

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

+ **RFA No. 108/2004**

% **1st March, 2012**

MAHESH SARUP BHATNAGAR THR. LRS
& ORS.

..... Appellant

Through : Mr. P.S. Mahendru, Advocate.

versus

NARAINI DEVI & ORS.

..... Respondent

Through : Mr. Italang Ramlia, proxy counsel
for Respondent No.4

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J. (ORAL)

RFA No. 108/2004 and C.M. No. 12564/2005 (under Order 5 Rule 20 CPC)

1. This appeal is on the Regular Board of this Court since 02.02.2012, i.e. for about a month. At the request made on behalf of the appellants on 28.02.2012, this case was listed for today. Today, counsel appears for the appellant. On behalf of the respondents, counsel appears for respondent No. 4. For over one hour, I have been very patiently trying to hear the case. The counsel for the appellants, almost inaudibly argues, but, is

unable to argue the appeal as he is not prepared. He has no reference of the trial Court record and in fact, the record with him is against the affidavits by way of evidence filed in the trial Court. Various arguments urged on behalf of the counsel for the appellant in fact amount to misleading the Court because it is against the trial Court record. The proxy counsel, who appears for respondent No. 4 said that the main counsel is coming, however, inspite of waiting for over 45 minutes, the counsel has also not appeared.

2. I am constrained to note that in these old regular matters, the Court receives on many occasions, almost nil assistance from the advocates who simply casually walk in the Court without the requisite preparation.

3. I know, the Court is required to have patience, however, what should be the limit of the patience with respect to the advocates in the present case I am at loss to understand.

4. The counsel for both the parties have only stood before me for about 45 minutes and I have in the meanwhile perused the record and on the basis of the record, and without any assistance from either of the counsel, I am disposing the present appeal.

5. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the

impugned judgment of the trial Court dated 14.11.2003, dismissing the suit for recovery of possession and mesne profits filed with respect to the share of one brother-Sh. Hari Mohan Bhatnagar which he inherited in the suit property from the mother-Smt. Kishan Devi. The property is a property measuring 162 sq.yds. built up to the first floor bearing No. 8/51 (old) and 8/43 (new) situated at Mohalla Kesari, Jain Mandir Street, Shahdra, Delhi.

6. The facts as alleged in the plaint are that that suit property was owned by the mother-Smt. Kishan Devi. Smt. Kishan Devi was the mother of plaintiff Nos. 1 to 5 and of the defendant Nos. 6 & 7. Smt. Kishan Devi died intestate on 18.8.1974 leaving behind four son, namely, Sh. Shyam Sunder, Sh. Mahesh Sarup, Sh. Onkar Sarup and Sh. Hari Mohan and four daughters, namely, Smt. Shakuntla Devi, Smt. Sushila Devi, Smt. Kanti Devi and Smt. Shanti Devi. It was pleaded that each of the sons and daughters of late Smt. Kishan Devi inherited $1/8^{\text{th}}$ share in the undivided property bearing No. 8/43. In the plaint, it was further pleaded that two sisters, Smt. Shakuntla Devi and Smt. Sushila Rani Manjal, relinquished their $1/8^{\text{th}}$ share in the property in favour of their brothers, Sh. Mahesh Sarup Bhatnagar and Sh. Hari Mohan Bhatnagar under a relinquishment deed dated 22.7.1988. It was pleaded that the deceased brother-Sh. Hari Mohan Bhatnagar was a bachelor living alone in the suit property. Since

Sh. Hari Mohan Bhagnagar was a bachelor and therefore, he was issueless and had died intestate on 22.4.1994, his share which totalled to 3/8th share (originally his 1/8th share and thereafter, the shares derived by way of relinquishment from the two sisters-Shakuntala Devi and Smt. Sushila Rani) has to devolve upon the surviving brothers and sisters in equal shares as per the Hindu Succession Act, 1956. The defendant No. 1 was pleaded to be a maid servant of Sh. Hari Mohan Sarup Bhatnagar and the defendant No. 4/respondent No. 4 was the son of the defendant No. 1. It was pleaded that defendant No. 1 was helping the deceased brother-Sh. Hari Mohan Bhatnagar with respect to his tea shop which he was running. It was pleaded that defendant Nos. 1 to 5 are in illegal occupation of the suit property and therefore, the suit for recovery of possession and mesne profits was filed.

