

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved On: December 02, 2011
Judgment Delivered On: December 12, 2011

+ RFA(OS) 115/2011

ANIRUDDHA DUTTA & ORS. Appellants
Through: Mr.J.P.Sengh, Sr.Advocate with
Mr.M.Qayamuddin, Advocate

versus

BHAWANI SHANKAR BASU & ORS. Respondents
Through: Mr.Sandeep Sethi, Sr.Advocate with
Mr.Ajay Mehrotra and Ms.Namita Goel,
Advocates

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE S.P. GARG

PRADEEP NANDRAJOG, J.

1. Two suits, CS(OS) No.2491/2009 and CS(OS) 163/2010 were filed seeking partition of property bearing Municipal No.66, Block B-4, Safdurjung Residential Area, Delhi, rendition of accounts, injunctions and declaration of decree dated 15.1.1976 as null and void. Appellants Aniruddha Dutta, Debashish Dutta and Arijit Dutta are the sons of late Ms.Mukul Dutta who was the daughter of late Ms.Nirod Bala Basu and appellant Debanjan Bishwas is the son of late Enakshmi

Bishwas the daughter of late Ms.Mukul Dutta. They were the plaintiffs of CS(OS) No.2491/2009. Ira Dutta daughter of late Nirod Bala Basu was the plaintiff of the other suit i.e. CS(OS) No.163/2010. We highlight that the prayers made in both the suits were the same.

2. Late Ms.Nirod Bala Basu was married to late Lalit Kumar Basu. The two were blessed with four sons and four daughters. The names of the four sons are:-

- (i) Birender Nath
- (ii) Shailender Nath
- (iii) Bhupender Nath
- (iv) Bhawani Shankar

3. The names of the four daughters are:-

- (i) Ms.Mukul Dutta
- (ii) Ms.Manju Shankar
- (iii) Ms.Jaba Mitra
- (iv) Ms.Ira Dutta

4. Birender Nath died and was survived by four sons named: (i) Ishan Chander Basu, ((ii) Pratap Chander Basu, (iii) Prosanto Kumar Basu and (iv) Shushanto Basu; and a daughter Ms.Ajanta Mitra.

5. Late Ms.Nirod Bala Basu died on 21.02.1971 and it is the claim of her four sons Birender Nath, Shailender Nath, Bhupender Nath and Bhawani Shankar that during her life time their mother executed a will dated 01.02.1971 as per which she bequeathed property bearing Municipal No.66, Block B-4, Safdurjung Residential Area, New Delhi which consisted of a perpetual lease hold right under DDA in their favour in equal share, to the exclusion of her daughters.

6. In the year 1975 Shailender Nath, Bhupender Nath and Bhawani Shankar filed a suit registered as Suit No.12/1975 seeking a declaration that the four sons of late Ms.Nirod Bala Basu were the joint owners of property No.66, Block B-4, Safdurjung Residential Area, New Delhi since their mother had bequeathed the same to her sons as per the will dated 01.02.1971, in which suit they impleaded their brother Birender Nath and their four sisters Mukul Dutta, Manju Sarkar, Jaba Mitra and Ira Dutta as defendants.

7. Summons were issued in the said suit and as per the record of the suit, all five defendants were served. The record of the suit would further reveal that the fourth son impleaded as a defendant i.e. Birender Nath filed a written statement admitting that his mother had executed the will dated 01.02.1971. Manju Sarkar, Jaba Mitra and Ira Dutta filed written statements in which even they admitted that their mother had executed the will dated 01.02.1971. The fourth daughter Mukul Dutta, as per the record of the suit, in spite of being served never appeared and was proceeded against ex-parte.

8. Needless to state, in view of the facts noted in para 6 and 7 above pertaining to Suit No.12/1975 a decree was passed on 15.01.1976 declaring that the four sons of Ms.Nirod Bala Basu i.e. Shailender Nath, Bhupender Nath, Bhawani Shankar and Birender Nath were the co-owners of the property on the basis of the will dated 01.02.1971 executed by their mother in their favour.

9. On the strength of the judgment and decree dated 15.01.1976 the four sons of late Ms.Nirod Bala Basu filed an

application before DDA under whom their mother held perpetual lease hold rights in respect of the land praying that their names be mutated as the perpetual lessees of the plot. DDA accepted their application and mutated their names as the successor-in-interest of their mother.

10. It appears that when late Ms.Nirod Bala Basu died, DDA had yet to execute a perpetual lease deed in her name conveying perpetual lease hold rights in her favour and thus on 03.02.1982 DDA executed a perpetual lease deed in the name of Shailnder Nath, Bhupender Nath, Bhawani Shankar and Birender Nath and as per which the four became the perpetual lessees under DDA. The four brothers obtained sanction to erect a building on the plot and constructed a residential building and after obtaining occupancy certificate from DDA, put the property to use.

