

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CM(M) No.1013/2013 and C.M. No.15193/2013 (stay)**
% **11th September, 2014**

MS. LOVELEEN KAUR Petitioner
Through: Mr. Manish Kumar, Advocate.

VERSUS

MS. NARINDER KAUR Respondent
Through: Mr. Amarjeet Singh, Advocate.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this petition under Article 227 of the Constitution of India is to the impugned order of the trial court dated 10.7.2013 by which the trial court has refused to delete issue nos.5,6,7 and 10. These issue nos.5,6,7 and 10 read as under:-

“5. Whether Smt. Balwant Kaur (deceased) was the sole and absolute owner of the property bearing No.B-82, Hari Nagar, Clock Tower, New Delhi measuring 73 Sq. Yds.? OPP

6. Whether the above issue already stands decided in the Judgment dated 8.10.2002 in Suit No.125/2000 between the plaintiff and the husband of the defendant (Now Deceased)? OPP

7. Whether the said Smt. Balwant Kaur (deceased) from her own funds and sources had raised some construction on the ground and first floors of the said property? OPP

10. Whether Smt. Balwant Kaur (deceased) during her lifetime bequeathed the said property comprising of ground and first floor, bearing No.B-82 Hari Nagar, Clock Tower, New Delhi measuring 73 Sq. Yds. to the plaintiff by way of Registered Will dated 1.5.1996 and whether the plaintiff become the sole and absolute owner of the said property by virtue? OPP”

2. The aforesaid issues have been framed in the suit filed by the petitioner/plaintiff for possession and damages with respect to the suit property bearing no.B-282, Hari Nagar, Clock Tower, New Delhi. The reliefs which are prayed for in the suit read as under:-

“a) pass a decree of possession in favour of the plaintiff and against the defendant thereby directing the defendant to deliver the vacant physical possession of the part of ground floor portion of the suit property bearing no.B-282, Hari Nagar, Clock Tower, New Delhi, more specifically shown in red colour in the site plan attached with the plaint.

b) pass a decree of damages/future damages in favour of the plaintiff and against the defendant for use & occupation, in respect of part of ground floor portion of the suit property, more specifically shown in red colour in the site plan attached with the plaint, at the rate of Rs.5000/- per month from the month of October 2010 till the date of possession.

c) Cost of the suit may also be awarded in favour of the plaintiff and against the defendant.

d) Any other relief which this Hon’ble Court may deem fit and proper in the circumstances of the case may also be granted.”

3. Learned counsel for the petitioner/plaintiff at the outset prays that since substance of the application has to be seen and the heading of the application is not material, since the sum and substance of the application filed by the petitioner/plaintiff is that on deletion of issue nos.5,6,7 and 10, the suit will have to be decreed for possession under Order XII of Code of Civil Procedure, 1908 (CPC), the subject application be treated as an application under Order XII Rule 6 CPC read with Order XIV Rule 5 CPC. Since the heading of the application is not material, but the substance has to be seen, I accept the prayer of the petitioner/plaintiff and treat the application which has been disposed of by the trial court in terms of the impugned order as an application filed under Order XIV Rule 5 also as one under Order XII Rule 6 CPC.

4. The basic argument urged on behalf of the petitioner/plaintiff for decree of the suit so far as the relief of possession is concerned by deleting of issue nos.5,6,7 and 10 is that there is an earlier judgment between the parties which operates as *res judicata* with respect to the fact that the mother Smt. Balwant Kaur was the owner of the suit property, and the mother Smt. Balwant Kaur had executed the Will dated 1.5.1996 in favour of the petitioner/plaintiff by which the petitioner/plaintiff became owner of

the suit property. It is argued that once the judgment in the earlier suit operates as *res judicata*, the suit so far as the relief of possession ought to be decreed. The judgment which is relied upon for operating as *res judicata* is the judgment dated 8.10.2002 passed in civil suit no.125/2000 titled as ***Gurcharan Singh Vs. Amarjit Singh, Harvinder Singh, Ms. Varinder Kaur and Loveleen Kaur*** (present petitioner/plaintiff).

