

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

Date of Decision: 24th May, 2013.

+ **CS(OS) 1397/2011**

KESHAV CHANDER THAKUR & ANR Plaintiffs

Through: Mr. Rakesh Tikku, Sr. Adv. with Mr.
Vivek Ojha & Mr. Manish Bishnoi,
Advs.

Versus

KRISHAN CHANDER & ORS Defendants

Through: Mr. Neeraj Kishan Kaul, Sr. Adv.
with Mr. Samar Kachwaha & Mr.
Mohan Bajaj, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

J U D G M E N T

%

IA No.22835/2012 (u/O 6 R-17 CPC) & IA No.13394/2011 (u/O 7 R-11 CPC)

1. The two plaintiffs have instituted this suit for partition of, (a) property No.B-11, Krishana Niwas, West End, New Delhi; (b) property No.245-A, Puran Nagar, Jammu & Kashmir; and, (c) other movable properties as detailed in Schedule-A to the plaint, pleading:

(i) that the property No.245-A, Puran Nagar, Jammu & Kashmir admeasuring approximately 5000 sq. yds. was purchased for the benefit of the family of Thakur Dina Nath comprising of his wife Smt. Krishna Thakur, four sons namely Major Sh. Puran Chander (whose son and widow respectively, are the two plaintiffs), the defendant No.1 Sh. Krishan Chander, defendant No.2 Sh. Yogesh Chander and defendant No.3 Sh. Suresh Chander and their three daughters i.e. defendant No.4 Smt. Santosh Dogra, defendant No.5

Smt. Kanta Singh and defendant No.6 Smt. Vimla Jamwal;

(ii) that property No.B-11, Krishana Niwas, West End, New Delhi admeasuring 800 sq. yds. was also constructed for the benefit of the family;

(iii) that Major Sh. Puran Chander i.e. the predecessor of the plaintiffs died on 23rd November, 1965 and the plaintiff No.1 was born to him posthumously on 16th July, 1966;

(iv) that Smt. Krishna Thakur died intestate in the year 1975 leaving her husband, her three sons and three daughters and the plaintiffs as the successors of her pre-deceased son as her heirs, with each being entitled to 1/8th share in her assets;

(v) that Thakur Dina Nath died intestate in the year 1994 leaving three sons, three daughters and the plaintiffs as heirs of his pre-deceased son as his only legal heirs, with each being entitled to 1/7th share in his assets;

(vi) that the plaintiffs thus claim 1/7th share in the properties aforesaid.

2. The defendant No.1 filed a written statement *inter alia* pleading:

(a) that the property No.245-A, Puran Nagar, Jammu & Kashmir was purchased by Thakur Dina Nath in the year 1947-48 and though originally comprised land of 3,630 sq. yds., an area of 1,210 sq. yds. was sold off before the year 1960 and a house was constructed on the remaining land of 2,420 sq. yds.;

(b) that the land admeasuring 800 sq. yds. underneath property

No.B-11, Krishana Niwas, West End, New Delhi was allotted to Smt. Krishna Thakur in the year 1961; she was since the year 1966 writing to the Delhi Development Authority (DDA) for transfer of her rights therein in the name of the defendant No.1 herein; that the DDA vide letter dated 31st August, 1970 conveyed approval for transfer of the said land in the name of the defendant No.1; that on 11th December, 1970, a perpetual Sub-lease Deed of the said land was executed in the name of the defendant No.1 and the defendant No.1 became the exclusive owner of the said land;

(c) that however after the demise of Smt. Krishna Thakur, the defendant No.3 Sh. Suresh Chander filed a suit for partition before the Principal District Judge, Jammu claiming rights over the properties of Thakur Dina Nath; the plaintiff No.1 though then minor, was also a defendant in the said suit;

(d) that a Local Commissioner was appointed in the aforesaid suit, who submitted a report dated 20th March, 1976 recommending the division of the Jammu property into three parts, with one share falling to defendant No.2 herein, one share to the defendant No.3 herein and one share to the plaintiff No.1 herein and the Delhi property falling to the share of defendant No.1 herein;

(e) the said report was accepted and a final decree for partition in terms thereof passed;

(f) that the properties having already been partitioned, this suit for partition of the same properties is misconceived.

3. The defendants No.2 to 6 have adopted the written statement of the

defendant No.1.

4. The defendant No.1 also filed the application aforesaid for rejection of the plaint on the same grounds.

5. The plaintiffs have thereafter filed this application for amendment of the plaint to incorporate therein, the reliefs of, (i) declaration of the decree dated 30th March, 1976 of the Principal District Judge, Jammu aforesaid as *void ab initio*, nonest and nullity; (ii) declaration of the Sub-lease Deed dated 11th December, 1970 executed by the DDA of the land underneath the Delhi property as *void ab initio* and nonest and for cancellation thereof, and the pleas in support thereof. The plaintiffs want to plead that the decree of the Jammu Court is without jurisdiction, without notice to the plaintiffs or participation of the plaintiffs, in non-compliance of Order XXXII of CPC, has never been acted upon, is fraudulent and suffers from non-application of mind. The plaintiffs further plead that the Sub-Lease of the land underneath the Delhi property has been obtained by the defendant No.1 in his name fraudulently and the plaintiffs were not aware thereof.

