

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

% **Date of decision: 3rd August, 2017**

+ **C.R.P. No.69/2017 & CM No.11147/2017 (for stay).**

HARSWAROOP SHARMA

..... Petitioner

Through: Mr. Manish Kohli, Mr. Pranav Joshi,
and Mr. Kush Bhardwaj, Advs. along
with petitioner in person.

versus

GIAN PRAKASH SHARMA AND ORS

..... Respondents

Through: Mr. R.K. Bhardwaj respondent no.2 in
person.

Mr. Lakshay Bhardwaj and Mr.
Manish Gandhi, Advs. for R-3&4.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order (dated 2nd January, 2017 in Suit No.96542/16 (Old Suit No.48/16) of the Court of Civil Judge-08 (Central), Tis Hazari Court, Delhi) of dismissal of the application of the petitioner / defendant no.1 under Order VII Rule 11 of the CPC for rejection of the plaint.

2. The petition was entertained and notice thereof issued.

3. The counsels for all the respondents appear.

4. The counsels have been heard.

5. The suit from which this petition arises was filed by the respondents no.1 to 4 / plaintiffs who are the heirs of one Jai Lal against the petitioner / defendant no.1 and the predecessor of the respondents no.5&6 herein for the reliefs of (i) declaration that the respondents no.1 to 4 / plaintiffs are entitled to half share of one Ram Swaroop in *mandir* Shri Kalkaji for performance of *puja sewa* and realisation of *tehbazari* and other profits attached to the

temple; and, (ii) permanent injunction restraining the petitioner / defendant no.1 and predecessor of respondents no.5&6 / defendant no.2 from interfering in the respondents no.1 to 4 / plaintiffs getting the said share.

6. The counsel for the petitioner / defendant no.1 has argued (i) that one Ram Swaroop whose heirs the parties are, had a share in the *tehbazari* and *puja sewa* and profits accruing therefrom in temple Shri Kalkaji; (ii) that the said Ram Swaroop died leaving three sons namely Tula Ram, Gauri Shankar and Jai Lal; (iii) that the respondents no.1 to 4 / plaintiffs are the heirs of Jai Lal and the petitioner / defendant no.1 is the son of Tula Ram and the respondents no.5&6 / defendant no.2 are the heirs of another son of Tula Ram; (iv) that after the demise of Ram Swaroop, each of his three sons had $1/3^{\text{rd}}$ share in the share aforesaid of Ram Swaroop; (v) Gauri Shankar, one of the sons of Ram Swaroop died in the year 1981 leaving his wife as his only heir as he was issueless; (vi) that the wife of Gauri Shankar also died issueless in the year 2000; (vii) that the aforesaid $1/3^{\text{rd}}$ share inherited by Gauri Shankar from his father Ram Swaroop was bequeathed by Gauri Shankar equally in favour of the petitioner / defendant no.1 and the predecessor of respondents no.5&6 / defendant no.2 vide a registered Will dated 28th September, 1979; (viii) that the petitioner / defendant no.1 and the predecessor of the respondents no.5&6 / defendant no.2 since the demise of Gauri Shankar, under the said Will, have been receiving the share of Gauri Shankar in mandir Shri Kalkaji; (ix) that the respondents no.1 to 4 / plaintiffs, in or about the year 2005 i.e. 24 years after the demise of Gauri Shankar, have filed the suit, from which this petition arises, claiming half share out of the share of Ram Swaroop on the premise that Gauri Shankar died issueless and thus Tula Ram and Jai Lal became entitled to the share of

Gauri Shankar on his demise (however on enquiry it is told that Tula Ram was not alive on the date of death of Gauri Shankar and only Jai Lal was alive; in this light of the matter, in the event of Gauri Shankar dying intestate, it is only Jai Lal who would inherit his share and not the petitioner / defendant no.1 and the predecessor of respondents no.5&6 / defendant no.2); (x) that though the respondents no.1 to 4 / plaintiffs were fully aware of the Will of Gauri Shankar but have in the plaint not sought the relief of declaration of the said Will or cancellation of the Will; and, (xi) the suit filed by the respondents no.1 to 4 / plaintiffs, without seeking declaration of the document claimed to be the Will as not the Will of Gauri Shankar and without seeking cancellation thereof, is not maintainable and the plaint was liable to be rejected under Order VII Rule 11 (d) of the CPC as barred by law.