5. A reference to the judgment dated 8.10.2002 shows that the husband of the present respondent/defendant was the plaintiff in that suit. Petitioner/plaintiff was the defendant no.4 in that suit. It is not disputed before this Court, and was also not disputed before the trial court that, the respondent/defendant claims rights in the suit property only through her husband Sh. Gurcharan Singh and who was the plaintiff in the earlier suit. Therefore, if the issues in the present case so far as the aspect of mother Smt. Balwant Kaur being the owner and she having executed the Will dated 1.5.1996 are concerned, have already been decided by the judgment dated 8.10.2002, then, issue nos.5,6,7 and 10 framed in the present suit will have to be struck off and possession of the suit property will have to be granted to the petitioner/plaintiff under Order XII Rule 6 CPC. The earlier suit filed by Sh. Gurcharan Singh, husband of the respondent/defendant was a suit for

partition with respect to the very same property, namely B-282, Hari Nagar, Clock Tower, New Delhi. The suit was dismissed by the judgment dated 8.10.2002.

6. Since the judgment dated 08.10.2002 is a short judgment, I reproduce the same in its entirety as under:-

“1. That plaintiff has filed the present suit for declaration, partition and for permanent injunction against the defendant.

2. The plaintiff has averred in the amended plaint apart from other facts that a plot of land measuring 73 sq. yds partially constructed ground floor, B-282, Hari Nagar, Clock Tower, New Delhi was purchased in the name of plaintiff's mother Smt. Balwant Kaur in the year 1982, out of the joint family funds / Incomes of the plaintiff and his brothers as a mark of respect of in the name of their mother.

3. The defendants have stated in the amended written statement that the suit of the plaintiff is not maintainable and the suit is liable to be dismissed U/s 7 rule 11 CPC. It is further submitted that Smt. Balwant Kaur, who was the sole and absolute owner of the property bearing No. B-282, Hari Nagar, Clock Tower, New Delhi, have executed a will in favour of Smt. Loveleen Kaur, defendant No.4 on 1.5.96 and the same was duly registered in the Sub-Registrar office.

4. The Defendants moved an application U/o 7 Rule 11 CPC dot 14.8.02 wherein, it is stated that the Will in favour of Ms. Loveleen Kaur has not been challenged in the plaint as well as in the evidence by way of affidavits and the only plea of the pl. is that the suit property was purchased by the Joint funds in the name of Smt.

Balwant Kaur, mother of the parties. The plaintiff, after the benami Transactions Act, can not raise the above stated plea.

5. The plaintiff has filed reply thereto, wherein, it is stated that the suit has been filed to declare the will in question as null and void because Smt. Balwant Kaur was not competent to execute the aforesaid will, and even, other objections have been taken by the plaintiff with regard to the execution of the will in his plaint as well as in his evidence by way of affidavit.

6. Ld. counsel for the plaintiff on 17.9.02, while addressing the arguments on the above application U/o 7 rule 11 CPC submitted that he is not pressing the ground of benami and admits Smt. Balwant Kaur as sole and absolute owner of the suit property, consequent whereupon, following additional issue No. IA was framed which is treated as preliminary issues:-

“Whether the suit is maintainable? OPP.

I have heard Ld. counsel for the parties and have perused the record.

8. The plaintiff has filed the present suit for declaration, partition, permanent injunction on the ground that a plot of land measuring 73 sq. yards partially constructed ground floor, B0282,1 Hari Nagar, Clock tower, New Delhi was purchased in the name of plaintiff's mother Smt. balwant Kaur in the year 1982, out of the joint family funds/ incomes of the plaintiff and his brothers as a mark of respect in the name of their mother. After the death of Smt. Balwant Kaur, plaintiff and the Defendants have become the co-owner of the property and Smt. Balwant Kaur was not competent to execute the will dot. 1.5.96 in favour of the defendants No. 4 and the said will is null and void. It is also stated in para No. 9 of the plant that the plaintiff is lawful owner being LRs. Of Smt. Balwant Kaur, who died intestate on 28.11.196.

