

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

+ CM(M) 34/2015 & CM 701/2015

% Reserved on: 19th May, 2015
Decided on: 29th June, 2015

SHANTI DEVI ... Petitioner
Through: Ms. Sonam Anand, Adv.
versus

KAILASH KUMAR VERMA Respondent
Through: Mr. M.L. Sharma, Adv.

Coram:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Aggrieved by the order dated 11th November, 2014 dismissing an application of the petitioner Shanti Devi under Section 11 CPC, the petitioner prefers the present petition.

2. A brief exposition of the facts is that Kailash Kumar Verma, the respondent herein filed a suit bearing No.1097/2006 against petitioner Shanti Devi seeking decree of permanent injunction restraining her from raising any construction in the property No. RZ-A-19, Sita Puri, Gali No.2, New Academy, Part-I, New Delhi admeasuring 100 sq.yds. (in short “the suit property”). In the said suit, Kailash Kumar claimed that he was the sole owner of the entire suit property on the basis of documents like agreement to sell, Will, receipt etc. dated 14th August, 1986. Shanti Devi filed a written statement contesting the suit mainly on the ground that the documents relied upon by Kailash Kumar were forged and fabricated and that the suit property

was jointly purchased by Kailash Kumar and deceased husband of Shanti Devi, who had equally contributed towards the consideration. It was not disputed that Shanti Devi along with her husband had been living in half portion of the suit property since August, 1986 and continued to live there even after her husband expired in the year 1993 in a road accident. During the pendency of Suit No.1097/2006, Kailash Kumar filed a subsequent suit being Suit No. 276/2008 later renumbered as 121/2013 against Shanti Devi seeking recovery of possession of 50 sq.yds. of the suit property and for damages at the rate of Rs.1800/- per month. In the subsequent suit also, Kailash Kumar claimed himself to be the owner of the entire property on the basis of same very documents which were relied upon by him in the former suit No.1097/2006. The cause of action paragraph in the two suits is identical. In the subsequent suit also Shanti Devi filed a written statement took the plea that the suit was barred by Order II Rule 2 CPC as the former suit pertaining to the same property and same cause of action had already been filed by Kailash Kumar and was pending. In October, 2008, Shanti Devi filed an amended written statement along with the counter claim in the former suit bearing No.1097/2006 and sought declaration that she was the owner of half portion i.e. 50 sq.yds. of the suit property which was under her possession/occupation. In the former suit the learned Civil Judge settled the following issues on 22nd April, 2009-

- (i). Whether the plaintiff is entitled to seek relief of injunction against the defendant in respect of the portion shown red in the plan of the suit property, as prayed?
- (ii). Whether the defendant is entitled to the relief of declaration in respect of the property in her occupation as prayed?

3. Learned Civil Judge vide its judgment dated 22nd August, 2012 decided the Suit No. 1097/2006 in favour of Kailash Kumar granting injunction against Shanti Devi and held that Kailash Kumar has been able to establish his ownership over the suit property on the basis of the documents relied upon and injuncted Shanti Devi from raising any construction in the suit property. However, issue No.2 regarding the counter claim of Shanti Devi over half portion of the suit property was declined on the ground that Kailash Kumar has been able to establish his ownership over the suit property and thus the relief of declaration of ownership could not be granted in favour of Shanti Devi.

4. Shanti Devi challenged the judgment dated 22nd August, 2012 passed by the learned Civil Judge before the learned Additional District Judge, Dwarka in RCA No. 47/2012 wherein the finding of the learned Civil Judge on issue No.1 was reversed vide judgment dated 2nd March, 2013. While setting aside the decree of injunction granted in favour of Kailash Kumar and against Shanti Devi the learned ADJ held that the learned Trial Court should not have given any credence to the alleged title documents of the plaintiff and at least on the basis of such documents, the plaintiff could not have been presumed to be the owner of the suit property. Reliance was placed on the decision in Suraj Lamp & Industries Pvt. Ltd. Vs. State of Haryana & Anr. 2011 (11) SCC 438. Learned ADJ also noted that Shanti Devi categorically raised cloud upon the title of Kailash Kumar in the suit property and thus the suit simplicitor for permanent injunction was not maintainable as the same was barred under Section 41(h) of the Specific Relief Act and Kailash Kumar had an alternative efficacious remedy of filing a suit for specific performance based upon Ex.PW1/A to Ex.PW1/E against the rightful owner

