stated that municipal No. 106 would come to the share of Salamuddin and municipal No. 105 would come to the share of respondents No. 7 to 15. According to the appellant, judgment exbt. DW-7/1A is not binding upon the appellant because appellant was not a party to the judgment. It is pointed out by the appellant that municipal numbers 105 & 106 as stated in the compromise application do not find mention in the judgment exbt. PX-1 relied upon by the appellant and these municipal numbers are neither pleaded nor given in the evidence in the case culminating in judgment exbt.PW-1.

10. Appellant has placed reliance upon judgment reported in AIR 1994 Supreme Court 853, wherein, it was held that when decree is vitiated by fraud, the guilty party is liable to be thrown out at any stage. I am in respectful agreement with the above-state legal position. Section 44 of the Indian Evidence Act, 1872 provides that fraud or collusion in obtaining judgment has to be proved. Trial Court has rightly concluded that in earlier litigation in RCA No. 21/83, the present respondents No. 1 & 2 had filed an application for being substituted as legal representative of Smt. Khimiya but said application was dismissed in aforesaid appeal vide order exbt. DW-7/1C and respondents No. 1 & 2 had not challenged order exbt. DW-7/1C and the same has attained finality. Appellant has stepped into the shoes of respondents No. 1 & 2 as he claims to have purchased 1/3 portion of the suit property from respondents no. 1 & 2. Therefore, I do not find any substance in the contention of the appellant regarding judgment exbt.DW-7/1A based upon compromise exbt. DW-7/1B not binding on the appellant because at no point of time, the appellant had challenged aforesaid compromise and judgment on the ground of being vitiated by fraud, although certified copies of compromise application exbt.DW-7/1B and judgment dated exbt. DW-7/1A passed in RCA no. 21/83 were placed on record of the suit file on 22.09.97. In my considered opinion, unless a declaration is sought by the appellant of the judgment exbt. DW-7/1A being vitiated by fraud is sought by the appellant, he cannot be permitted to orally challenge judgment exbt. DW-7/1A in these proceedings without laying any foundation of without leading any evidence to prove the alleged fraud.

11 In view of what is observed above, I hold that issue No. III has been rightly decided in favour of respondents No. 7 to 15 by the trial court. As a consequence, the consequential findings of the trial court on issues No. IV & V of the trial court are upheld.”

10. This is a second appeal. It was admitted and the following substantial question of law was formulated on 18.10.2010; it reads as follows:

“Whether the judgment and decree dated 27.08.1984 in RCA No. 21/1983 titled as “Sh. Salamuddin Vs. Smt. Khimiya” was obtained by fraud and if so, its effect on the present proceedings?”

It is on this question alone that arguments have been addressed. Learned counsel for the appellant has challenged this compromise decree dated 27.8.1984 which had been passed in the RCA No.21/1983 in the case titled Salamuddin Vs. Khimiya. It is submitted that a decree obtained by fraud is nonest and not binding on any Court. A separate suit does not necessarily have to be filed to address this question of fraud. Fraud vitiates the entire proceedings. For this proposition reliance has been placed upon 2007 SCC 543 Gram Panchayat of Village Naulakha Vs. Ujagar Singh [2010] SCCR 405 Santosh Vs. Jagat Ram 2007 RLR 210 A.V. Papayya Sastry Vs. Government of A.P.. It is contended that Court has inherent power under Section 44 of the Evidence Act to set aside an order obtained by fraud. It is not binding from the lower to highest Court.

This is an undisputed preposition. There is no quarrel to it.

It is contended that documents of transfer which included general power of attorney, receipt and will do not necessarily have to be registered; they are effective documents of transfer. In the instant case defendants no.1 and 2 had executed the said

documents Ex.PW-1/1 to Ex. PW-1/4 in his favour. To support this proposition reliance has been placed upon 1977 RLR 487 Harbans Singh Vs. Shanti Devi, 1999 RLR 20 Kuldip Singh Vs. Surinder Singh, as also 1986 RLR (Note) 89 H.L.Malhotra Vs. Nanak Jai Singhani.

Learned counsel for the appellant has also placed reliance upon the provisions of Section 17 of the Indian Registration Act. It is pointed out that the compromise decree dated 27.8.1984 which is the subject matter of the challenge before this Court even otherwise requires a compulsory registration as it had effected transfer of immovable property from one person to other; being more in value than Rs.100/- it was hit by the bar of Section 17 of the Resigation Act. To support this submission reliance has been placed upon 2005(2) Civ.C.R.605 (pat.) Dilip Gupta &Anr. Vs.Debashish Palit & Ors., 2008 RLR 4004(SC) K.Raghunandan Vs. Ali Hussain Sabi.