7. The suit was contested by the defendant No. 1 stating that she was the wife of Sh. Hari Mohan Bhatnagar and she and Sh. Hari Mohan Bhatnagar had a son, who was the defendant No. 4, born out of the wedlock. It was pleaded that the defendant Nos. 1 and 4 were the legal heirs of Sh. Hari Mohan Bhatnagar and hence entitled to the share of late Sh. Hari Mohan Bhatnagar. It was also pleaded that the mother-Smt. Kishan Devi had given the entire property to Sh. Hari Mohan Bhatnagar

and therefore, the defendant Nos. 1&4/respondent Nos. 1&4 were owners of the suit property being legal heirs of late Sh. Hari Mohan Bhatnagar.

8. After the pleadings were completed, the trial Court framed the following issues:-

1. Whether the suit property is the joint family property? OPP
2. Whether the plaintiffs are entitled to a decree of possession in respect of suit property? OPP
3. Whether the plaintiffs are entitled to any mesne profits and costs and to what extent if any? OPP
4. Whether the defendants no. 1 to 5 are legal heirs of the deceased owner of the suit property and hence entitled to any share? OPD
5. Whether the defendants no. 1 to 5 have become owners by adverse possession? OPD
6. Whether the suit is properly valued for court fees and jurisdiction? OPP
7. Relief.”

9. The main reason for dismissing the suit by the trial Court was that it was found that there was complete confusion as to who are the plaintiffs, which of them were alive, which of them had signed the plaint, out of the LRs of the plaintiffs who died during the pendency of the suit which LRs had signed the plaint, the defendant Nos. 6 & 7 (being one daughter, namely, Smt. Kanti Devi Bhatnagar and one son, namely, Shyam Sunder Bhatnagar) were originally were arrayed as plaintiffs and thereafter arrayed as defendant Nos. 6& 7, but were however not served. Reference is made by the trial Court to the depositions of witnesses on behalf of the

appellant/plaintiff, as to the sister-Smt. Shanti Devi Bhatnagar being whether alive or dead not being known to the witnesses. The trial Court also records that that defendant No. 6 was stated to be of unsound mind, however, no guardian *ad litem* was appointed. The casual manner in which the suit was pursued without many of the parties signing on the plaint and the defendant Nos. 6 & 7 not being served, is contained in the findings with respect to issue No. 2 which read as under:-

ISSUE No.2

7. Plaintiffs are claiming possession of the suit property on the ground that after the death of Smt. Kishan Devi they have become the owners of the property in their respective ratio.

8. Before coming to the merits, it may be mentioned that the suit as framed is highly defective inasmuch as perusal of the plaint goes to show that it was originally filed by Sh.Mahesh Sarup Bhatnagar, Onkar Sarup Bhatnagar, Smt. Sushila Rani Manjal, Smt. Shakuntala Devi and Smt. Kanti Devi Bhatnagar heirs and legal representatives of the deceased Smt. Shanti Devi Bhatnagar and Shuam Sunder Bhatnagar against seven defendants. During the proceedings of the case some of the parties died and fresh amended memo of parties were filed alleging that the parties sought to be impleaded are the legal heirs of the deceased. In this regard, testimony of plaintiff's witness is very relevant. PW-1 Smt. Madhwi Lata Bhatnagar is the widow of Sh. Mahesh Sarup Bhatnagar and in cross-examination she has deposed that Smt. Shanti Devi Bhatnagar was alive at the time of filing of the suit but they have no talk with her and even do not know whether she was alive or not. She even does not know who are the legal heirs of Shanti Devi. According to her Shanti Devi has one son and 4-5 daughters but she does not know as to where they are living and how they are living. She does not know their address. She even could not say if Shanti Devi is alive or has

died. As per the memo of parties Rajni is known as daughter of Shanti Devi however she pleaded her ignorance as to who is Rajni and what is the name of her husband. Similarly, Nisha, Anjana, Mamta, Neha and Chandni are shown in the memo of parties to be daughters of Mrs Rajni but this witness has expressed her ignorance and went to the extent of saying that they do not belong to her family. Similarly, Alka, Santosh, Sunita and Meenakshi are shown to be daughters of Smt. Shanti Devi Bhatnagar but the witness expressed her ignorance about these persons. In the array of the defendants Shashi, Kiran Pal and Gopal have been impleaded as defendant no. 2,3 and 4. The witness pleaded her ignorance as to who are Shashi and Kiran Pal and she could not even say if they were tenants in the suit property and have vacated the same in the year 1984 by giving possession to defendant no.1.

