

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

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Date of decision: 11th September, 2013

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RFA 575/2004

OM PRAKASH

..... Appellant

Through: Mr. P.S. Rana, Adv.

Versus

SHANTI SWAROOP

..... Defendant

Through: Mr. Davinder Hora, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree dated 24.07.2004 of the Court of Additional District Judge, Delhi of dismissal of suit No.621/2001 filed by the appellant / plaintiff *inter alia* for partition of property No.O-IV/19, Lajpat Nagar, New Delhi.

2. Notice of the appeal was issued and the Trial Court record requisitioned. The appeal was admitted for hearing on 12.09.2006 and vide interim order of the same date, the parties were directed to maintain *status quo* as regards possession and title of the suit property. The respondent / defendant died during the pendency of the appeal and vide order dated 16.03.2012 his widow and son were substituted in his place. The widow of the deceased respondent / defendant has also since died and now this appeal

is being contested by the son only of the deceased respondent / defendant. The counsel for the appellant / plaintiff was heard yesterday when none appeared for the respondent / defendant. Accordingly, the counsel for the respondent / defendant was telephonically contacted and has appeared today and the counsels have been heard further.

3. The appellant / plaintiff filed the suit from which this appeal arises pleading:

- (i) that the appellant / plaintiff and the deceased respondent / defendant along with their mother Smt. Dhanni Bai and younger brother Sh. Murari Lal migrated from West Pakistan after partition in the year 1947; they had ancestral properties in Multan city, West Punjab and the respondent / defendant being the elder brother submitted an application for the grant of compensation in lieu of properties left in Pakistan;
- (ii) that the mother of the parties also submitted an application for the grant of compensation;
- (iii) that at the time of settlement of claim, the appellant / plaintiff and Sh. Murari Lal were minors and as such the respondent /

defendant being the elder brother applied for grant of compensation and pursued the claim applications;

- (iv) that on 17.04.1952 the Claims Officer passed an order awarding compensation amount of Rs.3966/10/8, with each of the appellant / plaintiff, the respondent / defendant along with their mother Smt. Dhanni Bai and brother Sh. Murari Lal having a share of Rs.991/10/8 therein;
- (v) that the respondent / defendant purchased the suit property out of funds and compensation granted by the Settlement Officer, Delhi in lieu of properties left in Pakistan;
- (vi) that the suit property was allotted in the name of the respondent / defendant being a major and the respondent / defendant made payment thereof out of compensation aforesaid and the balance amount was paid in cash out of joint earnings by the appellant / plaintiff and the respondent / defendant;
- (vii) that the Conveyance Deed of the suit property was issued in the name of the respondent / defendant because at the time of allotment, he was the only major male member of the family

and the other two brothers i.e. the appellant / plaintiff and Sh. Murari Lal were minor at that time;

- (viii) that after allotment of the suit property, all the four members aforesaid of the family became joint owners to the extent of one-fourth share each;
- (ix) that the younger brother of the parties Sh. Murari Lal died unmarried and issueless and after his death, the mother of the appellant / plaintiff and the respondent / defendant became owners of one-third share each in the suit property;
- (x) that after the death of the mother Smt. Dhanni Bai, the appellant / plaintiff and the respondent / defendant became owners in equal share of the suit property; and,
- (xi) that though the respondent / defendant in the 50 years prior to the institution of the suit had never challenged or denied the rights of the appellant / plaintiff as a joint owner of the suit property but had prior to the institution of the suit, taking advantage of the Conveyance Deed thereof being in his individual name, started claiming himself to be the sole owner of the suit property.

Accordingly, the suit was filed claiming the reliefs, (i) of declaration that the appellant / plaintiff and the respondent / defendant were owners of ½ share each in the suit property and that the respondent / defendant was not the exclusive owner of the property; (ii) of partition of the property; and, (iii) of perpetual injunction restraining the respondent / defendant from exclusively dealing with the property.

4. The respondent / defendant contested the suit by filing a written statement on the grounds:

- (i) that the suit property was allotted in favour of the respondent / defendant sometime in January, 1953 and the respondent / defendant had deposited in cash a sum of Rs.581.40p as initial payment therefor out of the total costs fixed of Rs.2664.40p;
- (ii) that the parties to the suit along with their mother and brother had a verified claim in respect of the property left in Pakistan and the respondent / defendant got his share of Rs.991/10/8 of the claim adjusted towards the cost of the suit property and also purchased the claims of the appellant / plaintiff and his mother and brothers and paid the agreed amount to the appellant / plaintiff and the mother;

