

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

Date of decision: 1st July, 2013.

+ **CS(OS) 1294/2008**

SMT. HARBANS KAUR **Plaintiff**

Through: Mr. Harish Malhotra, Sr. Advocate
with Mr. P. Banerjee and Ms. Princy
Ponnan, Advocates.

Versus

BHAI BALBIR SINGH & ORS **Defendants**

Through: Mr. Animesh Rastogi, Advocate for
D-1 & 25.
Mr. Udit Gupta, Advocate for D-8, 9,
17, 18 & 26.
Mr. Manish Kumar and Mr. Amit
Kumar, Advocates for D-14.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

J U D G M E N T

% **01.07.2013**

1. The plaintiff has instituted the present suit pleading:

- (i) that the plaintiff is the daughter of Bhai Sunder Dass who died on 27th October, 1963;
- (ii) that Bhai Sunder Dass besides his wife Smt. Somawanti, had five sons and one daughter namely the plaintiff;
- (iii) that Bhai Sunder Dass left his last Will dated 11th January, 1962 bequeathing all his properties in favour of his wife Smt. Somawanti;

- (iv) that at the time of institution of the suit, the plaintiff and the defendants No.1 to 24 were heirs/heirs of heirs of Bhai Sunder Dass; Bhai Sunder Dass & Sardar Singh Pvt. Ltd. and Bhai Sunder Dass & Sons Co. Pvt. Ltd. being businesses commenced by Bhai Sunder Dass were impleaded as defendants No.25 & 26;
- (v) that after the death of Smt. Somawanti in the year 1993, several Wills purportedly executed by her came to the fore but none of them has been probated by any Court and thus Smt. Somawanti is deemed to have died intestate and her estate was inherited by her Class-I heirs;
- (vi) that the plaintiff has 1/6th share in the estate of Bhai Sunder Dass and late Smt. Somawanti;
- (vii) that the plaintiff in September, 2007 received summons of CS(OS) No.1698/2007 filed by some of the heirs of heirs of Bhai Sunder Dass for partition, injunction and rendition of accounts and in which the plaintiff was arrayed as a defendant;
- (viii) that in the plaint in the aforesaid suit reference was made to an Award dated 3rd May, 2005 of Justice (retired) P.K. Bahri in an arbitration proceeding for division between the heirs of Bhai Sunder Dass and it was also pleaded in the said plaint that the estate of Bhai Sunder Dass includes property No.9, Amrita Shergill Marg, New Delhi in which the plaintiff had relinquished her share;
- (ix) that the plaintiff prior to the receipt of the summons in the aforesaid suit was unaware of any arbitration proceeding or any award therein;

(x) that the plaintiff has also not relinquished her share in any part of the estate of Bhai Sunder Dass or Smt. Somawanti;

(xi) that the arbitral award to the extent it decides or impinges on the rights and interests of the plaintiff in the estate of Bhai Sunder Dass and late Smt. Somawanti is void *ab initio* and a nullity having been passed in the absence of the plaintiff.

2. The plaintiff has thus instituted the present suit, (a) for declaration that the Award dated 3rd May, 2005 of Justice (retired) P.K. Bahri is a nullity, void *ab-initio*, ineffective and contrary to law; (b) for declaration that the plaintiff has 1/6th share in the estate of late Bhai Sunder Dass and late Smt. Somawanti as detailed in Schedule-B to the plaint; and, (c) for perpetual injunction restraining the defendants from selling, and/or alienating and/or creating any third party right, title or interest in the assets as mentioned in the Schedule-B to the plaint.

3. Summons of the suit and notice of the application for interim relief were issued on 15th July, 2008, though no interim relief granted.

4. The defendant No.1 Bhai Balbir Singh and the defendant No.25 Bhai Sunder Dass & Sardar Singh Pvt. Ltd. filed I.A. No.15663/2009 for rejection of the plaint on the ground of the suit having been filed 17 years after the death of Smt. Somawanti. The said application was dismissed vide order dated 17th August, 2010 on the ground that at the stage of Order VII Rule 11 of Civil Procedure Code (CPC), 1908 only the plaint had to be looked into and as per which the cause of action had accrued to the plaintiff in September, 2007 upon receipt of summons of CS(OS) No.1698/2007 and this suit had been filed on 30th May, 2008. However the question of

limitation was kept open.

