

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

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Date of decision: 4th February, 2013

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CS(OS) No.1893/2010, CCP 86/2011 & CCP 4/2012

SHRI JAGDISH CHANDER TALWAR & ANR Plaintiffs

Through: Mr. Jayant Bhushan, Sr. Adv. with
Mr. Sabhyasachi Patra & Dr. P.K.
Agrwal, Advs.

versus

SH. UDAY SARIN & ORS.

..... Defendants

Through: Mr. Vishal Kumar & Mr. Bakash
Gautam, Advs. for D-1 to 3.
Mr. R.V. Sinha & Mr. A.S. Singh,
Advs. for L&DO.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

IA No.18813/2012 (of the plaintiffs under Order 12 Rule 6 of the CPC).

1. The plaintiffs in this suit, (i) for recovery of possession of property No.6, Kautilya Marg, Chanakyapuri, New Delhi – 110 021; (ii) for permanent injunction; and, (iii) for *mesne* profits, seek judgment qua the relief of possession on admission. The senior counsel for the plaintiffs and the counsel for the defendants have been heard.

2. The case of the plaintiffs is:-

- (a). that Smt. Bhagwati Talwar, mother of the plaintiffs, was the owner of the said property;
- (b). the said Smt. Bhagwati Talwar died on 29th November, 2006 leaving last Will and testament dated 3rd January, 1995, whereunder she bequeathed the said property to her two sons, the plaintiffs herein and to her daughter Smt. Neena Sarin in equal proportion, subject however to the condition that in the event of Smt. Neena Sarin predeceasing her, the property shall go to the plaintiffs in equal shares;
- (c). Smt. Neena Sarin predeceased her mother Smt. Bhagwati Talwar and died on 16th May, 2003;
- (d). probate of the aforesaid Will of Smt. Bhagwati Talwar has been granted by the High Court of Calcutta vide order dated 10th January, 2008;
- (e). Smt. Bhagwati Talwar in her lifetime had allowed her daughter Smt. Neena Sarin to use and occupy the said property and the three defendants being the husband and daughters of the said Smt. Neena Sarin continue to occupy the said property;

The plaintiffs as owners of the property, have sued for recovery of possession thereof and for injunction restraining the defendants from parting with possession of the property and for *mesne* profits.

3. The defendants have contested the suit by filing a written statement pleading:-

- (i). that the defendants no.2&3 being the daughters of Smt. Neena Sarin, predeceased daughter of Smt. Bhagwati Talwar, have applied to the Calcutta High Court for revocation of the probate granted of the Will dated 3rd January, 1995 aforesaid of Smt. Bhagwati Talwar and which proceedings are pending and the plaintiffs who claim title to the property under the said Will of Smt. Bhagwati Talwar, cannot during the pendency of such revocation proceedings recover possession of the property;
- (ii). that Smt. Bhagwati Talwar was residing at Calcutta and Smt. Neena Sarin and her husband, defendant no.1 herein, were managing the said property at Delhi on behalf of Smt. Bhagwati Talwar and the said property was being let out from time to time to different tenants;
- (iii). that in or around the year 1977 Smt. Neena Sarin along with the defendants shifted into the said property at the asking of Smt. Bhagwati Talwar;
- (iv). Smt. Bhagwati Talwar always told everybody that the said property belonged to her daughter Smt. Neena Sarin, though the property continued to be recorded in the name of Smt. Bhagwati Talwar;

- (v). Smt. Bhagwati Talwar also executed a Power of Attorney dated 15th March, 1986 in favour of the defendant no.1 to facilitate the management of affairs of the said property and the defendant no.1 only was paying the House Tax and other dues of the said property and also having the same renovated and re-furnished as his own property;
- (vi). though Smt. Bhagwati Talwar wanted to gift the said property to Smt. Neena Sarin but since no one ever doubted the intention of the plaintiffs in interfering with the said decision of Smt. Bhagwati Talwar, need was not felt to execute the Gift Deed;
- (vii). the defendant no.1 only carried out litigation for getting the ground floor of the said property vacated from the tenant and the defendant no.1 was taking independent decisions with respect to the said property; however since the property was in the name of Smt. Bhagwati Talwar, a Power of Attorney in favour of the defendant no.1 was filed in the said eviction proceedings; that upon the vacation of the ground floor by the tenant in the year 1984, the defendants and Smt. Neena Sarin occupied the entire property;
- (viii). Even after the demise of Smt. Neena Sarin, Smt. Bhagwati Talwar maintained that the said property belonged to her granddaughters defendants no.2&3;

- (ix). that the defendants no.2&3 are residing in the property as owners and have uninterrupted possession of the same without any hindrance whatsoever;
- (x). that the plaintiffs took no objection from the defendants no.2&3 to the grant of probate of the Will without showing the Will or without disclosing that the same was with respect to the said property also and by representing that the Will was only with respect to bank accounts and lockers; however upon coming to know that after obtaining the probate, the plaintiffs were seeking title to the property, application for revocation of the probate was filed in the Calcutta High Court;
- (xi). that the Will is forged and fabricated;
- (xii). that the suit is not appropriately valued for the purposes of Court Fees and jurisdiction and is undervalued.

