

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

+ **R.S.A. NO.47 OF 2005**

Decided on : 30th January , 2013

J.M. KOHLI Appellant
Through: Mr.Adhirath, proxy counsel.

Versus

VIMAL KANTA Respondent
Through: Mr.Kanwal Choudhary, Adv.

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

1. This is a Regular Second Appeal filed in the year 2005 which is pending in this Court for nearly last eight years.
2. The dispute in the instant case between the appellant and the respondent, who happen to be husband and wife, (since divorced on 30.9.1994) is with regard to the share in the property bearing no.50/5, East Punjabi Bagh, Delhi.
3. The case was called out earlier in the morning and a request for pass over was made by the proxy counsel for the appellant. In the second call, a request for adjournment is made by the proxy

counsel on the ground that Ms.Geeta Luthra, learned senior counsel is held up in a matter in Supreme Court and therefore, the matter may be adjourned.

4. On 11.9.12, the matter was fixed for today after a gap of almost four months. A perusal of the order sheets show that the case has been lingering on despite the fact that a regular second appeal has to be entertained only when a substantial question of law is involved. I am not inclined to accommodate the proxy counsel by giving any further adjournment, although the matter was passed over twice and it is already 3.30 pm. Therefore, I proceed with the hearing. The learned counsel for the respondent was permitted to read the entire judgment of the appellate Court under appeal.
5. In order to understand the controversy, the parties will be referred by their status as plaintiffs and the defendant in the first Forum when the suit was instituted. Vimal Kanta who is the respondent herein will be referred as the (plaintiff/or by name) while as J.M.Kohli will be referred as (defendant/or by name).
6. The plaintiff had got married to the defendant on 20.6.53. She filed a suit for declaration on 18.7.69 against the defendant to the

effect that she be declared as the owner of one half of the share in property bearing no. 50/5, East Punjabi Bagh, Delhi measuring 400 sq. yds. A consent decree was passed after contest on 13.8.1969 in favour of Vimal Kanta which has been exhibited as P-1 in the present proceedings. It has transpired from the orders of the appellate Court that this consent decree was also challenged by J.M.Kohli on 09.4.84 by filing a suit no.157/84 against Vimal Kanta and her brother to the effect that J.M.Kohli is the absolute owner of the property bearing no.50/5, East Punjabi Bagh. This suit is stated to have been withdrawn by J.M.Kohli on 17.9.1987 and thus the said decree exhibited as P-1 by virtue of which the right of the Vimal Kanta to the extent of one half share in the property in question has been admitted.

7. On 2.1.1985, Vimal Kanta filed a suit for partition in respect of this property against J.M.Kohli in 1985. Before filing of this suit, the J.M.Kohli had filed a petition for dissolution of marriage under Section 13(1) (ib) of HMA being HMA no.256/83. This filing of the HMA petition by the J.M.Kohli seems to be a precipitative factor which has resulted in filing of the suit for partition of the

property by Vimal Kanta.

8. J.M.Kohli appeared in the suit and contested the matter raising number of preliminary objections apart from contesting the matter on merits.
9. On preliminary objections, J.M.Kohli took the plea that the suit is liable to be stayed under Section 10 CPC as he had earlier filed a suit bearing no.157 of 1984 seeking declaration in his favour that he is the owner of the entire property and since the issue in previous suit and the present suit were the same, therefore, the present suit being the subsequent suit deserves to be stayed. Subsequently, the said suit bearing no.157/1984 was withdrawn.
10. The locus standi and the cause of action to maintain the suit for partition was also challenged by J.M.Kohli as the absolute owner. It was contended that the earlier decree Ex.P-1 was only a paper decree and was never acted upon and therefore, could not be the basis of claiming of partition. It was also objected that Vimal Kanta was not in possession of any portion of the property and therefore, the suit was not properly valued for the purpose of court fees and jurisdiction.

11. On merits, the claim of Vimal Kanta that she had invested money for the construction of the property from her stridhan or from her own source and thus contributed to the property, which may entitle her to the share in the property was also challenged by him.
12. J.M.Kohli filed the written statement and contested the pleas of Vimal Kanta in the original suit.
13. On the pleadings of the parties, the following issues were framed:-
 - “(i) Whether the plaintiff is entitled to decree of partition as prayed: OPP
 - (ii) Whether the plaintiff has no locus standi or cause of action to file the suit as defendant is absolute owner of the suit property? OPD
 - (iii) Whether the decree dated 13th August, 1969 was never acted upon/obtained by fraud and concealment of facts and as much is not binding upon the defendant? OPD
 - (iv) Whether the suit has been properly valued for court fee and jurisdiction?
 - (v) Relief.

Again on 17.2.1988, additional issues were framed, which are as follows: -

- (i) Whether the suit for partition filed by the

plaintiff does not lie for the reason stated in para 15 of the additional pleas of amended written statement?
OPD

(ii) Whether the suit of the plaintiff is not within time as alleged in para 16 of additional pleas of amended written statement of the defendant ?