5. The plaintiff on 17th August, 2010 also withdrew her application for interim relief.

6. The order dated 4th October, 2010 in this suit notes that FAO(OS) No.83/2007 was pending before the Division Bench with respect to the Award dated 3rd May, 2005 qua which declaration was sought in the present suit; this Court on the same day made a *prima facie* observation that for the said reason, the proceedings in this suit could not continue. The matter was adjourned on 7th February, 2011 also for the said reason, keeping the question of maintainability of this suit open for consideration. Thereafter, also the matter was adjourned for the reason of pendency of FAO(OS) No.83/2007. The plaintiff filed I.A. No.15837/2010 for clarification that the order dated 4th October, 2010 does not amount to stay of proceedings in the present suit. The defendants No.1 & 25 opposed the said application contending that the proceedings in the present suit should be adjourned awaiting the outcome of the appeal. However, vide order dated 11th January, 2013, finding that certain parties to the arbitral award had filed application under Section 34 of the Arbitration and Conciliation Act, 1996 and FAO(OS) No.83/2007 was preferred against the order therein and further finding that the plaintiff was neither a party to the arbitration proceedings nor a party to the said appeal, it was held that the outcome of the appeal will have no bearing on the present suit and as such the proceedings in the suit cannot be adjourned awaiting the outcome of the appeal. Further finding that the suit was otherwise ripe for framing of issues, pleadings were gone into for the said purpose. On going through the

pleadings on 11th January, 2013, it was *prima facie* felt, (a) that the suit for declaration qua arbitral award to which the plaintiff did not claim to be a party was not maintainable; (b) that the plaintiff, if desires to assert her rights in the estate has to sue for appropriate relief of partition claiming her share in the estate and if in such a suit the defendants or any of them set up the defense of the arbitral award, to plead that the same does not bind the plaintiff; and, (c) that a co-owner without seeking partition cannot injunct the other co-owner from dealing with the property and declaration of share could not be granted without seeking the consequential relief of partition. Time was granted to the counsels to address on the said aspects. The counsels have been heard.

7. Before proceeding to adjudicate on the aforesaid doubts as to the maintainability of the suit raised and recorded in the order dated 11th January, 2013, it may also be recorded that on that date i.e. 11th January, 2013 none except the counsel for the defendants No.1 & 25 and the counsel for the defendant No.14 had appeared and after noticing that some of the other defendants had filed their written statements and that the defendants No.2, 4, 5, 7, 10 to 13, 15, 16, 19 and 22 to 24 had already been proceeded against *ex-parte* vide order dated 4th December, 2009, the other non-appearing defendants were also proceeded against *ex-parte*. During the subsequent hearing however the counsel for the defendants No.8, 9, 17, 18 & 26 also appeared.

8. The defendants No.1 & 25 have contested the suit pleading:

- (i) that the suit is barred by limitation and is not maintainable as the plaintiff does not have any interest in the properties mentioned in

Schedule-B, having relinquished her rights therein through a Relinquishment Deed;

(ii) that the plaintiff was not a necessary party to the arbitration proceedings;

(iii) that the plaintiff has suppressed having obtained Relinquishment Deed from other heirs in her favour with respect to the ground floor of property No.1/16-A, Asaf Ali Road, New Delhi;

(iv) that property No.9A, Amrita Shergill Marg, New Delhi during the lifetime of Bhai Sunder Dass itself vested in the defendant No.1 and Smt. Somawanti at the time of her death did not have any share therein;

(iv) that the arbitration award does not in any manner prejudice the rights of the plaintiff;

(v) that Smt. Somawanti did not have any share in Bhai Sunder Dass & Sardar Singh Pvt. Ltd or in Bhai Sunder Dass & Sons Co. Pvt. Ltd.;

(vi) that the plaintiff even if has any right ought to assert the same in CS(OS) No.1698/2007.