11. Birender Nath Basu died on 29.07.1986 and a will dated 06.07.1986 being propounded by his four sons, probate thereof was granted vide order dated 30.06.1994 and needless to state one of the asset bequeathed in the will to the four sons of Birender Nath Basu was Birender Nath Basu's 1/4th share in the land and building bearing Municipal No.66, Block B-4, Safdurjung Residential Area, New Delhi.

12. In the year 2006 Bhawani Shankar filed a suit praying that the property be partitioned. His two surviving brothers and the four sons of the deceased brother were impleaded as defendants. A preliminary decree was passed holding that the share of the four sons of Nirod Bala Basu was 1/4th each in the property and thus the share of the four sons of the deceased brother Birender Nath Basu was 1/4th. A local

commissioner was appointed to suggest mode of partition of the property by metes and bounds. The learned local commissioner filed a report to the effect that the property was not capable of partition by metes and bounds and thus sale of the property and satisfaction of four claims therein became the only option available.

13. The three living brothers i.e. Shailender Nath, Bhupender Nath and Bhawani Shankar as also the four sons of their deceased brother Birender Nath thought that rather than have the property auctioned through the process of the Court, it would be advisable that they all sat together and found a buyer to whom the property could be sold and the four branches could divide the sale proceeds.

14. The reason for the aforesaid decision is easy to understand in India, where it is well-known that Court auctions do not fetch the best price for immovable property, not because there is any deficiency in the process of Court auction, but for the prevailing climate in India where underhand consideration passing on is a norm when immovable properties are sold and purchased.

15. The three sons of late Nirod Bala Basu and her four grandsons i.e. the sons of her deceased son Birender Nath found a buyer, namely, Sulochana Goyal. Before selling the property to her, they applied for the lease hold rights to be converted into free hold rights and on 17.02.2009 got registered, upon being executed by DDA, a conveyance deed as per which Shailender Nath, Bhupender Nath and Bhawani Shankar as also Ishan Chander Basu, Pratap Chander Basu, Prosanto Kumar Basu and Sushanto Kumar Basu were the

owners of the land. Thereafter, the seven executed two sale deeds, both dated 26.10.2009, transferring absolutely the ownership in the subject property in the name of Sulochana Goyal.

16. When Sulochana Goyal started demolishing the existing construction and re-build thereon, CS(OS) No.2491/2009 and CS(OS) No.163/2010 were filed, as noted hereinabove, the former being filed by the three sons and the son of the deceased daughter of Mukul Dutta and the latter by Ira Dutta. Whereas Ira Dutta claimed that she had never been served in Suit No.12/1975 and had never admitted to the claim of her brothers that her mother had executed a will on 01.02.1971 and that her signatures were forged, she sought a declaration that the decree dated 15.01.1976 was void and as a consequence she claimed 1/8th share in the subject property on the ground that her mother had died intestate. The three sons of Mukul Dutta and her grandson i.e. the son of her deceased daughter also claimed in the suit filed by them that late Mukul Dutta had not been served with the summons in Suit No.12/1975 and that she was erroneously proceeded against ex-parte. In both the complaints it was pleaded that the four sons of late Nirod Bala Basu had been assuring their sisters that they will resolve the issue of succession to the estate of their mother to the satisfaction of the sisters and had never predicated a claim under the will dated 01.02.1971. They relied upon two letters, the first being a letter dated 15.11.1987 in the handwriting of Shailender Nath Basu addressed to her sister Ira Dutta and the second being a letter written in the 1st week of January 1998 from the husband of Ira

Dutta to Bhupender Nath. Reliance was placed upon the former letter which has a reconciliatory tone to bring home the point that the said letter would show that notwithstanding the four sons of Nirod Bala Basu having obtained a decree in the year 1976, to the sisters it was being held out till as late as 1987 that the matter would be resolved amicably i.e. the same was proof of the collusiveness of the decree obtained.

17. The suits were filed after 38 years of the death of Nirod Bala Basu.

18. It is apparent that the bar of limitation was predicated at the threshold. An application each in the two suits were filed under Order 7 Rule 11 of the Code of Civil Procedure.

19. The applications have been allowed vide impugned order dated 18.11.2011. With reference to the identical pleadings, but in different paragraphs of the two suits; para 19 of CS(OS) No.2491/2009 and para 16 of CS(OS) No.163/2010, wherein it was pleaded that in January 2001 Shailender Nath Basu had told Ira Dutta that something bad had been done in the family, the learned Single Judge has opined, in para 26 of the impugned order that the same evidences knowledge of the plaintiffs that the four daughters of Nirod Bala Basu had been debarred a share in the property and thus it has been held that the two suits, one filed in the year 2009 and the other filed in the year 2010 were barred by limitation.

