

\$~R-4/R-5

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **RFA No. 187/2011 and CM Appl. No. 6326/2011 (stay)**

Judgment reserved on 11th April, 2013

Judgment delivered on 23rd April, 2013

YASH PAL SAINI Appellant
Through : Mr. Y.D. Nagar, Adv.

Versus

PUSHPA SAINI AND ORS. Respondents

Through :Mr. Sanjeev Sindhvani, Sr. Adv.
With Mr. Ananya Mehta, Adv. for
R-1

AND

RFA No. 149/2011

B.R. SAINI Appellant

Through : Mr. Y.D. Nagar, Adv.

Versus

PUSHPA SAINI AND ORS. Respondents

Through :Mr. Sanjeev Sindhvani, Sr. Adv.
with Mr. Ananya Mehta, Adv. for R-
1

CORAM:

Hon'ble Mr. Justice A. K. Pathak

1. Both the above appeals are in similar facts, inasmuch as, arise from

same judgment and decree passed by the trial court and are being disposed of together.

2. Trial court has passed a decree of possession in favour of plaintiff (respondent no.1) and against the defendant nos. 1 and 2 (appellants) in respect of portions in their possession as shown in the site plan Ex PW1/1 besides restraining them from alienating and creating any third party interest or parting with possession of the property bearing House no. 2979/XI, Kuncha Neel Kanth, Darya Ganj, New Delhi (for short hereinafter referred to as “suit property”). A decree of mesne profits/damages has also been passed; whereby appellants have been directed to pay ₹4,000/- (Rupees Four Thousand Only) each with effect from 1st May, 2006 till the possession of suit property is handed over to respondent no.1.

3. Plaintiff filed a suit for possession mesne profits and permanent injunction against defendant no. 1 (husband) and defendant no. 2 (son). She also impleaded her other two children as defendant nos. 3 and 4 but no relief was claimed against them. During pendency of the appeal, defendant no. 1 passed away and his legal representatives have been brought on record, vide order dated 7th March, 2012. Plaintiff alleged in the plaint that she was 74 years old woman; she was owner of suit property consisting of ground floor,

first floor and barsati floor. Suit property was purchased by her mother, namely, Smt. Mangli Devi, vide a registered Sale Deed dated 17th January, 1958. Smt. Mangli Devi died on 27th December, 1967. Her father Master Basma Ram passed away on 4th January, 1968. Upon death of her parents, plaintiff became sole and absolute owner of the suit property, which was duly mutated in her name in the records of Municipal Corporation of Delhi (MCD). Defendants were living in the suit property with the plaintiff in different portions. Rooms in possession of the plaintiff at the ground floor were shown in blue colour in the site plan; rooms in occupation of defendant no. 1 were shown in orange colour; similarly rooms in possession of defendant no. 2 and his family were shown in green colour; rooms in possession of defendant nos. 3 and 4 were shown in yellow colour. With the passage of time, relations between the plaintiff and defendant nos. 1 and 2 became estranged. Relations between defendant nos. 1 and 2 on one side and defendant nos. 3 and 4 on the other also became estranged, as a result whereof defendant no. 4 was forced to leave the suit property. While leaving, defendant no. 4 handed over possession of rooms which he was occupying to the plaintiff. However, defendant no. 1 forcibly took possession of the said rooms in the absence of plaintiff. With the passage of

time, relations between the plaintiff and defendant nos. 1 and 2 further deteriorated. Therefore, on 31st January, 2006 plaintiff asked the defendant nos. 1 and 2 to vacate the suit property within three months but to no effect. Defendant no. 2 was owner of a DDA flat bearing no. D-15/30, Sector 7, Rohini, Delhi, which he had let out on a monthly rent of ₹5,000/- (Rupees Five Thousand Only) to someone else. Since suit property was not vacated by the defendant nos. 1 and 2, hence the suit.