9. The defendants No.8,9, 17, 18 & 26 have also filed a written statement pleading:

(a) that the suit is barred by limitation;

(b) that the claim of the plaintiff in the properties mentioned in Schedule-B to the plaint stands extinguished by the law of adverse possession;

(c) that the suit is barred under Section 34 of the Specific Relief Act, 1963; the plaintiff while claiming relief of declaration of her 1/6th share in the estate of Smt. Somawanti has not sought the consequential relief of possession of the properties in which the share is claimed;

(d) that Bhai Sunder Dass in his lifetime had given a house at Pusa Road and a house at Defence Colony to the plaintiff; that the other legal heirs of Smt. Somawanti also in the year 1993-1995 executed a Relinquishment Deed in another property namely ground floor of 1/16-A, Asaf Ali Road, New Delhi owned by Smt. Somawanti in favour of the plaintiff; that the present suit filed in the year 2008 is the outcome of greed;

(e) that the plaintiff can assert her claim in CS(OS) No.1698/2007;

(f) that the plaintiff knew of the arbitration proceedings prior to the receipt of the summons in the said suit also.

10. The defendant No.14 in his written statement has pleaded:

(I) that the plaintiff has falsely pleaded that the Will of Bhai Sunder Dass bequeathed his entire estate to his wife Smt. Somawanti;

(II) that Smt. Somawanti executed a Will dated 3rd January, 1981;

(III) that subsequently another Will dated 15th November, 1990 of Smt. Somawanti was propounded and Probate Petition No.36/1996 filed with respect thereto and to which the plaintiff filed replies/objections and pleaded the existence of another Will dated 15th May, 1967 of Smt. Somawanti;

(IV) that the plaintiff filed Probate Petition No.55/1994 through her husband with respect to the Will dated 15th May, 1967 of Smt. Somawanti and which probate petition was dismissed for non-prosecution;

(V) that Probate Petition No.36/1996 was also dismissed on 16th May, 2008 as abated;

(VI) that the defendant No.14 has filed another petition being Test. Cas. No.108/2008 with respect to the Will dated 3rd January, 1981 of Smt. Somawanti and which is still pending consideration.

11. The senior counsel for the plaintiff has contended that the plaintiff cannot be compelled to seek partition and is entitled to only seek a declaration of her share and to which she is entitled under Section 34 of the Specific Relief Act, 1963; that as far as the arbitration award is concerned, no trial is needed for the present suit inasmuch as it is not the case of any of the defendants that the plaintiff was a party thereto and thus the same cannot be binding on the plaintiff and the declaration to the said effect can be given; that the plaintiff is desirous to maintain the joint character of the estate; that the main part of Section 34 of Specific Relief Act permits a suit for declaration simpliciter without asking for further relief; that the proviso thereto prohibiting such declaration on omission to sue for further relief has to be construed strictly so as to not negate the main section; it may be that the subsequent suit may become barred under Order II Rule 2 of CPC but the first suit for declaration simpliciter cannot be said to be not maintainable; alternatively, it is argued that the plaintiff has claimed the consequential relief of permanent injunction and thus the bar of the proviso

to Section 34 is not attracted; that the cause of action for the plaintiff to seek the relief of declaration qua the award is the recital in the said award of the plaintiff having relinquished her share in property No.9A, Amrita Shergill Marg, New Delhi which casts a cloud on the share of the plaintiff in the said property; that the cause of action for the relief of partition has not even accrued to the plaintiff because the plaintiff has till now never demanded partition and the question of the same being denied by the defendants does not arise; that in the written statement of none of the defendants, maintainability of the suit on the grounds as recorded in the order dated 11th January, 2013 has been contested; that according to the plaintiff, she has not even been ousted from possession and thus the cause of action for seeking the relief of possession also has not accrued. The senior counsel for the plaintiff has relied on:

(A) ***Chennai Container Terminal Pvt. Ltd. etc. Vs. Union of India*** AIR 2007 Madras 325 (DB) & ***Indusind Bank Ltd. Vs. Ram Laxman Hotels Ltd.*** 162 (2009) DLT 332, on the proposition that an application under Section 34 of the Arbitration Act can be preferred only by a party to arbitration proceedings;

(B) ***Nanak Chand Vs. Chander Kishore*** AIR 1982 Delhi 520 on the proposition that there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement by the defendant against whom the suit is instituted—every threat to such right, however ineffective or innocuous, cannot be considered to be a clear and unequivocal threat so as to compel filing of a suit;

(C) ***Union of India Vs. Ibrahim Uddin*** (2012) 8 SCC 148 to

contend that the bar of Section 34 is attracted only when there is an ouster and not otherwise.

