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

+ CS(OS) 1900/2013

SANGEETA KHOSLA Plaintiff
Through Mr. Lovish Sharma, Advocate

versus

SUNIL KUMAR & OTHERS Defendants
Through Mr. V.M. Issar with Mr. Vishesh
Issar, Advocates for D-2, 3 and 4.

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Date of Decision: 04th July, 2017

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

1. Today, costs imposed by the previous orders have been paid to learned counsel for defendants.
2. It is pertinent to mention that present suit has been filed for declaration, partition and perpetual injunction with regard to the property no. 16/18, W.E.A., Karol Bagh, New Delhi. Admittedly, the property is owned by late Smt. Kartari Devi, the maternal grandmother of the plaintiff and defendant nos. 1, 5 and 6 and the paternal grandmother of defendant nos. 3 and 4 and mother-in-law of defendant no. 2.
3. It is the case of the defendant nos. 2, 3 and 4 that in accordance with the Gift Deed executed by late Smt. Kartari Devi dated 5th July, 1968, the

entire property was gifted by her to defendant no. 2-widow daughter-in-law of Smt. Kartari Devi. It is further the stand of defendant nos. 2, 3 and 4 that mother of the plaintiff and the defendant nos. 1, 5 and 6 was residing with her husband in the suit property as licensee.

4. Since certain encroachments were alleged to have been made by the parents of the plaintiff, a suit of possession was filed by the present defendant no. 2 being Suit No. 225/1981 which was decreed vide judgment dated 09th April, 1991 by the Court of Mr. S.S. Handa, Sub-Judge, First Class. In the said suit, parents of the plaintiff had denied the validity and legality of the Gift Deed made by Smt. Kartari Devi and had taken the stand that they are the owners of the suit property on the ground that they had inherited 50% of the same on death of Smt. Kartari Devi.

5. It is pertinent to mention that one of the issues framed in the aforesaid suit was whether the present defendant no. 2 had become the owner of the suit property on account of the registered Gift Deed. The relevant portion of the said judgment is reproduced hereinbelow:-

“7. On the pleadings of the parties vide order dt.6.1.82 following issues for trial were framed:

- 1. Whether the pltff. had become the owner of the property in dispute by way of Gift Deed registered on 9.7.68? OPP*
- 2. Whether defdt. no.1 alongwith defdt. no.2 were formerly residing as licensees under the previous owners and subsequently defdt. no.1 became a tenant under the pltff. only in respect of miani on the terms as mentioned in para-5 of the plaint and had vacated the meter room? If so, to what effects? OPP*
- 3. Whether the defdts. have trespassed into the said meter room subsequently after the vacation in the year 1973? OPP*

4. *Whether the suit has been properly valued for the purpose of court fee and jurisdiction and if not, then what is the proper valuation? Onus on the parties.*
5. *Whether the property in dispute was held benami in the name of the mother of defdt no.2 and the actual owner was late Shiv Ram? If so, whether defdt. no.2 is co-owner of the suit property and to what extent? OPD*
6. *Whether defdts. are in possession of the premises in dispute since 1953 and have become owners by way of adverse possession? If so, is the suit barred by time? OPD*
7. *Relief.*

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12. *No case is referred or relief upon by the counsel of the deft. I have carefully gone through the records and case law referred to. My findings on the issues are as follows:*

ISSUE NO.1 & 5

These issues are taken up together being interlinked. The relevant allegations out of which these issues have arisen are that suit property no.16/18 WEA Karl Bagh, New Dehi was initially purchased by Smt. Kartar Devi vide sale deed which is proved on record as Ex.Px. Smt.Kartar Devi (since dead) was mother in law of the plaintiff and mother of the defendant no.2.

She executed allegedly gift deed Ex.P 10 in favour of the pl on 5.7.68. The objection raised by the defendant are that suit property was purchased by late Sh.Shiv Ram the husband of Smt. Kartar Devi on the name of Smt. Kartar Devi as Benami. That the defendant no.2 thus was co-owner of the suit property and secondly that plttf. was not owner of the suit property as no gift deed was ever executed by Smt. Kartar Devi in his favour. It was alleged that the defendant had filed a civil suit for partition of the suit property before Hon'ble High Court of Delhi against the plaintiff but the same was dismissed as withdrawn, on 25.11.81.

Vide testimony of PW 1 and admission of deft. and PW 3 as per Ex. P x. it stands established that suit property was purchased by Sm. Kartar Devi, thus, Benami Transaction

(Prohibition) Act, 1988, legal bars the defendant to raise this contention. This position is also clear from Mithilesh Kumari's case.