6. Though the senior counsel for the defendants on 19th March, 2013 contended that the application of the defendant No.1 under Order VII Rule 11 of CPC being prior in point of time ought to be considered first before consideration of the application of the plaintiffs for amendment of the plaint but it was held that the question of maintainability of the suit has to be considered only after the application for amendment of the plaint has been adjudicated. In this light, though on 30th April, 2013 arguments were commenced on the application of the plaintiffs under Order VI Rule 17 of CPC but finding that the opposition by the defendants thereto was *inter alia*

on the same grounds on which the rejection of the plaint was being sought, with the consent of the counsels, arguments were heard on both the applications and orders reserved.

7. The senior counsel for the plaintiffs has with reference to ***S.P. Chengalvaraya Naidu Vs. Jagannath*** AIR 1994 SC 853 and ***Kiran Singh Vs. Chaman Paswan*** AIR 1954 SC 340 contended that plea of nullity of a decree can be taken in collateral proceedings also. It is contended that in the proceedings in the Jammu Court, there is no service report and no appointment of guardian of the plaintiff No.1 who was admittedly a minor then. Relying on ***Ram Chandra Arya Vs. Man Singh*** AIR 1968 SC 954 and ***Gurpreet Singh Vs. Chatterbhuj Goel*** AIR 1992 P&H 95 it is contended that a decree in non-compliance of Order XXXII of CPC is a nullity. Reference is made to ***Ratnam Chettiar Vs. S.M. Kuppuswami Chettiar*** AIR 1976 SC 1 and ***Smt. Sukhrani Vs. Hari Shanker*** AIR 1979 SC 1436 to argue that a partition effected between members of HUF consisting of minors, if proved to be unjust and unfair and detrimental to the interest of minors, can be re-opened, whatsoever the length of time when partition took place

8. Per contra, the senior counsel for the defendants has argued that the plaintiffs cannot seek setting aside of a decree of a Jammu Court before this Court; that the defendants in their written statement, filed as far back as in August, 2011, had taken the plea of the decree of partition of the Jammu Court; that the plaintiffs filed a replication thereto in April, 2012 but filed this application for amendment only in December, 2012 and the amendment sought highly belated, is not to be allowed for this reason alone. It is further

argued that the relief of declaration qua a decree of the year 1976, in the application for amendment of the plaint filed in December, 2012 beyond the period of limitation and is not to be allowed. It is further informed that the plaintiff No.1 though a minor in 1976, became an adult in the year 1984 and the relief claimed in the application for amendment of the plaint filed in December, 2012 is after 28 years therefrom also. It is informed that the plaintiff No.1 is a lawyer by profession. It is yet further argued that the Delhi property was re-constructed into three separate units in the year 2007 and some part of which let out and the claim now is barred by time for this reason also. To show the knowledge of the plaintiff No.1 of the decree of the Jammu Court, attention is invited to the letter dated 1st March, 2007 of the plaintiffs to the Deputy Commissioner, Jammu with reference to assessment of his house on his portion of property No.245-A, Puran Nagar, Jammu & Kashmir and it is contended that the plaintiff No.1 has been renting out his part of the Jammu property and appropriating the rent thereof exclusively to himself. A copy of the Lease Deed executed by the plaintiff No.1 of his part of the Jammu property describing himself as the sole owner thereof has also been filed. It is contended that amendments ought not to be allowed as a vehicle of delay of proceedings and to keep alive a totally unsustainable claim in law. It is further argued that though a plea of a decree of a Court being a nullity/illegal can be raised in collateral proceedings but the relief of setting aside of the decree cannot be granted in the collateral proceedings. Attention in this regard is invited to ***Rafique Bibi Vs. Sayed Waliuddiin*** (2004) 1 SCC 287. It is argued that the plaintiff No.1 in the Jammu suit is described as a minor through his mother plaintiff No.2. To demonstrate knowledge of the plaintiff No.1 of the decree of the

Jammu Court, attention is invited to the attestation by the plaintiff No.1 as an Advocate of a document referring to the said decree. It is argued that the plaintiff No.1 is guilty of suppression and abuse of the process of the Court and after enjoying the fruits of the decree is intending to challenge the same.

9. The senior counsel for the plaintiffs in rejoinder has contended that the plaintiff No.1 as an Advocate was attesting documents the family wanted and merely because the plaintiff No.1 has attested the document, cannot impute the knowledge of the contents thereof.

