

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

+ RSA No. 171/2010
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19th May, 2014

MST. AMNA BI & ORS. Appellants
Through: Mr. Shariq Mohammad, Adv.

VERSUS

AZIZ –UR- REHMAN DECD. THR. LRS. Respondents
Through: Mr. Jabbar Hussain, Adv.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No.20025/2013 (for restoration)

There is no opposition to this application and which is therefore allowed. The appeal is restored to its original number.

RSA 171/2010

1. This second appeal is filed under Section 100 CPC impugning the concurrent judgments of the courts below; of the trial court dated 27.1.2004 and the first appellate court dated 18.3.2010; whereby the suit of the respondent-plaintiff for declaration of ownership has been decreed.

Respondent no.1 (now represented by his legal heirs) was the sole plaintiff in the trial court. The plaintiff was declared to be the owner of the suit properties bearing nos. 431 and 486, Shehzada Bagh, Inderlok, Delhi.

2. A reference to the impugned judgment shows that the appellants/defendants claimed that ownership of the suit property came to Habib-Ur- Rehman, real brother of plaintiff Sh. Aziz-Ur-Rehman (appellants no.2 to 6 being the children of late Habib-Ur- Rehman), because, as per the case of the appellants-defendants there was a family settlement between the plaintiff Aziz-Ur-Rehman and his brother Habib-Ur-Rehman whereby the suit properties fell to the share and ownership of Habib-Ur-Rehman.

3. The courts below have noted the fact that though the appellants-defendants placed reliance on a family settlement, this family settlement has not seen the light of the day because this family settlement is not filed and not proved and that no witness to this alleged family settlement has been examined. I put a query to the counsel for the appellants-defendants that whether the family settlement is oral or in writing, and to which counsel for the appellants states that the family settlement was not oral but was in writing . Once therefore, the appellants-defendants do not file and prove the written family settlement on the basis of which they claim exclusive

ownership of their predecessor-in-interest Habib-Ur-Rehman, the suit properties will hence be jointly owned by the plaintiff and Habib-Ur-Rehman inasmuch as the common case is that the suit property belonged to Haji Abdul Rehman, father of the plaintiff and late Sh. Habib-Ur-Rehman.

4. Learned counsel for the appellants argued before this Court that the suit is barred under the proviso to Section 34 of the Specific Relief Act, 1963 because the plaintiff should have filed a suit claiming consequential relief of possession and/or partition. Reliance in support of this argument is placed upon the judgment of the Supreme Court in the case of ***Ram Saran and another Vs. Smt. Ganga Devi AIR 1972 SC 2685.***

5. The first appellate court has rejected this contention by making the following observations:-

“10. It is contended by Ld. Counsel for the appellant that Ld. Trial Court failed to appreciate that suit properties in complete possession and control of the appellant since the very beginning and suit for declaration without seeking possession or partition by the respondent was not maintainable.

It is further, contended that Ld. Trial Court failed to appreciate that the mutation of the said plot was entered in the name of husband of the appellant on 1.4.1977 which clearly shows that the appellant were in possession and control of the suit premises. It is further contended that Ld. Trial Court has failed to appreciate that suit was clearly hit by the provision of Section 34 of the Specific Relief Act as the plaintiff had not

claimed any consequential relief, thus, the relief of declaration could not be granted. It is, further, contended that the Ld. Trial Court ignored the admission of the respondent in the plaint that the properties have not been partitioned till date. It is, further, contended that the suit property has been in the possession of the appellant and respondent has not sought partition or possession of his alleged half share, consequently, the suit is hit by the provision of Section 34 of the Specific Relief Act. It is further contended that Ld. Trial Court has further failed to appreciate that the document Ex.PW-1/D1 was produced during cross-examination of UDC of the DDA which clearly proved that respondent had relinquished his share and right in the suit property No.486, Shehzada Bagh, Delhi way back in the year 1981. It is, further contended that the judgment passed by the Ld. Trial Court is against the fact and law of the case and same is liable to be set aside.