Thus Smt. Kartar Devi is the owner of the suit property of her own rights and defendant no. 2, as precluded to claim any rights on the ground of her being legal heir to late Sh Shiv Ram, her father. Smt. Kartar Devi executed a gift deed ex. P 10 in favour of the plaintiff PW 2 as witness to the gift deed testified having signed the original gift deed of which Ex. P 10 is the certified copy. The suit property stands mutated in the name of the plaintiff on the basis of gift deed (ex. P 10). There is nothing on record in-validating the gift deed which was registered on 9.7.68. By this gift deed the plaintiff has become exclusive owner of the suit property whereas to the own admission of defendant no. 2, (as DW 3) she had filed the case in Hon'ble High Court claiming her rights in the suit property and this suit was dismissed. Thus she is estopped from claiming ownership right in the suit property.

In the light of above discussion issue no 1, is decided to the effect that plttf. has become owner of the suit property by way of gift deed Ex. P 10.

Issue No 2 is decided against the defendant no 2 that she does not hold co-owner's right to any extent in the property."

6. Even an appeal being RCA No. 15/1991 was dismissed by Shri Chander Shekhar, learned ADJ vide judgment dated 6th September, 2003.
7. Learned Predecessor of this Court vide the order dated 20th January, 2015 framed a preliminary issue as to whether the present suit is barred by *res-judicata* on account of earlier judgment of the civil court dated 9th April, 1991 which has attained finality.
8. Today, learned counsel for the plaintiff states that the judgment dated 9th April, 1991 is not final as till date it has never been urged that the the gift deed in favour of donee-defendant no. 2 was conditional and consequently

by virtue of Sections 122 and 123 of the Transfer of Property Act, the document could not operate as a gift. In support of his submission, he relies upon the judgment of the Supreme Court in ***Renikuntla Rajamma Vs. K. Sarwanamma***, AIR 2014 SC 2906, wherein it has been held as under:-

“18. We are in respectful agreement with the statement of law contained in the above passage in K. Balakrishnan case [(2004) 1 SCC 581] . There is indeed no provision in law that ownership in property cannot be gifted without transfer of possession of such property. As noticed earlier, Section 123 does not make the delivery of possession of the gifted property essential for validity of a gift. It is true that the attention of this Court does not appear to have been drawn to the earlier decision rendered in Naramadaben Maganlal Thakker [(1997) 2 SCC 255] where this Court had on a reading of the recital of the gift deed and the cancellation deed held that the gift was not complete. This Court had in that case found that the donee had not accepted the gift thereby making the gift incomplete. This Court further held that the donor cancelled the gift within a month of the gift and subsequently executed a will in favour of the appellant: on a proper construction of the deed and the deed cancelling the same this Court held that the gift in favour of the donee was conditional and that there was no acceptance of the same by the donee. The gift deed conferred a limited right upon the donee and was to become operative after the death of the donee. This is evident from the following passage from the said judgment: (Naramadaben Maganlal Thakker case [(1997) 2 SCC 255] , SCC p. 258, para 7)

“7. It would thus be clear that the execution of a registered gift deed, acceptance of the gift and delivery of the property, together make the gift complete. Thereafter, the donor is divested of his title and the donee becomes the absolute owner of the property. The question is whether the gift in question had become complete under Section 123 of the TP Act? It is seen from the recitals of the gift deed that Motilal Gopalji gifted the property to the respondent. In other words, it was a conditional gift. There is no recital of acceptance nor is there any evidence in proof of acceptance. Similarly, he had specifically stated that the property would remain in his possession till he was alive. Thereafter, the

gifted property would become his property and he was entitled to collect mesne profits in respect of the existing rooms throughout his life. The gift deed conferred only limited right upon the respondent donee. The gift was to become operative after the death of the donor and he was to be entitled to have the right to transfer the property absolutely by way of gift or he would be entitled to collect the mesne profits. It would thus be seen that the donor had executed a conditional gift deed and retained the possession and enjoyment of the property during his lifetime.”

9. On the other hand, learned counsel for the defendant nos. 2, 3 and 4 states that the present suit is barred by *res judicata* and the decree dated 09th April, 1991 stands executed. He points out that even the objections to the Execution Petition and Execution Second Appeal filed by the brother of the plaintiff had been dismissed as withdrawn. He emphasises that in the objections, the brother of the plaintiff had taken the plea that the plaintiffs are tenant and not co-owners.

10. He also emphasises that the judgment of the Supreme Court in ***Renikuntla Rajamma*** (supra) is inapplicable to the facts of the present case as the donee in the present case has accepted the gift deed.