10. The senior counsel for the defendants has also argued that besides the aforesaid aspects, the rejection of the plaint is also sought on the grounds of the plaintiffs having not paid the appropriate court fees on the reliefs claimed and the reliefs claimed/sought to be claimed being palpably barred by time.

11. The defendants having opposed the amendment sought, on the merits thereof, of the amended claim even being liable to rejection, I have considered the tenability in law of the amended claim of the plaintiffs.

12. The plaintiffs, it is not disputed, will not be entitled to seek the relief of partition of the properties already partitioned by the Jammu Court.

13. The plaintiffs are avoiding the decree of the Jammu Court, terming it as nullity. Nullity is argued on two grounds, i.e. on the ground of Jammu Court having no jurisdiction to grant partition of the Delhi property and the Jammu proceedings being in violation of Order XXXII of CPC.

14. Attention of the senior counsel for the plaintiffs was invited to Section 17 of CPC permitting a suit to obtain relief with respect to the

immovable property situated within the jurisdiction of different Courts to be instituted in any Court within local limits of whose jurisdiction any portion of the property is situated. The senior counsel for the plaintiffs however contends that the CPC as applicable to this Court is not applicable to the Courts in Jammu, which follow their own CPC and a copy of which was handed over. However, the same was also found to contain a *pari materia* provision in Section 17 thereof also. The senior counsel for the plaintiffs however contended that the said CPC extends to the State of Jammu & Kashmir only and the reference in Section 17 thereof to the Court within the local limits of whose jurisdiction any property may be situated is in reference to Courts within the State of Jammu & Kashmir only and cannot be with reference to Courts situated outside Jammu & Kashmir.

15. Though the counsels at the time of hearing did not argue but there is a reference in the pleading and the synopsis of submissions subsequently handed over to ***Dewan Izzat Rai Vs. Dewan Iqbal Nath Nanda*** AIR 1981 Delhi 263 and ***Chander Kishore Gulati Vs. Virender Kishore Gulati*** AIR 1996 J&K 14 laying down that the Courts in Jammu & Kashmir can certainly partition property situated outside that State as long as some part of the joint property is situated within the territorial limits of that State. The plaintiffs however claim the same to be no longer good law owing to SLP(C) No.22578/1994 having been preferred against the judgment in ***Chander Kishore Gulati*** (supra) and having been allowed vide order dated 27th April, 1995. However, a perusal thereof shows that the SLP was allowed with the consent of the parties and without adjudicating the said issue. It cannot be thus said that the said judgments have been set aside or

are no longer good law. I see no reason to not follow the said view. The objection thus of the plaintiffs to the decree of the Jammu Court being bad for this reason disappears.

16. As far as the plea of nullity of the Jammu decree owing to non-compliance of Order XXXII of CPC is concerned, though undoubtedly in ***Ram Chandra Arya*** supra, it was held that a decree passed against a minor without appointment of a guardian is a nullity and is void and not merely voidable but attention of the counsels was drawn to incorporation by the amendment of the year 1976 with effect from 1st February, 1977 of Rule 3A to Order XXXII of CPC providing that no decree passed against a minor shall be set aside merely on the ground that next friend or guardian for the suit had an interest in the subject matter of the suit adverse to that of the minor but the fact that by reason of such adverse interest of the next friend or guardian, prejudice has been caused to the interest of the minor, shall be a ground for setting aside of the decree. It was enquired, whether not the same is reflective of the Legislative intent being contrary to the dicta in ***Ram Chandra Arya*** and whether in the light of Rule 3A, ***Ram Chandra Arya*** can be said to be good law. Again, the senior counsel for the plaintiffs contended that without the corresponding amendment in the Jammu CPC also, the same would be of no avail. However, a similar incorporation of Rule 3A is found to have been carried out in the Jammu CPC also, though with effect from 15th August, 1983.

17. The decree of the Jammu Court is of a date prior to the amendments aforesaid. I have wondered whether for this reason, the change made by amendment by insertion of Rule 3A will not apply and this matter will

continue to be governed by law laid down in ***Ram Chandra Arya***.

18. I find a Full Bench of the Punjab & Haryana High Court in ***Amrik Singh Vs. Karnail Singh*** AIR 1974 Punjab & Haryana 315 to have held that it has to be seen whether the minor was effectively represented in the litigation, if he was, then non-compliance with the provisions of Order XXXII Rule 3 which is mandatory, would not render the decision void, however if the non-compliance has caused prejudice to the minor or the minor was not effectively represented, the decision would be void. To the same effect are the views of the Gujarat High Court in ***Sarjubhai Kantilal Patel Vs. Bikhubhai Maganbhai Patel*** MANU/GJ/0130/2001 and the subsequent judgment of the Punjab & Haryana High Court in ***Baldev Singh Vs. Sukhdev Singh*** MANU/PH/0524/2006.