15. This issue was amended vide order dated 17.3.1988 and was recast as follows:

“Whether the suit of the plaintiff is within time as alleged? OPP

If the issue no.III framed on 17.7.1986 is proved in negative, whether the defendant has become the owner of ½ share by adverse possession as alleged in additional plea no.17 of amended written statement of defendant? OPD

16. Both the parties have adduced their respective evidence before the trial court and after hearing arguments, the trial court decided all these issues in favour of Vimal Kanta and a preliminary decree was passed in favour of the Vimal Kanta to the extent that she has one half share in the suit property. The matter was adjourned for further proceedings. Since it was a suit for partition obviously,

after passing of the preliminary decree modalities had to be explored as to how to pass a final decree.

17. J.M.Kohli feeling aggrieved by passing of the preliminary decree assailed the same by filing an appeal which was heard by the learned ADJ. The learned ADJ dismissed the appeal of J.M.Kohli by a detailed order dated 23.10.2004 dealing with in extenso so far as all the objections were concerned.
18. It may be pertinent here to mention that the judgment of the appellate Court has dealt with the question of Order 2 Rule 2 CPC, the question of locus standi, the question of court fees, the pecuniary jurisdiction, the question of adverse possession and also the fact that Vimal Kanta was in joint possession and therefore, is entitled to maintain the suit. With regard to the suit being barred by Benami Transaction Act, 1988, it was observed that the matter stands already decided by the High Court on 6.3.91 in Civil Revision no.920/89.
19. Still feeling aggrieved, J.M.Kohli has filed the present Regular Second appeal which has been kept lingering for the last more than

seven years without formulation of a substantial question of law by the counsel.

20. It may be pertinent here to mention that in the appeal itself, the following questions are formulated as substantial questions of law in the appeal:

“(i) Whether the cause of action for claiming relief of possession was available to the respondent at the time of filing earlier suit for declaration by her in the year 1969?

(ii) Whether the earlier suit of respondent for declaration and subsequent suit for partition and possession are based on same cause of action?

(iii) Whether subsequent suit for partition is barred under Order 2 Rule 2 CPC due to omission to claim consequential relief in earlier suit for declaration?

(iv) Whether joinder of relief of possession with relief of declaration in respect of suit for recovery of immovable property is barred under Order 2 Rule 4 CPC?

(v) Whether the respondent was in joint possession of suit property with the appellant after her ouster from the suit property?

(vi) Whether the right of respondent is extinguished by prescription, on her failure to enforce her right within limitation period, on being denial of her title by appellant after her ouster from the suit property in 1970?

(vii) What is the basis of valuation of suit for partition when the plaintiff claims partition as well as its possession of his/her share in the property?

(viii) What is the effect of the decree passed by a court having no pecuniary jurisdiction to try the case?

(ix) Whether the respondent acquired right to half share of suit property by adverse possession?

(x) Whether a decree obtained by fraud or coercion is liable to be enforced or relied upon in subsequent proceedings' between the parties?

(xi) Whether an unstamped and unregistered document resulting in transfer of share in immovable property is admissible in evidence or is liable to be relied upon in subsequent proceedings between the parties?"

21. A perusal of all these questions would clearly show that these are essentially all questions of fact. Section 100 lays down that the power of the High Court is to entertain the second appeal only if a substantial question of law is involved in the appeal. The learned counsel for the appellant has failed to show that any substantial question of law is arising from the appeal. He is only interested in seeking adjournment. The over indulgence shown by the court in granting the repeated adjournments only adds up to the pendency

of the cases in Courts. This is the reason for which the present appeal has been pending for the last 7 years. No substantial question of law is involved in the present appeal. In case titled **Govindaraju Vs. Mariamman** AIR 2005 SC 1008, the Apex Court has very clearly laid down that from the analysis of Section 100, if an appeal is entertained without framing of a substantial question of law, then it would be illegal and would be tantamount to failure or of the duty cast on the Court. The existence of substantial question of law is a *sine qua non* for the exercise of jurisdiction under Section 100 CPC.

22. In the instant case, the substantial questions of law which are purportedly framed by the appellant in the appeal are essentially questions of fact and are not even questions of law; what to say substantial questions of law. As has been stated above, that these questions have been dealt with in the judgment of the trial court as well as the appellate Court itself in extenso and very clearly answered in favour of the respondent Vimal Kanta and against the appellant.

23. In the instant case, there is a concurrent finding of fact passing preliminary decree of one half share in the suit property in favour of Vimal Kanta.
24. I find that the present regular second appeal is not maintainable as no substantial question of law is involved. Hence, the same is dismissed.

V.K. SHALI, J

JANUARY 30, 2013
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