11. Having heard learned counsel for the parties this Court is of the view that it is first essential to analyse the object and scope of Section 11 CPC. The said section reads as under:-

“11. Res judicata — *No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*

Explanation I.—The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

12. In the opinion of this Court, Section 11 CPC incorporates the rule of conclusiveness of the judgment and the principle that no person should be vexed twice over the same cause of action. It is settled law that once the matter which was a subject matter of lis stood determined by a competent Court, no party can thereafter reopen it in a subsequent litigation.

13. Section 11 CPC operates as a bar to the trial of the suit or issue if the matter in the suit was directly and substantially in issue in the former suit between the parties under whom they claim to have been litigating under the same title in a Court competent to try the subsequent suit in which such an issue has been raised. The Supreme Court in **Ramchandra Dagdu**

Sonavene (Dead) by LRS. And Ors. Vs. Vithu Hira Mahar (Dead) by LRs. And Ors., (2009) 10 SCC 273 has held as under:-

42. It is well known that the doctrine of res judicata is codified in Section 11 of the Code of Civil Procedure. Section 11 generally comes into play in relation to civil suits. But apart from the codified law, the doctrine of res judicata or the principle of res judicata has been applied since long in various other kinds of proceedings and situations by courts in England, India and other countries. The rule of constructive res judicata is engrafted in Explanation IV of Section 11 of the Code of Civil Procedure and in many other situations also principles not only of direct res judicata but of constructive res judicata are also applied, if by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceedings between the same parties.

43. The principle of res judicata comes into play when by judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implications even then the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of the law, to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue and, therefore, is taken as decided. (See Workmen v. Cochin Port Trust).

44. In Swamy Atmananda v. Sri Ramakrishna Tapovanam it was held by this Court: (SCC p. 61, paras 26-27)

“26. The object and purport of the principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis

stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute book with a view to bring the litigation to an end so that the other side may not be put to harassment.

27. The principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment.”

45. When the material issue has been tried and determined between the same parties in a proper suit by a competent court as to the status of one of them in relation to the other, it cannot be again tried in another suit between them as laid down in Krishna Behari Roy v. Brojeswari which is followed by this Court in Ishwar Dutt v. Collector (LA) wherein the doctrine of “cause of action estoppel” and “issue estoppel” has been discussed. It is laid down by this Court that if there is an issue between the parties that is decided, the same would operate as a res judicata between the same parties in the subsequent proceedings. This Court in Isher Singh v. Sarwan Singh has observed: (AIR p. 951, para 11)

“11. We thus reach the position that in the former suit the heirship of the respondents to Jati deceased (a) was in terms raised by the pleadings, (b) that an issue was framed in regard to it by the trial Judge, (c) that evidence was led by the parties on that point directed towards this issue, (d) a finding was recorded on it by the appellate court, and (e) that on the proper construction of the pleadings it would have been necessary to decide the issue in order to properly and completely decide all the points arising in the case to grant relief to the plaintiff. We thus find that everyone of the conditions necessary to satisfy the test as to the applicability of Section 11 of the Civil Procedure Code is satisfied.”

14. The plaintiff's argument that the point now sought to be urged had never been agitated earlier, cuts no ice as Explanation IV to Section 11 CPC clearly stipulates that in the matter which might or ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Consequently, the point urged today by the plaintiff is barred on the principle of constructive res judicata.

15. In fact, the point urged by learned counsel for the plaintiff today is not even mentioned in the present plaint!

16. The argument of the defendants that the legal heirs of Smt. Ved Wati have taken contradictory and convenient stands in different proceedings before different forums has not even been rebutted by the plaintiff.

17. This Court is also of the view that the present suit constitutes re-litigation. A Division Bench of this Court in ***N.D.Qureshi Vs. Union of India & Another, 2008 (13) DRJ 547*** to which this Court was a party has observed as under:-

“12. Moreover, from the above narrated facts, it would be apparent that the petitioner has been re-litigating for a considerable number of years. In our view on the principle of res judicata and re-litigation the petitioner is even barred from raising new pleas for the same old relief. The Hon’ble Supreme Court in K.K.Modi Vs. K.N.Modi and others, reported in (1998) 3 SCC 573 has held that it is an abuse of the process of the court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. This re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of the court. The Hon’ble Supreme Court

has further held that if a spurious claim is made in a case, it may also amount to an abuse of process of the court. In our view, frivolous or vexatious proceedings amount to an abuse of the process of the court especially where the proceedings are absolutely groundless-like in the present case.”

(emphasis supplied)

18. Keeping in view the aforesaid, this Court is of the opinion that the present suit is barred by *res judicata* and as the same constitutes re-litigation. Consequently, present suit is dismissed with costs of Rs.1 lac to be paid to the defendants No.2, 3 and 4 within four weeks.

MANMOHAN, J

JULY 04, 2017

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