and had further efficacious remedy of seeking declaration. The finding on issue No.2 which was decided by the learned Civil Judge against Shanti Devi was upheld by the learned ADJ as well and the judgment of the learned Civil Judge was modified to the effect that issue No.1 was decided in favour of Shanti Devi and against Kailash Kumar and it was noted that Kailash Kumar was not entitled to seek relief of permanent injunction as he had an alternative efficacious remedy of filing a suit for declaration and possession once the cloud upon his title had been raised by Shanti Devi and thus the suit was liable to be dismissed. Shanti Devi filed an appeal being RSA 137/2013 before this Court, which was withdrawn on 7th October, 2013, however no appeal was filed by Kailash Kumar against the judgment dated 2nd March, 2013 passed by the learned ADJ in RCA No.47/2012. Thus the finding of the learned ADJ on issue No.1 has attained finality.

5. Armed with the judgment dated 2nd March, 2013 Shanti Devi filed an application under Section 11 CPC on 11th November, 2013 in the subsequent suit being Suit No. 121/2013 filed by Kailash Kumar seeking recovery of possession of 50 sq.yds. of suit property under the possession of Shanti Devi and damages. Shanti Devi claimed that vide the order dated 2nd March, 2013 the finding in respect of ownership of Kailash Kumar in the suit property has attained finality and thus the same would operate as res-judicata in the subsequent suit for possession and damages and the suit was thus liable to be dismissed on this ground.

6. Vide the impugned order dated 11th November, 2014 the learned Civil Judge dismissed the application of Shanti Devi under Section 11 CPC holding that the judgment in the former suit was passed in a suit simplicitor for permanent injunction. No issue as to title of plaintiff qua the suit

property was framed in that suit. It is well settled that decision on question of title in a suit for injunction is not binding in latter suit where the title is directly in question and does not operate as res judicata even though there is an incidental finding on title. Reliance was placed on Gram Panchayat, Naulakha Vs. Ujagar Singh AIR 2000 SC 3272 and Sajjadanashi Sayed Vs. Musha Dadhabhai Ummer AIR 2000 SC 1238. Thus, the application of Shanti Devi seeking dismissal of suit as barred by res-judicata was misconceived and dismissed.

7. Assailing the impugned order, learned counsel for the petitioner urges that if the issue raised in the subsequent suit is directly and substantially in issue in a former suit between the same parties and has been heard and finally decided by the Court of competent jurisdiction, the same would operate as res-judicata. In the former suit though the relief of injunction was prayed however the issue of title of Kailash Kumar to the Suit property was directly and substantially in issue and was decided by the learned Civil Judge which was set aside by the learned ADJ finding arrived at by the Court of competent jurisdiction has attained finality and thus in all subsequent suits wherever the issue of title arises “directly and substantially” the same would operate as res-judicata. Reliance is placed on Sulochana Amma Vs. Narayanan Nair (1994) 2 SCC 14 and Sajjadanashin Sayed Vs. Musa Dadabhai Ummer (2000) 3 SCC 350.

8. Learned counsel for the respondent on the other hand contends that in a suit for injunction, issue of title can never be an issue directly and substantially involved and hence there is no illegality in the impugned order as held vide the impugned order. Merely because Kailash Kumar did not sign the document would not lead to the inference that the same was not

executed. Non-execution of an instrument is a question of fact to be determined on the basis of evidence led by the parties. Reliance is placed on Tejpal Vs. Shanti Devi 2013 (1) CCC 463 (P&H).