20. Learned counsel for the respondents had conceded at the hearing of the appeal, that the reason on which the learned Single Judge had held the two suits to be barred by limitation was not a sound view, but immediately urged that

there was good and justifiable reasons to reach the same conclusion and thus we note the same.

21. It was urged that the first suit was filed after 38 years of the death of late Nirod Bala Basu and the second was filed after 39 years of her death. It was urged that it is against human conduct for a person to await a settlement and a share in the property of one's mother. It was urged that in the plaint it was pleaded that Bhupender Nath Basu had visited India in December 1996 in connection with the marriage of his daughter and had visited the plaintiffs of CS(OS) No.2491/2009. It was highlighted that it was pleaded further in para 15 of the plaint that talks had taken place between the plaintiffs and Bhupender Nath Basu. It was highlighted that indisputably the four sons of Nirod Bala Basu had effected a construction of a building on the plot after obtaining sanctions in the year 1985 and it would be preposterous to believe that the plaintiffs would not have known about the construction and especially when they plead that in December 1996 Bhupender Nath Basu had discussed the settlement issue with them qua the property. The argument was terminated by pleading that the plaintiffs would be presumed to be knowing that property taxes are paid for urban properties all over India and that mutations have to be got effected in the relevant record of the municipality in which the property is situated and the authority under which title is held. The conduct of the plaintiffs in sleeping through 38 years was highlighted. The letter relied upon by the husband of Ira Dutta was whisked away as a self-created document and the letter written by Shailender Nath Basu to Ira Dutta was highlighted as not containing any

assurance that the issue of inheritance would be amicably resolved. With reference to the letter dated 15.11.1987 it was highlighted that the letter is in no manner connected with the partition of the property. It was asserted that summons in Suit No.12/1975 were served upon all four daughters of Nirod Bala Basu whose signatures were to be found on the summons issued. It was highlighted that the signatures of Ira Dutta on the written statement filed by her were genuine and indeed of the two other sisters who had likewise filed a written statement.

22. Sh.J.P.Sengh learned senior counsel for the appellants urged that whether the four daughters of Nirod Bala Basu were served with the summons and whether the signatures on the summons issued to them which purported to be theirs were genuine or not is a question of fact the answer whereof has to await a trial. Similarly, whether three out of four sisters i.e. the three daughters of Nirod Bala Basu who purportedly filed written statements supporting the will dated 01.02.1971 had signed the same or not was also a question of fact. The interpretation of the letter dated 15.11.1987 had to await the author thereof i.e. Shailender Nath being subjected to examination in Court and thus learned counsel urged that there was no way in which the suit could be held to be barred by limitation.

23. Logic and not strict reason is the life of law and thus we proceed to answer, keeping in view not only logic but even reason of life, for the reason where the Rule of Law does not run close to the Rule of Life, the citizens of the State would not

accept the Rule of Law and would prefer settling their disputes in the street, a situation which no State can accept.

24. It is recognized by law and jurisprudence relating to immovable property that title to real property can be acquired by holding the property in a manner that conflicts with the true owner's right for a specified period; for example, squatter's rights, is a specific form of adverse possession. Law recognizes a person can be secured to title in land if his uninterrupted, open and hostile possession under colour of ownership is not questioned by the heirs of the owner and where long lost heirs surface after decades, the person in possession can not only retain possession but even assert ownership. Failure to exercise the right to defend and gain one's property for a certain period may result in the permanent loss of the ownership interest in the property and world over 12 years' period is prescribed after which title is lost by prescription. The only rider is that the adverse party called the '*disseisor*', meaning the one who dispossesses the true owner of the property, must occupy the same openly and exclusively, keeping out others, and use as if the property was his own. This is the law of adverse possession. It has a rationale. If a person openly proclaims to the world at large continuously for 12 years that he is the owner of a property and uses the property as an owner would do, public at large would be entitled to the benefit of forming a fair opinion that the person concerned is the owner of the property. If this person has the backing of a statutory authority recognizing his ownership and possession, a third party purchasing the same after paying money would obviously be a bona fide purchaser

for valuable consideration and the rights of such a person cannot be defeated in law and even in equity.