7. On 28th July, 2017, when arguments were partly heard, I had enquired from the counsel for the petitioner / defendant no.1, whether it is necessary to seek declaration qua a Will particularly when the beneficiaries under the Will have not sought probate thereof (even though to claim rights under the Will, as far as the city of Delhi is concerned, probate is not essential).

8. The counsel for the petitioner / defendant no.1 has today drawn attention to Section 31 of the Specific Relief Act, 1963 which is as under:-

“31. When cancellation may be ordered.—

(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation”.

9. I have enquired from the counsel for the petitioner / defendant no.1, whether the word ‘instrument’ used in Section 31 would include a Will.

10. The counsel for the petitioner / defendant no.1 has contended that the said question is no longer *res integra* in view of the Constitution Bench judgment in **Mohan Chowdhury Vs. The Chief-Commissioner, Union Territory of Tripura** AIR 1964 SC 173 holding the word ‘instrument’ to include a Will. Attention is drawn to the part of para 11 of the said judgments as under:-

“Is the President's Order in question an "instrument" within the meaning of the section? The General Clauses Act does not define the expression "instrument". Therefore, the expression must be taken to have been used in the sense in which it is generally understood in legal parlance. In Stroud's Judicial Dictionary of Words and Phrases (Third Edition, Volume 2, page 1472), "instrument" is described as follows:

"An 'instrument' is a writing, and generally imports a document of a formal legal kind. Semble, the word may include an Act of Parliament..... (11) Conveyancing Act, 1881 (44 & 45 Vict. c.41), S.2(xiii), 'instrument' includes deed, will, inclosure, award and Act of Parliament.....”

11. The aforesaid judgment is in the context of Section 8 of the General Clauses Act, 1897 which is as under:-

“8. Construction of references to repealed enactment -
[(1) Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then reference in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

[(2)] [Where before the fifteenth day of August, 1947, any Act of Parliament of the United Kingdom repealed and re-enacted, with or without modification, any provision of a former enactment, then references in any [Central Act] or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted]

and the Supreme Court has been careful to observe that the expression ‘instrument’ used therein must be taken to have been used in the sense as ‘generally understood’.

12. I have enquired from the counsel for the petitioner / defendant no.1, whether not the word ‘instrument’ is defined in the General Clauses Act or in some other Statute viz. the Specific Relief Act or the Transfer of Property Act, 1882. Attention of the counsel is drawn to Section 3 of the Transfer of Property Act, being the interpretation clause thereof, providing as under:-

"instrument" means a non-testamentary instrument".

13. In the light of the above, it appears that the use of the expression ‘instrument’ in Section 31 of the Specific Relief Act cannot take its colour from the judgment in the context of Defence of India Rules, 1962 and has

to take its colour from Transfer of Property Act which is more aligned to the Specific Relief Act.

14. Be that as it may, I have before proceeding further, enquired from the counsel for the respondents no.1 to 4 / plaintiffs the reason if any for not seeking the relief of declaration and cancellation qua the Will.

15. The counsel for the respondents no.1 to 4 / plaintiffs has informed that the predecessor of the respondents no.5&6 / defendant no.2, on 19th October, 2000 i.e. soon after the demise in the year 2000 of the wife of Gauri Shankar, filed a suit for partition of the estate of Gauri Shankar impleading the petitioner / defendant no.1 herein and the respondents no.1 to 4 / plaintiffs herein as defendants thereto and on the basis of the Will aforesaid.

16. I have enquired from the counsel for the respondents no.1 to 4 / plaintiffs, whether the subject Will is in issue in that suit.