9. Heard learned counsel for the parties.

10. The facts noted being undisputed the questions that call for determination are whether the issue of title of Kailash Kumar to the suit property was an issue directly and substantially in issue in the former suit i.e. Suit No.1097/2007 and if so, the decision thereof having attained finality whether Kailash Kumar was barred by the principles of res-judicata from seeking determination of same issue again in the subsequent suit i.e. Suit No.121/2013 seeking recovery of possession and damages from Shanti Devi.

11. The decision relied upon by the learned Trial Court vide the impugned order in Gram Panchayat, Naulakha (supra) has no application to the facts of the case as the Court was dealing with a collusive suit and in the said light it was held that the decision in the suit for injunction was not binding on question of title even though issue on title was framed in that suit and incidental finding on question of title was arrived at. It is trite law that finding arrived by collusion and fraud can never be binding.

12. In Sajjadanashin Sayed (supra) Supreme Court reiterated the principles of “directly and substantially in issue” and held that the fundamental rule is that a judgment is not conclusive if any matter came collaterally in question. It was held that a collateral or incidental issue is one that is ancillary to a direct and substantive issue that is the former is an auxiliary issue and latter the principal issue. The Court held-

12. It will be noticed that the words used in Section 11 CPC are “directly and substantially in issue”. If the matter was in issue

directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions have however held that if a matter was only “collaterally or incidentally” in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue.

13. As pointed out in Halsbury's Laws of England (Vol. 16, para 1538, 4th Edn.), the fundamental rule is that a judgment is not conclusive if any matter came collaterally in question [R. v. Knaptoft Inhabitants [(1824) 2 B&C 883 : 107 ER 610] ; Heptulla Bros. v. Thakore [(1956) 1 WLR 289, 297 (PC)] WLR at p. 297 (PC)]; or if any matter was incidentally cognizable [Sanders (otherwise Saunders) v. Sanders (otherwise Saunders) [(1952) 2 All ER 767, 771 : 116 JP 564] All ER at p. 771].

14. A collateral or incidental issue is one that is ancillary to a direct and substantive issue; the former is an auxiliary issue and the latter the principal issue. The expression “collaterally or incidentally” in issue implies that there is another matter which is “directly and substantially” in issue (Mulla's Civil Procedure Code, 15th Edn., p. 104).

Difficulty in distinguishing whether a matter was directly in issue or collaterally or incidentally in issue and tests laid down in various courts

15. Difficulty in this area of law has been felt in various jurisdictions and therefore some tests have been evolved. Halsbury says (Vol. 16, para 1538) (4th Edn.) that while the general principle is clear,

“difficulty arises in the application of the rule, in determining in each case what was the point decided and what was the matter incidentally cognizable, and the opinion of Judges seems to have undergone some fluctuations”.

(emphasis supplied)

16. *Spencer Bower and Turner on The Doctrine of Res Judicata* (2nd Edn., 1969, p. 181) refer to the English and Australian experience and quote Dixon, J. of the Australian High Court in *Blair v. Curran* [(1939) 62 CLR 464, 553 (Aus HC)] CLR at p. 553 to say:

“The difficulty in the actual application of these conceptions is to distinguish the matters fundamental or cardinal to the prior decision on judgment, or necessarily involved in it as its legal justification or foundation, from matters which, even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation of a groundwork of the judgment.”

The authors say that in order to understand this essential distinction, one has always to inquire with unrelenting severity — is the determination upon which it is sought to find an estoppel so fundamental to the substantive decision that the latter cannot stand without the former. Nothing less than this will do. It is suggested by Dixon, J. that even where this inquiry is answered satisfactorily, there is still another test to pass: viz. whether the determination is the “immediate foundation” of the decision as opposed to merely “a proposition collateral or subsidiary only, i.e. not more than part of the reasoning supporting the conclusion”. It is well settled, say the above authors, “that a mere step in reasoning is insufficient. What is required is no less than the determination of law, or fact or both, fundamental to the substantive decision”.