- (iii) that thereafter in consideration of the payment received, the appellant / plaintiff and the mother Smt. Dhanni Bai wrote two letters dated 14.12.1964 and 28.12.1964 to the office of the Regional Settlement Commissioner to the effect that they had no objection if the amount of their share is adjusted towards the cost of the suit property and the Sale Deed issued in favour of the respondent / defendant;
- (iv) that the letter dated 05.01.1965 issued by the Settlement Officer showed that Smt. Dhanni Bai mother of the parties had applied for transfer of allotment in her favour but the same appeared to have been rejected as the Lease Conveyance Deed was executed in favour of the respondent / defendant on 31.08.1965;
- (v) that by the time of rejection of the request of the mother for transfer of allotment, the appellant / plaintiff born in the year 1938 had already become major and if so desirous of challenging the allotment in the sole name of the respondent / defendant could have taken his legal remedies including under the Displaced Persons (Compensation & Rehabilitation) Rules,

1955 framed under the Displaced Persons (Compensation & Rehabilitation) Act, 1954 but no such steps were taken;

- (vi) that in the circumstances, the allotment / transfer of the suit property in favour of the respondent / defendant became final and the respondent / defendant continued to be the owner of the suit property in his own right;
- (vii) that the suit was thus barred by time;
- (viii) that the jurisdiction of the Civil Court was barred under Section 36 of the Displaced Persons Act;
- (ix) that the Government of India as the lessor of the property was a necessary and proper party to the suit;
- (x) that the suit was not correctly valued for the purpose of court fees and jurisdiction;
- (xi) that the suit property was allotted to the respondent / defendant much before the filing of the compensation application;
- (xii) that the appellant / plaintiff and the mother Smt. Dhanni Bai had received the consideration for their claim and for this reason only gave no objection for adjusting their claims towards the costs of the suit property;

(xiv) that the allotment of the suit property was in the individual capacity of the respondent / defendant and not as the only major member of the family; and,

(xv) that the appellant / plaintiff had no share in the suit property and the respondent / defendant was the exclusive owner thereof.

5. The appellant / plaintiff filed a replication further pleading that the respondent / defendant was holding the title as trustee of the family members; that the property was equally partitioned in two units with the appellant / plaintiff and the respondent / defendant occupying the equal portions; that the property was allotted in the name of the respondent / defendant because he was acting as the Karta of the family; that the appellant / plaintiff never sold his verified claims to the respondent / defendant. Else, the contents of the written statement were denied and the contents of the plaint reiterated.

6. On the pleadings of the parties, the following issues were framed on 18.09.2002:

1. *Whether the suit of the plaintiff is not maintainable in view of preliminary objection No.1? OPD.*

2. *Whether the suit of the plaintiff is not maintainable in view of the Section 36 of Displaced Persons Act, 1954?*

OPD

3. *Whether the suit of the plaintiff is not maintainable for the purposes of court fee and jurisdiction? OPD*

4. *Whether the plaint is not properly verified? OPD*

5. *Whether the suit of the plaintiff is bad for non-joinder of necessary parties? OPD*

6. *Whether the suit of the plaintiff is barred by limitation? OPD*

7. *Whether the plaintiff is entitled for declaration as prayed? OPP*

8. *Whether the plaintiff is entitled to the partition as prayed? OPP*

9. *Relief.”*

7. The appellant / plaintiff besides examining himself examined one neighbor. The respondent / defendant besides examining himself examined five other witnesses. No evidence was led by the appellant / plaintiff in rebuttal.

8. The learned Additional District Judge in the impugned judgment has found / observed / held:

- (i) that the appellant / plaintiff and the mother Smt. Dhanni Bai had given their no objection to the amount of compensation of their share being adjusted towards the suit property and of which the respondent / defendant was the allottee and to all the necessary papers viz. Sale Deed etc. with respect to the property being issued in the name of the respondent / defendant;
- (ii) that the appellant / plaintiff and the mother Smt. Dhanni Bai had filed affidavits dated 28.08.1965 confirming that they had already given their irrevocable consent for adjustment of their share of claim compensation towards the costs of the property and that they had no objection if the Lease/Conveyance /Transfer Deed of the property were executed in the exclusive name of the respondent / defendant as they had no interest in the property nor shall they claim any interest therein;
- (iii) that ultimately Conveyance Deed dated 31.08.1965 with respect to the property was executed in favour of the respondent / defendant. “All these documents are admitted documents”;