17. The counsel for the respondents no.1 to 4 / plaintiffs has drawn attention to the issues framed on 13th January, 2012 in that suit and of which the issue no.3 is as under:-

“3. Whether the Will dated 28.09.1979 of Sh. Gauri Shankar is a genuine document and has been validly executed? OPP”

18. Once the Will, qua which it is the contention of the petitioner / defendant no.1 that it was incumbent on the respondents no.1 to 4 / plaintiffs to seek the relief of cancellation, is in issue in the pending suit, I fail to see the need for the respondents no.1 to 4 / plaintiffs to, in the suit from which this petition arises, seek the relief of cancellation thereof.

19. In fact I have enquired from the counsel for the respondents no.1 to 4 / plaintiffs the need for the respondents no.1 to 4 / plaintiffs to file the subject

suit inasmuch as the estate of Gauri Shankar being subject matter of partition in the suit aforesaid, it is felt that there was no need for the respondents no.1 to 4 / plaintiffs to file separate suit for claiming the reliefs as claimed in the subject suit and the said reliefs would have flowed from the decree in the partition suit.

20. The counsel for the respondents no.1 to 4 / plaintiffs states that he was also of the same opinion and had in fact filed an application in the partition suit aforesaid to obtain interim orders with respect to the share of Gauri Shankar in the then incumbent *baari* in mandir Shri Kalkaji but the said application was dismissed vide order dated 29th March, 2005 of the Court in which the partition suit is pending, observing that the relief claimed therein was not within the scope of the partition suit. It is stated that it is only thereafter that the need to file the suit from which this petition arises, was felt.

21. What thus transpires is that though a suit for partition of the estate of Gauri Shankar is pending consideration and which estate *inter alia* also comprise of the share of Gauri Shankar in the *tehbazari* and *puja sewa* and profit thereof of the mandir Shri Kalkaji but a separate suit i.e. the suit from which this petition arises has been filed claiming the said reliefs.

22. On enquiry it is informed that the partition suit is only with respect to the immoveable properties and neither of the defendants also who enjoyed the same status as a plaintiff in a partition suit, have in their written statement, sought partition of the share of Gauri Shankar in mandir Shri Kalkaji. It is also informed that the plaint in the suit for partition was returned for filing in the Court of appropriate pecuniary jurisdiction; that thereafter the plaint was presented in this Court and was admitted; however

on enhancement in pecuniary jurisdiction of this Court, that suit has again been transferred to the District Judge and is now pending at the stage of service.

23. All that I can observe is that the parties, without any application of mind, are engaging in multifarious litigation and separate suits have been preferred with respect to the estate of Gauri Shankar and which are / should be subject matter of one suit for partition.

24. The parties to seriously consider clubbing the two suits to avoid multiplicity.

25. Coming back to the subject petition, it is the contention of the counsel for the petitioner / defendant no.1 that the Will is not subject matter of the partition suit. However on enquiry as to the need for issue framed in the suit with respect to the Will, it is stated that the Will set-up by the petitioner / defendant no.1 is with respect to the immoveable properties also of Gauri Shankar which are admittedly subject matter of partition suit.

26. When by the same document claimed to be the Will of Gauri Shankar, all his properties have been bequeathed, it cannot be said that because only the immovable properties are subject matter of partition suit, Will only qua those and not qua *tehbazari* and *puja sewa* and profit thereof of mandir Shri Kalkaji, shall be proved or not proved in the partition suit. For this reason also it cannot be said that it was incumbent upon the respondents no.1 to 4 / plaintiffs to, in the suit from which this petition arises, seek the relief of declaration.

27. I am even otherwise of the opinion that

- (a) merely because a Will is set-up would not require another person claiming a share in the estate on the basis of succession

to, in a suit for partition, seek cancellation of the Will, so set up, which unless probated or unless admitted by the person suing on the basis of succession, does not bind that person; and,

- (b) it is for the propounder of the Will to, in the defence set-up, plead and prove the Will.

The onus of proof of the Will, it is settled position in law, is on the propounder thereof.

28. The counsel for the petitioner / defendant no.1 has also drawn attention to ***Abdul Rahim Vs. SK. Abdul Zabbar*** (2009) 6 SCC 160 and particularly to para 29 thereof. However the said judgment is also in the context of a gift and admittedly not in the context of Will which as per the Transfer of Property Act is beyond the scope of the word 'instrument'.