4. Defendant nos. 1 and 2 filed separate written statements. In the written statements defendants have taken similar pleas. Defendant no. 1 claimed his independent right in the suit property being husband of plaintiff. It was alleged that suit was filed at the behest of defendant nos. 3 and 4 to disrupt the joint family and to harass the defendant no. 1, who was a Senior Citizen. It was a collusive suit. It was not disputed that the suit property was purchased by Smt. Mangli Devi, mother of plaintiff in the year 1958. It was alleged that suit property was purchased by Smt. Mangli Devi for ₹10,000/- (Rupees Ten Thousand Only) a sum of ₹1,000/- (Rupees One Thousand Only) was spent on stamp duty etc. Smt. Mangli Devi paid ₹7,000/- (Rupees Seven Thousand Only) by selling her agricultural land situated in Haryana. The property was mortgaged with one Late Shri Marey Singh

against a sum of ₹4,000/- (Rupees Four Thousand Only). Subsequently, mortgage was got redeemed by the defendant no. 1 by paying money from his personal resources. In the year 1958 suit property was a dilapidated tin shed. It is the defendant no. 1 who made the property inhabitable by spending huge amounts in the year 1958 itself. Even thereafter defendant no. 1 constructed pacca rooms in the year 1964-65 by spending money from his pocket. After few years, defendant no. 2 joined as a Clerk with State Bank of India and renovated the suit property by spending huge sums. In nutshell, their plea is that the construction was raised by the defendant no. 1, inasmuch as, certain portions were later renovated by the defendant no. 2, thus, by virtue of expenditure incurred by them they had acquired independent rights in the suit property. It was alleged that defendant no. 1 was a lawyer and financially well off and had resources to raise construction from time to time. It was not denied that suit property was mutated in the name of plaintiff after the death of her parents. It was further alleged that defendant nos. 1 and 2 were occupying the suit property in their own rights being members of joint Hindu undivided family. Shortly after marriage of defendant no. 2 in the year 1982, on account of some misunderstandings, defendant no. 2 and his wife were asked to leave the suit property,

accordingly, they shifted to Dev Nagar, Karol Bagh, New Delhi. In the month of December, 1986 a family arrangement/ settlement was arrived at the instance of plaintiff and defendant no. 1, pursuant whereof defendant no. 2 along with his wife and his new born son shifted back to the suit property. It was settled that defendant no. 2 and his family would continue to live in the suit property as members of the joint family forever. It may be noted that initially plea of family settlement was not taken in the written statements. It is by way of amendment, which was permitted vide order dated 21st August, 2007, the plea of family settlement was added in the written statement(s). It was not disputed that defendant no. 1 owned a DDA flat in Rohini. It was prayed that suit be dismissed.

5. Plaintiff filed replication (s) whereby allegations as contained in the written statement (s) were denied and averments made in the plaint were reiterated.

6. On the pleadings of parties trial court framed following issues:-

- (1) Whether there was family settlement between the parties, if so, to what effect? OPD 1 & 2
- (2) Whether defendant no. 1 had spent his personal fund for the construction and improvement of property in dispute, if so to what extent? OPD 1
- (3) Whether the plaintiff is entitled for decree of possession as prayed for? OPP
- (4) Whether plaintiff entitled for the decree of

mesne profits, if yes, at what rate and for what period? OPP

(5) Whether plaintiff is entitled for the decree of permanent injunction? OPP

(6) Relief.

7. Plaintiff examined herself as PW1. She also examined her son Rakesh Kumar Saini (defendant no. 4) as PW2. As against this, defendant no. 1 examined himself as DW1. Defendant no. 2 stepped in the witness box as DW2. Trial court scrutinized the entire material on record and held that no family arrangement/settlement could be established by the defendants. Defendants had failed to prove that they had raised constructions and made improvements in the suit property from time to time by spending their personal funds as was alleged in the written statement(s). Though defendants had alleged that they had spent lacs of rupees in construction but had failed to produce any documentary evidence to substantiate this plea, inasmuch as it had come on record in the cross-examination of defendant no. 1 that he had taken up a job in 1950 as a Clerk with the Ministry of Labour, Govt. Of India but resigned from the said job in 1952 and started his own business as an independent contractor. Later he started practicing as an Advocate. He admitted that he did not file any income tax returns between 1952 – 1958, though he claimed that he filed tax returns in the year 1960 onwards.