9. Similarly, PW-2 Sh. Rakesh Mohan Bhatnagar alleged his acquaintance about Rajni, Santosh, Sunita and Meenakshi but could not say whether the plaint bears their signatures or not. Similarly, he could not say who are Nisha, Anjana, Mamta, Neha and Chandni. He is in fact the son of defendant no.7 and although he has deposed that the plaint bears his signatures as well as of his father however, on being shown the plaint he admitted that the same neither bears his signatures nor of his father. According to him Shanti Devi is his bua and earlier her whereabouts was not known but now they have come to know that she has expired. He further deposed that the suit was not filed under his instruction and he does not know when it was filed. His other brothers and sisters were not aware about the filing of the suit. It is pertinent to note that although Smt. Kanti Devi Bhatnagar and legal heirs of Sh. Shyam Sunder Bhatnagar have been impleaded as defendant no.6 and 7 no efforts were ever made by the plaintiff to get them served and therefore PW-2 has deposed that his other brothers and sisters are not aware about the filing of the present suit.

10. Testimony of PW-3 Sh. Sandeep Bhatnagar is almost on the same lines. He has deposed that Shanti Devi is his bua. She was missing for last many years and probably she has

died. He is not sure whether she has died or not. According to him Manmohan Bhatnagar, Alka, Santosh are sons and daughters of Shanti Devi but he cannot say whether the plaint bears their signature or not. He cannot even say whether they are major or minor. He could not tell whether Raji is daughter or grand daughter of Shanti Devi or whether she is alive or not. Same was the reply regarding her children. He does not know any Nisha, Anjana, Mamta, Neha and Chandni nor can identify their signature. According to him Vandana, Rakesh Bhatnagar, Dinesh Bhatnagar are children of S.S. Bhatnagar but he admitted that the plaint does not bears their signatures. Although, he is son of Sh. M.S. Bhatnagar but the plaint is not even signed by him.

11. PW-4 Smt. Sushila Rani has deposed that Shashi is the daughter of Naraini Devi, however, she does not know any Kiran Pal or Kamal. She could not say why they have been impleaded as defendant in this case. She went on stating that Kiran Pal, Kamal and Shashi were not residing in the suit property. There were 2-3 tenants in the suit premises who had vacated the premises during the lifetime of Sh. Hari Mohan Bhatnagar. However, she could not say if their names were Kamal, Kiran pal or Shashi. She went on stating that Shakuntla Bhatnagar and Kanta Bhatnagar are her sisters who are still alive. Kanta Devi resides at Muzzafarnagar. She admitted that she is of unsound mind for last may years. She pleaded her ignorance about Manmohan Bhatnagar, Aalka, Santosh, Sunita and Meenakshi, Rajni, Nisha, Anjana, Mamta, Neha and Chandni. She went on stating that no such persons are related to her.

12. Perusal of aforesaid discussion goes to show that plaint is not signed by all the plaintiffs. Although, it may be termed as an irregularity as provided under Order VI Rule 15 CPC and the irregularity can be cured at any time. However, despite the fact that the witnesses were cross-examined at length on this aspect of the matter and even during the course of his argument the defects in the plaint were pointed out by ld. Counsel for the defendant at length till date no efforts were made by the plaintiff to cure the defects. Even if it is taken that the plaint may be signed by some of the plaintiff even

then it is not established that the persons who are arrayed as party are really entitle to the relief of possession because the witness examined by plaintiff have denied that most of them are related to each other, strangers to the suit cannot seek relief of possession.

