

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

RSA No. 44/2016

%

28th July, 2016

SH. BAIJ NATH

..... Appellant

Through: Mr. Sanjay Goswami, Advocate with
appellant in person.

versus

SH. BHOLA NATH GOYAL & ANR.

..... Respondents

Through: Mr. Pawan Kr. Bahl, Mr. J.P. Mishra,
Mr. Veeresh Kr. Sharma, Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant/defendant no.1 in the suit impugning the concurrent Judgments of the courts below; of the Trial Court dated 7.6.2014 and the First Appellate Court dated 12.1.2016; by which the suit for mandatory injunction filed by the respondent no.1/plaintiff for joint enjoyment of the suit property, a co-owned property, was decreed. The suit property is property bearing no. 3 Bhogal Road, Bhogal, New Delhi situated on a plot admeasuring 83.5 sq. yds. The trial court by its judgment has directed the appellant/defendant no.1 by way of mandatory injunction to

handover one set of keys of the suit property to the respondent no.1/plaintiff/co-owner.

2. That the suit property was originally owned by the father of the appellant/defendant no.1 and the respondent no.1/plaintiff is not disputed before this Court. It is also not disputed that on the death of the father of the parties both the appellant/defendant no.1 and the respondent no.1/plaintiff became co-owners. There are even other co-owners of the suit property being the other legal heirs of the father i.e widow/Smt. Laxmi Devi of the deceased Sh. Prem Nath, the brother Sh. Anand Kumar and the sisters Smt. Lalita Gupta and Smt. Nisha Vaish.

3. The crucial issue which was called for decision was issue no.4 as to the entitlement of the respondent no.1/plaintiff for being handed over the keys and therefore effectively joint possession of the suit property. This issue has been dealt with by the trial court in paras 32 to 36 in its judgment and which paras read as under:-

“32. The onus to prove this issue was on the plaintiff. As PW1, the plaintiff has deposed in Ex.PW1/A that all legal heirs including him were in joint legal possession of the suit property through the defendant No.1 was in physical possession of the same after obtaining the same from the plaintiff by fraud. PW1 has further deposed that it had been agreed between him and the defendant No.1 that they would not put individual locks on the suit premises and only locks with duplicate keys shall be used with the keys remaining with both the parties. PW1 has further deposed that on 20.01.2009, the defendant no.1 had approached the plaintiff and requested for his keys on the ground that he had lost his keys and the suit premises required cleaning and that he also promised to return the keys in the evening but he did not return the same on the

ground that the cleaning had not been completed and that he would return the same in 1-2 days. PW1 has further deposed that on 23.01.2009 when he visited the suit premises inter alia the defendant No.1 refused to return the keys to the plaintiff. During the cross-examination of PW1, the defendant No.1 was unable to impeach the credibility of the witness or the veracity of his testimony. For reasons best known to the defendant No.1 no questions were put to the plaintiff in respect of the incident dated 20.01.2009 or 30.01.2009 being false.

33. The testimony of PW1 has also been duly corroborated by the testimony of PW2 Sh. Pankaj Chawla who has deposed as to being an eye witness as to the incident dated 20.01.2009 in respect of the defendant No.1 asking for the keys and the plaintiff handing over the same to the defendant No.1 in his presence. During the cross-examination, except putting a mere suggestion as to him not being present at the suit property on 20.01.2009, the defendant No.1 has been unable to elicit and contradiction or impeach the veracity and credibility of the testimony of PW2. No reason has been brought forth by the defendant No 1 to disbelieve the testimony of the eye witness PW2.
34. **On the other hand, the defendant No.1 has himself admitted during his cross-examination that he has not placed on record any document to show that he is in exclusive possession of the suit premises for the claimed period.** In the absence of the defendant proving his exclusive right in the suit property, he has failed to prove his right entitling him to put an exclusive lock on the suit premises to the exclusion of the other co-owners including the plaintiff.
35. The question whether the suit premises was being used by the plaintiff and defendant No.1 as a go-down in the ratio of 50:50 is not required to be adjudicated as the same is not relevant for the adjudication of the present dispute which is essentially in respect of the keys of the go-down not being returned by the defendant No.1.
36. Thus, in the totality of evidence on record and on the basis of preponderance of probabilities, the plaintiff has been able to discharge the onus cast upon him in respect of his entitlement to only one set of keys of the suit premises as a co-owner and hence this issue is accordingly decided in favour of the plaintiff and against the defendant No.1.”
(emphasis is mine)

4. A reading of the aforesaid paras of the judgment of the trial court shows that the appellant/defendant no.1 has not filed a single document on record to show that he was ever in exclusive/sole possession of the suit

property. Once the suit property is jointly owned, all co-owners are entitled to joint possession of the same and one co-owner cannot deny benefit of use, enjoyment and possession of a co-owned property to other co-owners including the respondent no.1/plaintiff. Obviously, a co-owner has all the rights which flow from co-ownership including of enjoyment of co-ownership rights by use, enjoyment and joint possession of the co-owned property.

5. Learned counsel for the appellant/defendant no.1 very vehemently argued that the suit for mandatory injunction was not maintainable because a co-owner can only seek partition of the suit property and the suit is therefore barred by Sections 41(h) and 34 of the Specific Relief Act, 1963 as the respondent no.1/plaintiff should have sought, but has not sought, the relief of partition.

6. I am unable to agree with the arguments urged on behalf of the appellant/defendant no.1 that Section 41(h) of the Specific Relief Act bars the suit because respondent no.1/plaintiff had the efficacious remedy of seeking partition because this is not so stated in Section 41(h) that one co-owner is not entitled to the benefit of co-ownership of use, enjoyment and possession of a co-owned property and there is no law laid down under Section 41(h) that a co-owner cannot file a suit for joint enjoyment, possession and use of a co-owned property. Even Section 34 of the Specific Relief Act only talks of not

granting a declaration when consequential relief can be claimed and which is not the issue in the present case. In fact a direct provision of law against the appellant/defendant no.1 and in favour of the respondent no.1/plaintiff is the statutory provision of Section 7(iv) para 2 of the Court Fees Act, 1870 which provides for the subject matter of a suit which is to enforce a right to share in the joint family property. There is no law that a co-owner must seek partition and cannot seek benefit of joint use, possession and enjoyment of a co-owned property.

7. In view of the above, no substantial question of law arises for this second appeal to be entertained under Section 100 CPC. Dismissed.

8. Trial court record be sent back.

JULY 28, 2016
ib

VALMIKI J. MEHTA, J