29. The counsel for the petitioner / defendant no.1 has next drawn attention to the dicta of Co-ordinate Bench of this Court in ***Sangita Rehan Vs. Surinder Kishan Grover*** 218 (2015) DLT 305 of rejection, as barred by time, of the plaint in a suit for partition filed after 36 years of the death of the father on the ground that the Will was never challenged by the plaintiffs in the suit.

30. I have enquired from the counsel for the petitioner / defendant no.1 whether the said judgment was subject matter of appeal.

31. The counsel states that he has not checked. I have perused the said judgment. The same cannot also have any application to the present case inasmuch as at the stage of Order VII Rule 11 of the CPC, a finding in para 12 of the judgment was given of the plaintiffs in that suit having admitted the Will after the demise of the father.

32. Though the counsel for the petitioner / defendant no.1 states that the respondents no.1 to 4 / plaintiffs herein also have admitted the Will of Gauri Shankar which has been subject matter of earlier litigation but fairly admits that the same is not a ground under Order VII Rule 11 of the CPC and would require trial.

33. Not only is a Will, in my view, in the facts aforesaid not an 'instrument' within the meaning of Section 31 of the Specific Relief Act but even otherwise, it is not as if Section 31 of the Specific Relief Act makes it mandatory for the relief of cancellation to be obtained. If a plaintiff is entitled to the relief claimed without seeking cancellation of any instrument / document on the basis of which the defendant may be denying that relief to the plaintiff, there is no mandate in law for the plaintiff to still seek the relief of cancellation of the instrument / document.

34. The plaintiffs here are claiming the relief of declaration of their title as owners of half share of Ram Swaroop in mandir Shri Kalkaji for performance of *puja sewa* and realisation of *tehbazari* and other profits attached to the temple. It cannot be said that the plaintiffs are not entitled to the said relief for the reason of having not sought cancellation of the Will of Gauri Shankar on which the petitioner / defendant no.1 in the other suit is relying. I may in this regard notice that though Supreme Court in ***I.S. Sikandar Vs. K. Subramani*** (2013) 15 SCC 27 held that a suit for specific performance of an Agreement of Sale of immovable property is not maintainable without seeking the relief of declaration of the cancellation effected of the Agreement to Sell by the defendant as bad but subsequently in ***A. Kanthamani Vs. Nasreen Ahmed*** 2017 SCC OnLine SC 212 it has been held that the said judgment turned on its own facts.

35. There is another aspect of the matter. As per Section 31 also, only that person against whom a written instrument is void or voidable and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, is entitled to seek cancellation thereof. The occasion for the respondents no.1 to 4 / plaintiffs to have any apprehension that the Will if left outstanding may cause them serious injury did not arise as the Will is very much in issue in the other suit between the parties. Not only so, a Will claimed by the defendant, unless probated or proved in some other proceeding, can do no harm, for the need for the plaintiff to have the same being adjudged void or voidable. The plaintiff in such circumstances is entitled to ignore the Will and sue for declaration of his rights.

36. A Division Bench of the High Court of Bombay in *Anandappa Vs. Totappa* AIR 1915 Bombay 132 held that, whether a plaintiff must sue for cancellation of a document under which the defendant in possession claims, depends, upon, whether the onus of proving circumstances establishing its invalidity lies upon him or whether it lies upon defendant to prove circumstances establishing its validity. It was further held that where a plaintiff sues to recover possession of property which the defendant has obtained under a document executed by the plaintiff or under one whom he claims, the plaintiff would have to establish facts entitling him to have the instruments cancelled or set aside; on the other hand, where the defendant has acquired possession under a Deed executed not by the real owner of the property but by someone having a power of disposal under certain circumstances on behalf of the real owner, the onus lies on the defendant to prove the existence of those circumstances and the plaintiff may ignore the Deed in bringing his suit for possession. Applying the said test to the facts of