4. On the application of the plaintiffs for interim relief, vide *ex parte* order dated 15th September, 2010, the defendants were restrained from creating any kind of interest including third party interest in the property. The said order was made absolute on 17th February, 2011 and it was further directed that the defendants will also maintain *status quo* qua construction. During the hearing on 21st September, 2011 it was agreed between the parties that subject to final decision of this suit, the possession of ground floor of the property will be handed over by the defendants to the plaintiffs and liberty was granted to the plaintiffs to either occupy the same or to let

out the same to a suitable tenant. However thereafter an application was filed by the defendants for recall of the said order but which was dismissed. FAO(OS) No.494-495/2011 preferred thereagainst was also dismissed on 14th October, 2011. SLP (C) No.29733-35/2011 preferred thereagainst was also dismissed on 20th October, 2011.

5. The senior counsel for the plaintiffs informs that the application filed by the defendants no.2&3 before the Calcutta High Court for revocation of the probate has been dismissed on 10th September, 2012 and though the defendants no.2&3 have filed an appeal to the Division Bench of the Calcutta High Court but there is no interim order therein.

6. The counsel for the defendants has argued that the basis of the claim of the plaintiffs in the present suit is the Will aforesaid of Smt. Bhagwati Talwar and the dispute with respect where to is pending before the Calcutta High Court; that the application for interim relief filed along with the appeal preferred to the Division Bench of the Calcutta High Court could not be taken up for consideration till now owing to certified copy being not available till now and which has now been received and the application for interim relief shall be urged. He seeks adjournment of the present proceedings till the decision of the appeal and/or at least for a period of six weeks to enable the appeal preferred by the defendants no.2&3 against the dismissal of their application for revocation of probate of the Will being considered. Upon being asked to make submissions on the merits of the application, the counsel urges that the plaintiffs are not entitled to the decree on admissions as the Will on the basis where of they claim, is forged; the

defendants have been in possession of the property since the year 1977 and they have already acquired rights by way of adverse possession.

7. I have considered the rival submissions. The title of Smt. Bhagwati Talwar of the property is not under dispute. As far as the challenge to the Will of Smt. Bhagwati Talwar is concerned, the order granting probate of a Will is an order in *rem* and once probate has been granted, the Will of which probate is granted is to be accepted in all proceedings as a validly executed last Will of the deceased and the genuineness and validity of the Will is not to be gone into in every proceeding where claim to any property bequeathed under the Will is made. Thus the argument of the counsel for the defendants of the Will being forged, has no weight.

8. As far as the plea of the defendants, of Smt. Bhagwati Talwar having always wanted to gift the said property to Smt. Neena Sarin and/or to the defendants no.2&3 is concerned, admittedly no Gift Deed or any other document of transfer of any rights in the said property by Smt. Bhagwati Talwar to Smt. Neena Sarin or to the defendants no.2&3 is in existence. Rights in immovable property can be created only by a registered instrument and not by intention. The said pleas of the defendants in the written statement are thus not material on which an issue is required to be framed or on which the parties should be put to trial.

9. As far as the plea of the defendants of being in long possession of the property since the year 1977 is concerned, mere long possession also does not create any rights in immovable property. Reference in this regard can be made to ***Roop Singh Vs. Ram Singh*** (2000) 3 SCC 708. The plea of

adverse possession, the Supreme Court in ***Mohan Lal Vs. Mirza Abdul Gaffar*** (1996) 1 SCC 639 and ***Karnataka Board of Wakf Vs. Government of India*** (2004) 10 SCC 779 and ***Annasaheb Bapusaheb Patil Vs. Balwant @ Balasaheb Babusaheb Patil*** (1995) 2 SCC 543 and ***L.N. Aswathama Vs. P. Prakash*** (2009) 13 SCC 229 has held, cannot be taken simultaneously with the plea of a lawful title to the premises, as the defendants are attempting to do. It is the case of the defendants themselves that the defendant no.1 was dealing with the property under the Power of Attorney of Smt. Bhagwati Talwar. Defendants cannot on the one hand deal with the property as attorneys of Smt. Bhagwati Talwar and on the other hand claim adversely to Smt. Bhagwati Talwar. Even today during the hearing the counsel for the defendants inspite of prodding is unable to tell as to on which date the possession of the defendants of the property became adverse to that of Smt. Bhagwati Talwar or as to before which authority/person the defendants or any of them have proclaimed themselves as owners of the property. Thus, these pleas of adverse possession are also not such which are required to be put to trial. The senior counsel for the plaintiffs in this regard has rightly drawn attention to ***Charanjit Lal Mehra Vs. Kamal Saroj Mahajan*** (2005) 11 SCC 279 laying down that an admission under Order 12 Rule 6 of the CPC can be inferred from the facts and circumstances of the case and that Order 12 Rule 6 is enacted in order to expedite trial and where the Courts find that the suit can be disposed of on such admissions, the Courts should not hesitate from doing so. Mention may also be made to ***Hemaji Waghaji Jat Vs. Bhikhabhai Khengarbhai Harijan*** AIR 2009 SC 103 and ***State of Haryana Vs. Mukesh Kumar*** (2011) 10 SCC 404 holding

that the law of adverse possession which ousts an owner on the basis of inaction within limitation, is irrational, illegal and wholly disproportionate.