However, he could not produce any document in this regard. He also failed to produce any document to show that mortgage money of ₹4,000/- (Rupees Four Thousand Only) was paid by him from his personal fund. He even failed to produce and prove any document on record to substantiate his plea that construction was raised by him by spending huge amounts. Defendant no. 2 also failed to produce any document to show that he spent any amount for making improvements in the suit property. Defendants had admitted that original owner was Smt. Mangli Devi and upon her death plaintiff became the sole and absolute owner of suit property being only legal heir of Smt. Mangli Devi, inasmuch as, her name was mutated in MCD records and the house tax receipts were also in her name. No evidence could be led by the defendants to show that the property was a joint family property. Merely because all the family members were living in the property by itself was not sufficient to convert the status of the property to a joint family property. Defendant nos. 1 and 2 were living in property with the permission of plaintiff as licencees without any payment of licence fee and after revocation of licence by the plaintiff, they had no right to remain in the suit property. It was further held that they were liable to pay mesne profits for their continued stay after termination of licence.

8. I have heard learned counsel/ Senior Counsel for the parties, considered written submissions and have perused the trial court records and do not find any illegality or perversity in the impugned judgment and decree, which in my view is in consonance with the evidence adduced by the parties. It is not in dispute that suit property was purchased by Smt. Mangli Devi vide a registered sale deed and after the death of her parents plaintiff acquired ownership rights, inasmuch as, property was mutated in the MCD records in the name of plaintiff without any objections from any quarters. The plea taken by the contesting defendants primarily is that property was mortgaged by Smt. Mangli Devi with Late Shri Marey Singh against a loan of ₹4,000/- (Rupees Four Thousand Only) and it is the defendant no. 1 who got the mortgage redeemed by making payment. However, no cogent evidence has been led by either of the defendants to prove that ₹4,000/- (Rupees Four Thousand Only) was paid by the defendant no. 1, inasmuch as there is no evidence that suit property was mortgaged by the plaintiff. That apart, this plea would not be sufficient to hold that defendant no. 1, by getting the mortgage redeemed, acquired any ownership rights in the suit property. The plea of defendants is that the suit property at the time of its purchase was in a dilapidated condition and was only a tin shed.

Subsequently, entire suit property was constructed by defendant no. 1 by investing his personal funds, inasmuch as, defendant no. 2 had also spent huge amounts on renovation, thus, had acquired independent ownership rights in the suit property. However, contesting defendants have miserably failed to prove this plea which has remained unsubstantiated by documentary evidence. Defendant no. 1 has failed to produce documents to show that he was earning well and was having sufficient funds to raise construction. He has failed to show that he was an income tax payee as he failed to produce income tax returns. Though he claimed that he was an income tax assessee in the year 1960 and thereafter, but in his cross – examination he stated that he cannot produce income tax returns. Defendants have also not produced any documents on record to support their version that the construction was raised by them in the suit property. No receipts regarding purchase of construction material could be produced and proved. In absence of the documentary evidence in this regard this plea has remained unsubstantiated. Accordingly, trial court has rightly concluded that defendants had failed to prove that they had spent any money on raising the construction, which otherwise, in my view, would not give any joint ownership rights to them in the suit property. Defendants have also not

adduced any evidence to show that the suit property was a joint family property.

9. In Sandeep Chandra vs. R.S. Chandra, 2010 (116) DRJ 327, a Division Bench of this Court has held that there is no presumption of property being a joint Hindu property on account of existence of a joint Hindu family. One who asserts that it is so has to prove that the property is a joint family property.