13. Moreover, in the written statement, the defendant had taken specific objection that plaintiff no.5 and 7 were arrayed as defendant no. 6 and 7. The plaint as it appears now has curring of plaintiff no. 4 & 7 but is it not clear as to when this cutting was made because no date is forthcoming. Be that as it may be even if it is treated that defendant no.6 and 7 did not agree to join as plaintiffs and as such were impleaded as defendants after impleading them as defendant it was incumbent upon the plaintiff to get them served with the summons of the suit but that was also not done. One of the legal heirs of defendant no. 7 Sh. Sham Sunder Bhatnagar has categorically deposed that his sisters and brothers are not aware about the pendency of the suit. Moreover, as regards Shanti Devi Bhatnagar is concerned PW-4 deposed that she is of insane mind. If that is so no steps have been taken by the plaintiff to appoint her guardian. Ld. counsel for the defendant has placed reliance on **AIR 1968 Supreme Court 954 Ram Chandra Arya Vs. Man Singh and another** for contending that a decree passed in contravention of Order 32 Rule 15 of the code of civil Procedure is bad in law. It was observed that it is now well settled principle that if a decree is passed against a minor without appointment of guardian, the decree is a nullity and is void and not merely voidable. This principle becomes applicable to the case of a lunatic in view of Rule 15 of Order 32 of the Code of Civil Procedure so that the decree against a lunatic is to be treated as without jurisdiction and void. This authority applies with full force to the facts of the case in hand. Since as per the testimony of PW-4 Smt. Shanti Devi is of unsound mind and no steps has been taken by the plaintiff to appoint her guardian, the decree if passed would be a nullity. The result of the aforesaid discussion is that the suit has not been properly instituted and even it is not established that the person who has instituted the suit are legally entitle to seek possession of the same and even does not established as

to who are the defendant no. 2,3 and 5 against whom relief of possession is being sought. Moreover, as stated above, defendant no. 6 and 7 have not been served and in fact defendant no.6 who is an insane her interest has not been safeguarded by the plaintiff. Although, it is alleged by the plaintiff that some of the plaintiffs had relinquished their share in favour of Sh. Sh. Hari Mohan Bhatnagar and Mahesh Swarup Bhatnagar even the fact of that relinquishment has not been duly proved. Moreover, it is alleged that movable property lying in house belongs to Sh. hari Mohan Bhatnagar and after his death plaintiffs are entitle to the suit property. In this regard it may be mentioned that PW-3 Sh. Sandeep bhatnagar has deposed that his father purchased one T.V. Set and gave it to Sh. hari Mohan bhatnagar in the year 1978 and its make was Blston. He could not say from where T.V. was purchased by his father. He could not say if Naraini Devi purchased T.V. in the year 1982 from Krishna Nagar Biston Shop. He also could not say if sofa and double bed was purchased by Naraini Devi from the shop of Kapoor Furniture. PW-4 Sushila Rani deposed that movable properties belongs to her mother i.e. Kishan Devi but admitted that there was no television at that time. She could not say if the double bed and T.V. belongs to Naraini Devi under these circumstances, it is not proved that movable properties as detailed in para 5 of the plaint exclusively belong to Sh. Hari Mohan Bhatnagar. In view of the foregoing I am of the opinion that plaintiff is not entitle for the relief of possession as prayed for. This issue is decided against the plaintiff.

10. In my opinion, in view of the findings with regard to the issue No. 2, I have no option but to dismiss the appeal as there is total confusion, complete negligence and lack of due application required in law for conduct of the suit. Surely, the persons, who are arrayed as plaintiffs had to sign the plaint, however, some of the original plaintiffs, on the

deposition of the witnesses of the plaintiffs themselves, were said not to have signed the plaint. After some of the plaintiffs died, it was not known as to whether the persons impleaded in their place were the legal heirs or not and even if they were legal heirs, there were no signatures on the plaint of most of these legal heirs. The defendant Nos.6 & 7 being one son and one daughter of Smt. Kishan Devi i.e. the brother and sister of deceased Sh. Hari Mohan Bhatnagar, whose share was in issue were never served at all. Surely, the trial Court in the state of affairs, which existed and which is reflected in paras-7 to 13 of the impugned judgment, was fully justified in dismissing the suit.

11. I have already narrated above the total lack of assistance by the counsel, who have appeared in the case. I have made my best endeavour to go through the bulky record. It is quite obvious that there is total lack of interest as also insurmountable defects in filing and pursuing the suit.

12. In view of the above, the appeal and the application are dismissed, leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J.

MARCH 01, 2012

RS