12. The counsel for the defendant No.14 has contended that the present is essentially a suit for partition; that the plaintiff being not a party to the award cannot claim declaration qua the award—reliance in this regard is placed on *Vasumati Agencies Pvt. Ltd. Vs. Harish Chander Dewan* (2002) I AD (Delhi) 433 (DB); that a partition suit instituted by one of the legal heirs as far back as in the year 1984 and also mentioned in the award is still pending in the Court and lastly that during the pendency of the probate petition, no declaration of shares in the property can be given.

13. Though the counsel for the defendants No.1 & 25 did not address any arguments but has subsequently filed written submissions contending the suit to be barred by Section 34 of the Specific Relief Act and limitation and also on the merits of the case.

14. As aforesaid, the application of the defendants No.1 & 25 for rejection of the plaint on the ground of the same being barred by limitation has already been dismissed vide order dated 17th August, 2010. The said order has attained finality and thus the question of the bar of limitation cannot be considered at this stage and this order is confined to the maintainability of the suit only on the grounds recorded in the order dated 11th January, 2013.

15. The plaintiff in her replication to the written statement of the defendant No.14 has admitted to the pendency of Test. Cas. No.108/2008 pertaining to the Will dated 3rd January, 1981 of Smt. Somawanti and has pleaded having filed objections thereto. Similarly, the plaintiff in the plaint

itself has admitted to the pendency of CS(OS) No.1698/2007 for partition of the estate, for declaration of share wherein the present suit has been filed. Even if it were to be assumed that some of the properties qua which the plaintiff is seeking declaration are not included in CS(OS) No.1698/2007, it is always open to the plaintiff who is a party thereto to have the same also included in the suit, the status of all the parties in a suit for partition being both of a plaintiff as well as defendant.

16. I fail to see as to how this Court can in this suit grant a declaration of the plaintiff being entitled to a 1/6th share in the estate of her parents, when a suit for partition of the said estate as well as a proceeding seeking probate of a Will of the mother are pending consideration since prior to the institution of the present suit. Even if it were to be held that a co-owner cannot be compelled to seek the relief of partition, the fact remains that another co-owner having sought the relief of partition, the said plea is no longer available and the remedy if any of the plaintiff to declaration of her share in the estate of her parents is in the said suit for partition only in which also the preliminary decree is to be of declaration of the shares of the respective parties. The relief claimed in the present suit of declaration of the share of the plaintiff and of perpetual injunction restraining the defendants from dealing with the estate are thus clearly misconceived. The right if any of the plaintiff to injunct the others during the pendency of the partition suit is also in the partition suit only and cannot be by way of an independent suit.

17. As far as the relief claimed by the plaintiff of declaration qua the award is concerned, again, if the said award is set up by any of the parties in the partition suit to deny the share claimed by the plaintiff in the partition

suit, the effect thereof has to be adjudicated in the partition suit only and cannot be by way of a declaration in the present suit.

18. Whichsoever way the matter is thus looked at, I am unable to satisfy myself as to the maintainability of the present suit which is clearly a case of misadventure and in which notice ought not to have been issued.

19. The suit is accordingly dismissed as not maintainable with costs on the plaintiff of Rs.25,000/- payable to the Delhi High Court Bar Association Lawyers' Social Security & Welfare Fund, New Delhi. It is however clarified that the dismissal of this suit would not come in the way of the plaintiff asserting her rights/claims in the estate qua which the present suit was filed, in the suit for partition or the probate proceedings.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

JULY 1, 2013

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