11. On the other hand ld. Counsel for the respondent contended that the Ld. Trial court has passed a reasoned judgment after examining the fact of the case. It is further contended that it is admitted case of the parties that both the plots were allotted to the father of the appellant and respondent as well as to the grand-father of the parties and after their demise being the legal heirs they are entitled for equal share in the suit properties. It is, further contended that the said fact has not been disputed by the appellant in the written statement. Ld. Counsel for the respondent, further, contended that the appellant/defendant tried to show that a family settlement was arrived, however, he could not produce any material on record to show that any family settlement was arrived between the parties. It is, further contended that by way of present suit, the plaintiff has claimed only a legal character in the suit property, thus, the suit is not hit by under Section 34 of the Specific Relief Act.
12. I have heard ld. Counsel for the parties and perused the plaint, written statement, evidence led by the parties and the judgment and other material produced on record.
13. The Ld. Trial Court after analysis the pleadings and evidence led by both the parties returned the finding on issue no.1 that

suit is not hit by Section 34 of Specific Relief Act because the properties in question are in the possession of the tenant and rent is being realized by the defendant, therefore, partition of the suit properties as consequential relief could not have been asked for. It is, further, hold that every co-owner under the law presumed to be in constructive possession of each and every inch of the property with other co-owners, therefore, it is the right of plaintiff not to ask for partition and wishes the declaration of one half of owner for the purpose of rental income arising out of properties in question.”

(underlining added)

6. A reference to the aforesaid paras shows that the suit was held to be maintainable because in the present case, the respondent-plaintiff had only claimed to be the co-owner of the suit properties alongwith his brother Habib-Ur-Rehman, predecessor-in-interest of the appellants-defendants. Possession of a co-owner is for and on behalf of the co-owners and possession of such a co-owner therefore being on behalf of all the co-owners would not negate the claim of relief of declaration of ownership even if no possession/partition is claimed. If the plaintiff had claimed exclusive ownership rights of the suit property and the appellants-defendants were in possession of the same, then in such a case the respondent-plaintiff should have asked for the consequential relief of possession or partition. The plaintiff was satisfied with the declaration of ownership, and therefore, once there is no issue of adverse possession which was framed in the suit by

which the appellants-defendants were claiming exclusive ownership, the suit filed by the plaintiffs/respondents would be maintainable for grant of declaration of ownership. I therefore find no merit in the contention that the suit is barred by Section 34 of the Specific Relief Act. The judgment cited in the case of ***Ram Saran (supra)*** on behalf of the appellant will not help the appellants because in the said case the suit for declaration was held to be not maintainable because plaintiffs in that suit before the Supreme Court were claiming to be the sole owners of the suit properties whereas in the present case, plaintiffs/respondents are only claiming co-ownership with the appellants-defendants of the suit properties. Accordingly, in my opinion, declaration of ownership claim was sufficient and it was not compulsory for the plaintiffs/respondents to claim possession or partition as is sought to be argued on behalf of the appellants. As already stated above, appellants-defendants have failed in their case of proving a family settlement and therefore the late Habib-Ur-Rehman would be a co-owner of the suit properties with the plaintiff and therefore parties to the present appeal who are the legal heirs of late plaintiff and Habib-Ur-Rehman would also be co-owners and accordingly the plaintiffs/respondents would simply claim declaration of co-ownership of the parties to the suit properties.

7. Finally I may note that the courts below have noted that mere mutation of the property will not confer title and this aspect has to be taken with the fact that the appellants –defendants had neither prayed for and nor got an issue framed of their exclusive ownership on account of adverse possession. Once the family settlement fails, parties would become co-owners, and therefore in such a case plaintiffs-respondents would be entitled to declaration of co-owners of the parties of the suit properties.

8. In view of the above, no substantial question of law arises under Section 100 CPC, and therefore, the appeal being without any merit is dismissed, leaving the parties to bear their own costs.

MAY 19, 2014
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VALMIKI J. MEHTA, J.