- (iv) that the appellant / plaintiff in the affidavit aforesaid had mentioned his age as 22 years – he was not minor at that time;
- (v) that the appellant / plaintiff was a major also at the time of execution of the Conveyance Deed dated 31.08.1965 with respect to the property in favour of the respondent / defendant;
- (vi) that in none of the documents of the contemporaneous time, the appellant / plaintiff and the mother Smt. Dhanni Bai had mentioned that they had sold their share of claim compensation to the respondent / defendant for a particular sum or that in consideration thereof they were giving no objection to execution of the conveyance documents in respect of the suit property in favour of the respondent / defendant;
- (vii) that though the circumstance of the appellant / plaintiff and the mother also having started residing in the property and having continued to reside in the property for long showed that they were in dire need of shelter and had agreed to the adjustment of their share of claim compensation towards the price of the property to avoid any delays in allotment thereof especially with the appellant / plaintiff being a younger brother but from

the execution of the affidavit aforesaid of the appellant / plaintiff and the Conveyance Deed of the property in the name of the respondent / defendant, it could not be said that the appellant / plaintiff was not aware of the fact that the property stood in the name of the respondent / defendant and it was unbelievable that the appellant / plaintiff came to know only on 28.04.2001 that he had no right in the property;

- (viii) that the appellant / plaintiff had waited for more than 35 years to challenge the right of the respondent / defendant but by which time the period of limitation to assert such right had expired;
 - (ix) that the suit was thus barred by limitation and not maintainable;
 - (x) that the suit was not barred by Section 36 of the Displaced Persons Act;
 - (xi) that the suit was properly valued for the purpose of court fees and jurisdiction;
 - (xii) that there was no defect in the verification of the plaint;
 - (xiii) that the suit was not bad for non-joinder of any necessary party;
- and,

(xiv) that the appellant / plaintiff was not entitled to any of the reliefs claimed.

9. As the aforesaid narrative would show, what has gone against the appellant / plaintiff is the affidavit given by the appellant / plaintiff and proved as Ex.DW6/B and which is as under:

*“No objection certificate for the issue of sale
Before the Managing Officer,
Jam Nagar House
N. Delhi*

*In the matter of property No.O-IV/19, D.S. Lajpat Nagar,
situated at New Delhi.*

AFFIDAVIT

*Affidavit of Sh. Om Prakash, S/o Sh. Tej Bhan aged about
22 yrs. Resident of O-IV/19, D.S. Lajpat Nagar, New Delhi-
14.*

I do hereby solemnly affirm and declare as under:-

- 1. That I have associated myself with the Principal purchaser Sh. Mohan Lal, S/o Sh. Tej Bhan for adjustment compensation under CAF No.D/4973-A/IM A, to the extent of Rs.541.00, towards the balance cost property cited above.*
- 2. That I have already given my irremovable consent for the adjustment of Rs.541.00 from my claim compensation aforesaid.*
- 3. That I have no objection if the lease / conveyance / transfer deed of the above noted Property is executed in the exclusive name of the Principal purchaser Sh.*

Mohan Lal, S/o Sh. Tej Bhan as I have no interest in the property nor shall I claim any interest therein.

*Sd/-
Deponent*

VERIFICATION

I solemnly affirm that what is mentioned above is true to the best of my knowledge and belief and that no fact has been concealed.

*Sd/-
Deponent”*

10. The suit from which this appeal arises was instituted in or about the year 2001 i.e. after the coming into force of the Benami Transactions (Prohibition) Act, 1988, Section 4 (1) & (2) whereof prohibits any suit, claim, action or defence to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person by or on behalf of a person claiming to be the real owner of such property. However, Section 4(3) thereof makes the said prohibition inapplicable where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family and where the person in whose name the property is held is a trustee or other person standing in a fiduciary

capacity and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity. The appellant / plaintiff had as aforesaid pleaded a relationship of trust and I am of the opinion that the bar under the Benami Act would also have not come in the way of the appellant / plaintiff especially in view of the recent dicta of the Supreme Court in *Marcel Martins Vs. M. Printer* (2012) 5 SCC 342 but for the affidavit aforesaid in which the appellant / plaintiff has not only given a no objection to the execution of the Conveyance Deed with respect to the property in the name of the respondent / defendant but has also categorically stated that he had no interest in the property and shall not claim any interest therein. Certainly a person, after 35 years of giving such an affidavit, cannot claim to be the owner of the property and claim the person in whose name the property is held to be a benami at least to the extent of 50% of the share. Faced therewith the counsel for the appellant / plaintiff has contended that such affidavit is not a registered document and could not have affected the rights of the appellant in the property.

11. I am unable to accept the aforesaid contention. As on the date of making of the affidavit, the appellant / plaintiff had no right or interest in any property and only had a share in the claim compensation awarded in

favour of the parties to the proceedings and their mother and brother. The said right to compensation can by no stretch of imagination be said to be immovable property, relinquishment of rights wherein would require a registered document.

12. The documents on record show and the counsel for the appellant / plaintiff also agrees, that by the time the order dated 17.04.1952 on the claims filed by the parties to the proceedings and their mother and brother, holding them entitled to compensation of Rs.3966/10/8 with each of the four having 991/10/8 share therein was made, the property had already been allotted in the sole name of the respondent / defendant. There is nothing to show that the allotment of the property in the name of the respondent / defendant was in lieu of any ancestral properties.