11. Arguments have been countered. It is pointed out that the submission made before this Court and the substantial question of law as aforementioned have already been answered by the courts below. Attention has been drawn to para 33 of the trial court and paras 9 to 11 of the impugned judgment. Both the aforementioned paras have already been quoted hereinabove. The submission is that the question of fraud does not arise; the title of the plaintiff has been denied from the very inception; defendants no.1 and 2 through whom the plaintiff is claiming have been held not to be co-owners in the suit property; the plaintiff cannot get a better title than that of his transferor. Counsel for the respondents has placed reliance upon the judgment reported in AIR 2003 Delhi 120

G. Ram Vs. Delhi Development Authority ; as also the judgment reported in AIR 1982 Cal. 222 Surjya Kumar Das Vs. Maya Dutta to support the submission that a compromise decree passed in a suit does not require any registration.

12. Record has been perused. The substantial question of law as aforenoted by this Court has to be answered. This question borders on the averment and the argument as to whether the decree dated 27.8.1994 (Ex.DW-7/1A) had been obtained by fraud. To answer this query, it is necessary to trace out the proceedings not only between the plaintiff and defendant no.1 and 2 but also the subsequently added defendants especially defendants no.7 to 15 who had been ordered to be impleaded under the orders of the High Court. Case of the plaintiff is founded on his purchase of 1/3rd share in the suit property from defendants no.1 and 2. The fact is that both defendants no.1 and 2 have denied that they had executed any document in favour of the plaintiff; they had categorically denied the execution of Ex.PW-1/1 to Ex.PW-1/4, plaintiff could not have got a better right than that of defendants no.1 and 2. To recapitulate, the defendant no.1 Karimuddin and defendant no.2 Allauddin were the sons of Saeuddin. The said defendants had moved an application in RCA No.21/1983 to be substituted in the place of Khimiya who had died on 21.5.1983; they were claiming title on the basis of the agreement to sell executed by Khimiya in their favour. Defendants no.7 to 10 had also made a similar application to be substituted in place of Khimiya on the basis and strength of the will dated 08.5.1983. Vide order dated 14.1.1983 Ex.PW-7/1C the application of defendants no.1 and 2 had been dismissed. Defendants no.7 to 10

had been substituted in place of Khimiya. No appeal or revision had been filed against the said order by defendants no.1 and 2. Rights of defendants no.1 and 2 had been extinguished on that date. The plaintiff being a transferee and claiming only through defendants no.1 and 2 could have claimed a better title than that available to defendants no.1 and 2. Their rights having been extinguished when there were not substituted as legal representatives of Khimiya, no right accrued in favour of the plaintiff. The first appellate court had also correctly noted that the plaintiff was aware of this decree dated 27.8.1984 on 22.9.1997; he did not take any proceeding qua this issue. There was no averment to this effect in his plaint either; he had made efforts to amend his plaint and certain additions were made in his amended plaint, yet this aspect nowhere found mention. It was never averred by the plaintiff that the decree dated 27.8.1984 had been obtained by fraud; this was neither the contention in the pleadings nor in his deposition on oath. Even in his examination-in-chief, on the role of defendants no.7 to 15 he had deposed that they have no right, title or interest in the suit property as they have already sold their share. It was neither contended and nor deposed that the decree of 27.8.1984 had been obtained in collusion or by way of fraud.

13. The judgments relied upon by the learned counsel for the appellant would not apply in the instant scenario. Although in the case of Gram Pranchayat (supra) the Supreme Court had held that if a party pleads fraud and contends that the earlier judgment had been obtained by collusion or fraud; it would not be necessary to file an independent suit for declaration about this collusive nature; this judgment would apply only if there was an averment to the

said effect. As already noted nowhere has it been pleaded by the plaintiff that the decree dated 27.8.1984 had been obtained by fraud.

14. The question of the registration of this document i.e. the decree dated 27.8.1984 also does not arise. The compromise application Ex.DW-7/1B on the basis of which the compromise deed Ex. DW-7/1A was passed was essentially a family arrangement. The respondents were the legal representatives of Khimiya and as per the averments made in Ex.DW-7/1B, the appellant is the brother-in-law (husband's brother) of Khimiya. Section 17(2)(vi) of the Indian Registration Act clearly indicates that no question of registration arises in respect of a decree or order made on a compromise which is the subject matter of the suit proceedings which was so in the instant case.

15. There is no merit in the appeal. The appeal as also the application is dismissed.

INDERMEET KAUR, J.

JANUARY 25, 2011
nandan