10. That brings me to the question, whether this Court ought to adjourn this matter awaiting the disposal of the appeal preferred by the defendants no.2&3 to the Division Bench of Calcutta High Court against the dismissal of their application for revocation of the probate of the Will whereunder the plaintiffs claim.

11. I am of the opinion that the Courts cannot defer hearings in this manner. The application of the defendants no.2&3 for revocation of the probate was dismissed nearly four months ago and the defendants have had sufficient time to obtain an interim order, if were to be so entitled. The question, whether pending the consideration of the appeal the plaintiffs are to be restrained from acting under the Will, is a question which is the subject matter of the appeal only and it is not in the domain of this Court to, when there is no interim order in the appeal, to stay its hands. The senior counsel for the plaintiffs has in this regard rightly drawn attention to order 41 Rule 5 and *Collector of Customs, Bombay Vs. Krishna Sales (P) Ltd.* 1994 Supp (3) SCC 73 laying down that mere filing of appeal does not amount to stay or suspension of the order. As far as this Court is concerned, a meaningful reading of the written statement of the defendants does not disclose any material question to be arising for consideration in the suit and the plaintiffs are found entitled to a judgment under Order 15 of the CPC, as well as on admissions.

12. Though no such plea has been taken by the defendants in their written

statement but I have also gone through the Will of which probate has been granted to satisfy whether the plaintiffs thereunder are the exclusive owners of the property, to be entitled to possession thereof from the defendants. Clauses 4&5 of the said Will are as under:-

“I bequeath my right title and interest in the Delhi Property to my two sons Jagdish Chander and Sudesh Chander and my daughter Neena Sarin absolutely in equal proportion. In the event of Neena Sarin predeceasing me, the Delhi Property shall go to Jagdish Chander and Sudesh Chander absolutely in equal proportion. In the event of any of my sons predeceasing me their share shall go to their children in equal proportion.

5. I bequeath the rest of my assets available after payment of all taxes and liabilities, if any, as follows:-

- i) to DEVINDER NARANG AND NAVINA PUNJ children of my predeceased daughter Kuku Narang – 1/4th share equally;*
- ii) to JAGDISH CHANDER – 1/4th share and in the event of his predeceasing me, to his children in equal proportion;*
- iii) to SUDESH CHANDER – 1/4th share and in the event of his predeceasing me, to his children in equal proportion;*
- iv) to NEENA SARIN – 1/4th share and in the event of her predeceasing me, to her children in equal proportion.*

13. The deceased testatrix is found to have made a distinction between the property aforesaid and her other assets; while a share in the property is bequeathed to Smt. Neena Sarin only if she survives the testatrix, share in other assets, in the event of Smt. Neena Sarin predeceasing the testatrix, has been bequeathed to her children also. I am unable to find anything in the Indian Succession Act, 1925 requiring the Will to be read in any other manner than the literal construction thereof. Section 109 of the said Act though provides that a bequest to a lineal descendant of the testator shall not

lapse by the death of the legatee and shall take effect as if the death of the legatee had happened immediately after the death of the testator but is subject to a contrary intention in the Will. The Will in the present case clearly provides to the contrary.

14. The senior counsel for the plaintiffs on instructions states that owing to the close relationship of the parties and in the hope that the defendants shall abide by the decree, the plaintiffs do not press the relief claimed of *mesne* profits. He for the same reasons states that the plaintiffs also do not press two contempt petitions averring non-compliance by the defendants of the directions issued from time to time and if the defendants still do not themselves vacate, the plaintiffs will execute the decree for possession of the entire property including the portions which the defendants were directed vide interim order to vacate and have not vacated.

15. The application is accordingly allowed and the suit of the plaintiffs, in so far as for the recovery of the possession, is decreed against the defendants. Decree for injunctions in terms of the interim orders in suit is also passed in favour of the plaintiffs and against the defendants and which injunction order shall continue till the possession of the property is delivered by the defendants to the plaintiffs. The suit, in so far as for the relief of *mesne profits*, is dismissed as withdrawn with liberty however to the plaintiffs to apply for an inquiry into the *mesne* profits from the date of the decree till the date of delivery of possession if the defendants delay the delivery of possession.

16. Decree sheet be drawn up.

17. The CCPs are dismissed as not pressed.

No costs.

RAJIV SAHAI ENDLAW, J

FEBRUARY 4, 2013

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