13. The counsel for the appellant / plaintiff has at this stage interjected and stated that the affidavit was given before a Judicial Officer.

14. I am unable to see as to what impact the same would have.

15. Thus it is not as if the allotment of the property is in lieu of any joint properties left in Pakistan or as part of the compensation package in lieu thereof. All that has happened is that the appellant / plaintiff and the mother allowed their share of claim compensation also to be adjusted towards the

cost of the property allotment whereof was in the name of the respondent / defendant only. Though such contribution to sale consideration in certain circumstances could have vested title in the property in favour of the appellant / plaintiff and the mother but the appellant / plaintiff by furnishing the affidavit supra disclaiming any rights whatsoever in the property have ruled out any possibility of such vesting also.

16. The counsel for the appellant / plaintiff then contends that the said affidavit does not form part of the pleadings and in fact was not relied upon and filed by the respondent / defendant and was sprung as a surprise on the appellant / plaintiff during the recording of the evidence of DW6 namely the official from the office of the Land and Development Office, New Delhi examined by the respondent / defendant and who had brought the file with respect to the said property and which contained the affidavit aforesaid. He has contended that the appellant / plaintiff has not even had an occasion to deny or challenge the said affidavit and the matter be remanded for the said purpose.

17. Though undoubtedly, the affidavit came on record during the testimony of the witness from the office of the L&DO but it is not as if the appellant / plaintiff had no occasion to, if of the view that the said affidavit

was not executed by him and was not binding on him, to take such a stand. Not only did the appellant / plaintiff not cross examine the said witness from the office of the L&DO and did not even put to him that the said affidavit did not bear the signatures of the appellant / plaintiff but a perusal of the Trial Court record shows that after the examination of the said witness on 18.11.2003, the recording of the evidence of the respondent / defendant continued on 19.11.2003, 06.01.2004, 04.02.2004, 10.02.2004 and 20.02.2004 when the recording of the evidence was completed. Though the appellant / plaintiff had opportunity to lead rebuttal evidence and in which stand if any required to be taken with respect to the affidavit could have been taken but that opportunity also was not availed and the matter adjourned to 02.04.2004 for addressing final arguments. In fact the final arguments were heard only on 13.07.2004. The appellant / plaintiff thus had more than eight months after the aforesaid affidavit had come on record to, if intended to challenge the same, do so but no such steps were taken. Even in the memorandum of appeal it is not the case of the appellant / plaintiff that the said affidavit was not given by the appellant / plaintiff or does not bear his signatures. This appeal itself has remained pending for the last nearly nine years and the limitation for the appellant / plaintiff to even if can

be said to be aggrieved by the said affidavit, to challenge the same has also long since expired. The appellant / plaintiff cannot now be heard to say that he is not bound by the said affidavit when no such ground has been taken neither before the learned Additional District Judge nor in this appeal.

18. As far as long residence / occupation by the appellant / plaintiff of the property is concerned, the same also in view of the categorical stand of the appellant / plaintiff in the affidavit aforesaid could only be on account of relationship with the respondent / defendant i.e. as a licensee and not in any other capacity.

19. The counsel for the appellant / plaintiff has referred to ***Bharat Singh Vs. Kunwar Singh*** AIR 1991 MP 368, ***Gauranga Sahu Vs. Bhaga Sahu*** AIR 1976 Orissa 49, ***Raj Ballav Das Vs. Haripada Das*** AIR 1985 Calcutta 2 and ***Ibrahim Vs. Sharifan*** AIR 1980 P&H 25 with respect to the period of limitation under Article 58 of the Limitation Act to contend that the limitation of three years from the date when the right to sue first accrues commenced to run not from the date of mere denial or innocuous threat to appellant / plaintiff's right but from the clear and unequivocal threat to the appellant / plaintiff's right necessary for the limitation to commence running. However in the present case since the appellant / plaintiff had

given the affidavit aforesaid in the year 1965 disclaiming any right in the property, if the appellant / plaintiff wanted to wriggle out from his statement in the said affidavit by explaining any circumstances owing to which he claims to be not bound thereby, the limitation therefor has to be from the date of the execution of the affidavit, the execution whereof was admittedly in the knowledge of the appellant / plaintiff and could not depend upon the threat by the respondent / defendant to dispossess the appellant / plaintiff from the property. The said judgments thus do not come to the rescue of the appellant / plaintiff.

20. No error is thus found in the impugned judgment and decree. Resultantly, the appeal fails and is dismissed. However in the facts, no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 11, 2013

‘gsr’..