17. American jurists and courts have also found difficulty but they have tried to lay down some tests. It is conceded in *Corpus Juris Secundum* (Vol. 50, para 725) that “it is sometimes difficult to determine when particular issue determined is of sufficient dignity to be covered by the rule of estoppel. It is said that estoppel by judgment does not extend to any matter which was only incidentally cognizable or which came collaterally in question, although it may have arisen in the case and have been judicially passed on” (per Taft, J. in *North Carolina Railroad Co. v. Story* [45 S Ct 531 : 268 US 288 : 69 L Ed 959 (1924)]). But this rule does not however prevent a judgment

from constituting an estoppel with reference to incidental matters necessarily adjudicated in determining the ultimate vital point. American Jurisprudence (Vol. 46, Judgments, para 422), too says: “Under this rule, if the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties.” (Per Harlan, J. in Hoag v. New Jersey [356 US 464 : 78 S Ct 829 : 2 L Ed 2d 913 (1958)]), quoting Restatement, Judgments [para 68(1)] and Developments in the Law — Res Judicata (1952) 65 Harv. L. Review 818 (820). [See also Collateral Estoppel by Judgment by Prof. Scott (1942), Harv. L. Review 1.]

18. In India, Mulla has referred to similar tests (Mulla, 15th Edn., p. 104). The learned author says: a matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter “directly and substantially” in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was “directly and substantially” in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the test for deciding into which category a case falls? One test is that if the issue was “necessary” to be decided for adjudicating on the principal issue and was decided, it would have to be treated as “directly and substantially” in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case (Mulla, p. 104). One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (Ishwer Singh v. Sarwan Singh[AIR 1965 SC 948] and Syed Mohd. Salie Labbai v. Mohd. Hanifa [(1976) 4 SCC 780 : AIR 1976 SC 1569]). We are of the view that the above summary in Mulla is a correct statement of the law.

19. We have here to advert to another principle of caution referred to by Mulla (p. 105):

“It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the court considers the adjudication of the issue material and essential for its decision.””

13. Thus, the test laid down is that the issue should not be collateral or incidental in question, nor special significance should be attached to the fact that a particular issue was mentioned in the list of issues. The material test to be applied is whether the Court considers the adjudication of the said issue material and essential for its decision.

14. Indubitably the relief of injunction is an equitable relief and even if a person proves his title he may still be denied the relief of injunction. But whether the issue was directly and substantially involved or incidentally involved is a question of fact in each case. In the present case as noted above, both the learned Civil Judge and learned ADJ considered the issue No.1 on the basis of documents filed by Kailash Kumar to show his title. The same documents have been relied upon in the subsequent suit. Learned ADJ after considering the documents came to the conclusion that agreement to sell, general power of attorney, Will etc. are not transfers of sales. The learned ADJ specifically examined the fact whether the documents of Kailash Kumar can be held to be documents passing on the title to him in the suit property and in light of the decision in Suraj Lamps (supra) came to the conclusion that sale transactions entered through agreement to sell, general power of attorney, Will etc. are not transfers of sales but they can be treated as agreement to sell on the basis of which a party can obtain specific

performance or can defend possession under Section 53A of the Transfer of Property Act and that on the basis of title documents filed by Kailash Kumar it could not be presumed that he was owner of the suit property. In the subsequent suit, no new documents have been placed on record. No specific performance of the agreement to sell has been sought.

15. However the learned ADJ vide the judgment dated 2nd March, 2013 itself noted that Kailash Kumar was not entitled to the relief of permanent injunction as he had an alternative efficacious remedy of filing a suit for declaration and possession once the cloud upon his title had been raised by Shanti Devi. Thus, it is clear that while deciding the issue of injunction though a prima facie finding was returned by the learned ADJ that Kailash Kumar could not establish his title to the suit property, however the issue being directly and substantially in issue, the same would not operate as res-judicata.

16. Thus, I find no reason to interfere in the impugned order. Petition and application are dismissed.

(MUKTA GUPTA)
JUDGE

JUNE 29, 2015
‘v mittal’