19. I find from the report of the Law Commission preceding incorporation of Rule 3A supra that the entire gamut of case law and the reasoning given by the Courts was noticed and to settle the position, it was recommended that mere adverse interest should not be a ground for setting aside a decree and only the prejudice caused to the minor should be a ground.

20. The law contained in Order XXXII being a procedural one and the challenge to the decree of the Jammu Court being made now, much after the amendment to CPC by insertion of Rule 3A, I am of the view that the law now prevalent, of a decree in non-compliance of or XXXII being a nullity only on prejudice having been suffered by the minor being shown and not merely for the reason of non-compliance, will apply.

21. A perusal of the proceedings before the Jammu Court shows that the

plaint was presented on 21st April, 1975, the written statement by all the defendants i.e. Thakur Dina Nath, defendants No.1 and 2 herein and by the plaintiff No.1 represented by his guardian i.e. plaintiff No.2, was filed within two days, on 23rd April, 1975 admitting the properties of which the partition was claimed to be joint properties and giving no objection to the partition. It is significant that by that time the Lease Deed of the land underneath the Delhi property already stood executed in favour of the defendant No.1 herein but the defendant No.1 herein did not take the plea of the said property being his individual property and agreed to the same also being put in the common pool.

22. Another thing which is significant is that the certified copy of the Jammu proceedings further shows that Thakur Dina Nath did not claim any share in the property and agreed to his share also being partitioned between the defendants No.1 to 3 and the plaintiff no.1 herein.

23. It is yet further significant to note that it is the case of the plaintiffs themselves in the plaint in this suit that Thakur Dina Nath being the grandfather of the plaintiff No.1 was very protective towards the plaintiffs and has brought up the plaintiff No.1 as his own son. The presence of Thakur Dina Nath as a defendant in the Jammu suit shows that the proceedings therein were with his knowledge and consent. It is inconceivable that Thakur Dina Nath against whom the plaintiffs in the plaint have not levelled any allegations and rather who is pleaded to have acted in the interest of the plaintiffs, would have allowed the Jammu decree to be passed, had it not been equitable and in the interest of the plaintiff No.1. We cannot lose sight of the fact that we are today looking at fairness

of distribution of shares done in the year 1976 after nearly 35 years; in these 35 years, the way immovable properties are viewed has changed from “only fools build houses and wisemen stay in them” to “wisemen not only build and live in their own house, but also invest their savings in houses”. Merely because in today’s date and time, the Delhi property is situated in one of the prime residential localities of the national capital city, fetching very high value, is no reason to hold the partition of the year 1976 which is more in the nature of a Family Settlement with the seal of the Court to be an inequitable one.

24. Rather, that is another reason why I feel that the status which has prevailed for the last 35 years in the family ought not to be permitted to be disturbed. The settled principle with respect to the Family Settlements is that the technicalities are not allowed to come in the way thereof. The pleas being taken here by the plaintiffs, objecting to the decree of the Jammu Court, are technical in nature. The plaintiffs otherwise have not been able to dispute that they have been dealing with their portion of the Jammu property exclusively as absolute owners thereof, without any interference from other family members and similarly the other family members have been so dealing with the portions of the property which fell to their shares in the said Family Settlement. As aforesaid, it is only the plaintiffs who are challenging the Family Settlement, while all the other family members are supporting the same.

25. It cannot be lost sight of that the decree of the Jammu Court is over 35 years old. It appears that the entire record of that suit is also not available. Merely because the documents showing proof of service of

summons of the suit or appearance of the parties are not available, is no ground for this Court to hold any irregularity in that suit. The presumption is of the validity of the Court proceedings.

26. I am therefore of the opinion that the case set up by the plaintiffs even by way of amendment to the plaint is far fetched and untenable and unsustainable in law and no purpose would be served in putting the said claim to trial and rather it would be in disservice of the Family Settlement of the year 1976. The reliance placed by the senior counsel for the defendants in this regard on *Liverpool & London S.P. & I Association Ltd. Vs. M.V. Sea Success I* (2004) 9 SCC 512 & *ITC Limited Vs. Debts Recovery Appellate Tribunal* (1998) 2 SCC 70 laying down that the Courts should not unnecessarily protract the hearing of a suit and the whole purpose of conferment of powers under Order 7 Rule 11 CPC is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the Court and clever drafting creating illusions of cause of action should not be permitted to blur the vision of the Court, is apposite.

27. Accordingly, I.A. No.13394/2011 for rejection of the plaint is allowed. I refrain from imposing any costs on the plaintiffs in the hope that the plaintiffs will foster harmony rather than acrimony in the family.

RAJIV SAHAI ENDLAW, J

MAY 24, 2013

‘bs’..