10. In Srinivas vs. Narayan, AIR 1954 SC 379, Supreme Court held as under:-

i) Proof of existence of joint family does not lead to a presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish that fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question have been acquired, the burden shifts to the party alleging self-acquisition to establish that property was acquired without the aid of joint family funds.

ii) The mere proof of existence of joint family nucleus out of which acquisitions should have been made is not sufficient. The important thing to consider is whether the income which the nucleus yields is sufficient to lead to an inference that acquisitions were made with that income. A building in the occupation of the members of a family yielding no income could not be a nucleus out of which acquisitions could be made even though it might be of considerable value.

11. Similar is the view expressed by the Supreme Court in M. Girimallappa vs. R. Yellappagouda AIR 1959 SC 906 in the following terms:

“.... there is no presumption that any property, whether movable or immovable, held by a member of a joint Hindu Family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property.”

12. In view of the above discussions I do not find any force in the contentions of contesting defendants that the suit property is a joint family property.

13. As regards to plea of existence of family settlement, same also has no force. No cogent evidence has been led by the contesting defendants that family settlement was arrived at vesting independent rights in the contesting defendants to retain the portions in their possession. It has been admitted by the defendant nos. 1 and 2 in their cross-examinations that family settlement was not reduced in writing. As regards to plea of oral family

settlement, same does not inspire confidence as I do not find DW1 and DW2 to be trustworthy and reliable witnesses. Even otherwise, merely because defendant no. 2 was permitted to rejoin the family in the year 1986 by the plaintiff out of love and affection by itself does not give any independent right in his favour to continue to hold on the possession forever. The defendants have admitted that in the year 1982 plaintiff had asked the defendant no. 2 to leave the house along with his wife because of their ill behaviour and thereafter they left the house and started living in Dev Nagar, Karol Bagh on rent. In the year 1986, plaintiff permitted defendant no. 2 to come back and start living with their family members, on the assurance of good behaviour. It appears that in the year 1986 defendant no. 2 was permitted by the plaintiff to stay in the house subject to his behaving well. This accommodation extended by the plaintiff cannot be said a family settlement in order to claim the rights in the suit property; this simply shows that plaintiff permitted the defendant no. 2 to live with her in her house as a licensee, without payment of licence fee. So called family arrangement in no manner vests any independent rights in favour of defendant no. 2 in the suit property.

14. In *Ajit Singh vs. Smt. Prakash Devi* 2007 V AD (Delhi) 289 mother

had filed a suit for possession against her son. Son had claimed independent right in the suit property of his mother on the basis of Family Settlement Deed, which could not be produced by him. Since son had failed to prove family settlement, it was held that he was liable to vacate the property owned by his mother. In *Arjan Dev vs. Sh. Om Parkash*, AIR 1992 Delhi 202, plaintiff had allowed his brother to live in the property owned by him. A defence was set up that property was a joint family property. However, said plea remained unproved. Accordingly, decree of possession was passed against the defendant, who was also ordered to pay damages.

15. Counsel for the appellant has placed reliance on *Hari Shankar Singhanian & Ors. Vs. Gaur Hari Singhanian & Ors.* AIR 2006 (4) Scale 74, *Tek Bahadur Bhujil, vs. Debi Singh Bhujil and Ors.* AIR 1966 SCC 292, *Mt. Sodhan and Another vs. L. Khushi Ram and Others*, AIR (87), 1950 (East) Punjab 261, *Latifannessa Bibi and Others vs. Abdul Rahaman and Others*, AIR 1934 Calcutta 202 and *Sahu Madho Das & Ors. Vs. Pandit Mukand Ram & Anr.* 1955 (2) SCR 22. I have perused these judgments carefully and I am of the view that the same are in context of different facts and are not applicable to the present case, inasmuch as, in this case plea of family settlement has remained unsubstantiated.

16. For the foregoing reasons, both the appeals are dismissed. No order as to costs. Miscellaneous application is disposed of as infructuous.

A.K. PATHAK, J.

APRIL 23, 2013

rb