9. Now, taking into consideration the above facts and the statement of the counsel for the plaintiff, wherein he was admitted Smt. Balwant Kaur as sole and absolute owner of the suit property. I am of the opinion that the suit of the plaintiff so far as declaration is sought that the suit property was joint property as the same was purchased out of the joint family funds is not maintainable. Similarly, the prayer that the Smt. Balwant Kaur was not competent to executed the will dt. 1.5.96 in favour of Defendant No.4 because the suit property was joint property and the same was purchased out of the family funds also is not tenable in law in view of the admission of the counsel for the plaintiff on 17.9.02 as stated herein above. Fro these reasons, the plaintiff is also not entitled for other relief's i.e. for decree or partition and permanent injunction as these relief's, also based upon the same cause of action. The plaintiff has not challenged the will on any other ground or most specifically on the ground that either the will is forged or that Smt. Balwant Kaur was not in her senses etc. when she executed to will, through the plaintiff has stated in para No. 9 that Smt. Balwant Kaur died intestate on 25.12.96, but when the whole of the plaint is read, it is apparent that the will is challenged by the plaintiff only on the ground that Smt. Balwant Kaur was not competent to execute the will dated 10.5.96 in favour of the Defendant No. 4 because the suit property was the joint family property and the same was purchased out of the joint family funds.

10. Hence, I am of the opinion that once it is admitted that Smt. Balwant Kaur is the owner of the suit property then she was also having the right to execute the will in respect of the suit property bequeathing the suit property in favour of Defendant No. 4 hence for these reasons, I am of he considered opining that the suit of the plaintiff is not maintainable. This issue is accordingly decided in favour of the Defendants and against the plaintiff.

11. Accordingly, in view of the above discussions the suit of the plaintiff is dismissed. Parties are left to bear their own costs. Decree-sheet be prepared accordingly. File be consigned to record room.”

7. A reading of paras 6 to 9 of the judgment dated 8.10.2002 shows that the husband of the respondent/defendant in the present suit gave up the plea of benami i.e he did not contest the issue and admitted the fact that Smt. Balwant Kaur was the owner of the suit property although as per the plaint originally the case which was set up by the husband of the respondent herein (plaintiff in the earlier suit) was that Smt. Balwant Kaur was not the sole owner of the property because the suit property was purchased from joint family funds. Para 9 of the judgment dated 8.10.2002 concludes by holding that husband of the respondent/defendant to the present suit fails in his challenge to the Will dated 1.5.1996 because the Will was not challenged on the ground that the Will was not duly executed and the Will was only challenged on the ground that the mother Smt. Balwant Kaur who executed the Will was not competent to make the Will because she was not the owner of the suit property which though was in her name was actually purchased from the joint family funds.

8. The trial court, in my opinion, while passing the impugned judgment has committed a basic mistake in holding that the earlier judgment

is not *res judicata* because the respondent/defendant in the present suit was not a party to the earlier suit inasmuch as the principle of *res judicata* under Section 11 CPC applies not only with respect to the parties to the suit but also to all the persons who claim through the parties in the earlier suit, and admittedly the respondent/defendant in the present suit is only claiming through her husband Sh. Gurcharan Singh, who was the son of Smt. Balwant Kaur, and the plaintiff in the earlier suit, dismissed on 8.10.2002. Clearly, earlier judgment dated 8.10.2002 operates as *res judicata* between the parties to the present suit inasmuch as respondent/defendant is claiming through the plaintiff in the earlier suit and the present petitioner/plaintiff was the defendant no.4 in the earlier suit.

9. In view of the above, since the earlier judgment dated 8.10.2002 operates as *res judicata* between the parties that the mother Smt. Balwant Kaur was the owner of the suit property and she executed the Will dated 1.5.1996 in favour of the present petitioner/plaintiff with respect to the suit property, the petitioner/plaintiff is hence undisputed owner of the suit property and will therefore be entitled to possession of the suit property.

10. In view of the above, the petition is allowed. Impugned order of the trial court dated 10.7.2013 is set aside. Issue nos.5,6,7 and 10 are

deleted and simultaneously suit of the petitioner/plaintiff so far as the relief of possession with respect to the property bearing no. B-282, Hari Nagar, Clock Tower, New Delhi is decreed in terms of the site plan filed with the plaint. The other issues pertaining to damages/mesne profits will be decided after the parties will lead evidence in the trial court. Parties are left to bear their own costs.

SEPTEMBER 11, 2014
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VALMIKI J. MEHTA, J