the present case, as aforesaid, it is the petitioner / defendant no.1 who is claiming title to the share under the Will, and will have to prove the Will. It is the settled position in law (See (i) ***Shashi Kumar Banerjee Vs. Subodh Kumar Banerjee*** AIR 1964 SC 529; (ii) ***Seth Beni Chand Vs. Kamla Kunwar*** (1976) 4 SCC 554; (iii) ***Indu Bala Bose Vs. Manindra Chandra Bose*** (1982) 1 SCC 20; and, (iv) ***Savithri Vs. Karthyayani Amma*** (2007) 11 SCC 621) that the onus to prove the Will is on the propounder thereof i.e. the respondents no.1 to 4 / plaintiffs.

37. I may in this context also notice that the dicta in ***Sangita Rehan*** supra does not appear to take notice of another principle of law as enunciated by the Supreme Court in ***C. Natrajan Vs. Ashim Bai*** (2007) 14 SCC 183 and followed by this Court in ***Ashok Kumar Vs. Rustam*** 227 (2016) DLT 385 (SLP (C) No.14543/16 whereagainst was dismissed on 30th June, 2016) to the effect that where the suit for declaration is coupled with another relief, say of possession which has a larger period of limitation, the relief of possession cannot be denied on the basis of limitation for the relief of declaration having expired. In this light of the matter it appears that a suit for partition, in the event of the Will set up in defence having not been admitted at an earlier point of time, cannot be dismissed on the basis of the relief of the declaration qua the Will having become barred by time.

38. The counsel for the petitioner / defendant no.1 has also drawn attention to the dicta of the Division Bench of this Court in ***Razia Begum Vs. Delhi Development Authority*** 2015 II AD (Delhi) 159 (paras 88 and 92) which is again in the context of the need to seek cancellation of conveyance deed whereunder the property stood conveyed. The same again cannot have any application to a document as a Will.

39. The counsel for the petitioner / defendant no.1 has next contended that the petitioner / defendant no.1 and the predecessor of the respondents no.5&6 / defendant no.2 have since the death of Gauri Shankar in the year 1981 been taking the share of Gauri Shankar in the mandir Shri Kalkaji and the respondents no.1 to 4 / plaintiffs in the plaint have not pleaded as to who received the share of Gauri Shankar after his demise in the year 1981. It is argued that the same amounts to non-disclosure of a cause of action within the meaning of Order VII Rule 11 (a) of the CPC which is also a ground invoked for rejection of the plaint.

40. It is not in dispute that the share in mandir Shri Kalkaji of Ram Swaroop himself was not such which was accruing day-by-day but accrued after 4½ years or eight years or twelve years. Considering the said fact and otherwise also, these are not matters which can be a ground for rejection of the plaint under Order VII Rule 11 of the CPC. Even otherwise, it will have to be examined, whether the principle of estoppel is applicable to recurring rights as the right to *tehbazari* and *puja sewa* and profits thereof of mandir Shri Kalkaji is. As far as I recollect, in the context of mandir, it has already been held that the said *baari* or share in *tehbazari* and *puja sewa* constitutes immoveable property. Reference can be made to (i) **Ram Rattan Vs. Bajrang Lal** (1978) 3 SCC 236; (ii) **Shambhu Charan Shukla Vs. Thakur Ladli Radha Chandra Madan Gopalji Maharaj** (1985) 2 SCC 524; and, (iii) **U.N. Bhardwaj Vs. Y.N. Bhardwaj** (2010) 173 DLT 483.

41. For all the aforesaid reasons, the application of the petitioner / defendant no.1 seeking rejection of the plaint was misconceived as is this petition and has been rightly dismissed.

42. However before parting I may add that the impugned order is very unsatisfactory. It neither discloses any facts nor gives any reasons and merely observes that the objections urged are matter of trial. Non-giving of the reasons raises presumption of non-application of mind. A copy of this order be forwarded to the learned Civil Judge who has authored the impugned order along with copy of impugned order, to be careful in future.

The petition is dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

AUGUST 3, 2017

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(Corrected and released on 23rd September, 2017).

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