25. In the decision reported as Smith vs. Clay 3 Bro. Ch. 640, Lord Camden said:- *'A Court of Equity has always refused its aid to stale demands where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence. Where these are wanting the Court is passive and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction there was always a limitation to suits in this Court. And where the appeal upon its face shows that the plaintiff is not entitled to relief by reason of lapse of time and of his own laches, the objection may be taken by demurrer.'* In the decision reported as Lans Dale vs. Smith 106 US 391 it was observed: *'Equity withholds relief in all cases where the party seeking it has delayed for an unreasonable time in asserting his claim, and the proper rule of pleading would seem to be that when the case stated by the bill appears to be one in which a Court of Equity will refuse its aid, the defendant should be permitted to resist it by demurrer.*

26. Courts of Equity have always refused to grant relief where a person has acquiesced in the exercise of a right by another, under such circumstances that he cannot equitably dispute the right, although his acquiescence has not existed for the statutory period. In the decision reported as Dann vs. Spurrier 7 Ves. 231, Lord Eldon gave expression to the rule in such cases thus: *'This Court will not permit a man knowingly, though but passively, to encourage another to lay out money*

under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement, a lessor knowing and permitting these acts which the lessee would not have done, and the other must concede he would not have done, but upon an expectation that the lessor would not throw any objection in the way of his enjoyment.'

27. Mirroring the law of adverse possession in the admitted facts of the instant case, it would be apparent that the four daughters of Nirod Bala Basu never wrote to the title paramount i.e. DDA that their mother had died intestate and till her children resolved the issue of succession, no mutation be effected in the name of any person if at all a claim was staked to succession to the estate of their mother. The four daughters never came forward to inform the Municipal Authorities that nobody's name should be mutated as the owner of the property for purposes of municipal taxation till the authority heard from the four daughters. Further, for 38 years the four daughters of Nirod Bala Basu never bothered as to who constructed the building on the plot and who collected the rent therefrom, if the building was let out, or who resided in the building. The admission that when he came to India for marriage of his daughter, Shailender Nath Basu had a talk with the sisters, is an admission which has to be considered in common events and common talks in a family, at the time of marriage of a relative. The family welfare and worldly affairs of the family members are discussed and it is not possible that it would not have been in the knowledge of the four sisters

that in the year 1985 their brothers had constructed a building and were using the same.

28. A Court of record has every inherent power to prevent the abuse of its process and Order 7 Rule 11 of the Code of Civil Procedure is not the complete reservoir of the power to nip a frivolous suit when it is still in the stage of infancy. The inherent powers of a Court of record, and we highlight that Section 151 of the Code of Civil Procedure does not confer, but saves the inherent power of a Court also constitutes the reservoir of the power of a Court of record to throw out vexatious suits.

29. Even Rip-van-Winkle slept for 20 years and when he returned to the village, everything was changed. Here the sleep is near twice the period i.e. 39 years and obviously the world can never be the same again for the four daughters of Nirod Bala Basu and her grand children born through her daughters since these children would claim through her daughters and would have to suffer the consequence of their mother sleeping.

30. It cannot be lost sight of that Sulochana Goyal purchased the property after due title verification and is a bona fide purchaser for valuable consideration under the sale deed dated 26.10.2009 and within 1 month and 20 days thereof CS(OS) No.2491/2009 was filed. It smacks of a concerted action to extract money from Sulochana Goyal and if at all the plaintiffs of the suit were bona fide in their claim we would have appreciated they staking a claim to the sale proceeds and not the property itself. At least then, it could be argued by them that their action was bona fide.

31. As regards the letter dated 15.11.1987, no trial qua the said letter is necessary for the reason the letter contains an anguish expressed by Shailender Nath Basu qua some family affairs and though there is a reference to his obtaining affidavits from his sisters for the land at Safdurjung Enclave, which we presume is the suit land, but at best, would show that he regretted having obtained the signatures of his sisters thereon. Far from supporting the inferential claim of the plaintiffs, the same would support that the sisters had signed some affidavits pertaining to their mother's property. The anguish has to see reason from the part of the letter where he makes a grievance to the family of Birender Nath Basu occupying the full property. The anguish is obvious. The author feels anguished that he was the one who obtained the consent of the sisters for the four brothers inheriting the property and his efforts going in vain inasmuch as one brother has ousted the other. No trial qua the said letter is required not because we have interpreted the letter, indeed we cannot do so at this stage, we have only given the probable sole reason for the anguish but would highlight by way of abundant precaution that our reason to reach the destination reached by the learned Single Judge is that the four daughters of Nirod Bala Basu having slept for 39 years and in the interregnum their brothers, on the strength of a will executed by their mother not only got the property mutated in their names but constructed a building thereon and after using the same for nearly 25 years sold the property to a bona fide purchaser who paid valuable consideration and within less than 50 days of the sale the suit came to be filed on pleas which are against

human conduct; not tenable and keeping in view the extinguishment of claims on account of acts of the *disseisor* we dismiss the appeal but refrain from imposing any cost.

(PRADEEP NANDRAJOG)
JUDGE

(S.P.GARG)
JUDGE

DECEMBER 12, 2011
mm