

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

+ **RSA No.162/2017**

% **31st May, 2017**

SMT. GYATRI DEVI Appellant
Through: Ms. Monica Kapoor, Advocate.
versus

SH. JAG RAM & ANR. Respondents

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.22129/2017 (exemption)

1. Exemption allowed subject to just exceptions.
C.M. stands disposed of.

**RSA No.162/2017 and C.M. Nos. 22127/2017 (stay) & 22128/2017
(for additional evidence)**

2. This Regular Second Appeal under Section 100 of Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the judgments of the courts below; of the Trial Court dated 17.5.2016 and the First Appellate Court dated 29.11.2016; by which the suit for possession and *mesne* profits with respect to suit property bearing no.Y-330, Mangol Puri, Delhi has been decreed and as is shown in red colour in the site plan Ex.DW1/D. Trial court by its

judgment dated 17.5.2016 decreed the suit for possession but dismissed the suit seeking recovery of *mesne* profits. The first appellate court in the appeal filed by the respondents/plaintiffs by allowing the appeal passed a decree of *mesne* profits at Rs.6,000/- per month *pendente lite* and future till possession is recovered from the appellant/defendant. The trial court by its judgment dated 17.5.2016 decided two suits. One suit was filed by the present appellant Smt. Gayatri Devi and which was for declaration, permanent and mandatory injunction with respect to the suit property. The second suit was the suit filed by the present respondents for permanent and mandatory injunction and recovery of *mesne* profits with respect to the suit property. The suit which was filed by the respondents herein being the suit no.21/2012 was decreed only with respect to one property being Y-330, Mangol Puri, Delhi. Three appeals were filed against the judgment of the trial court dated 17.5.2016, two appeals being filed by the present appellant with respect to decreeing of the suit of the respondents/plaintiffs for the suit property and the third appeal was filed by the present respondents seeking the relief of recovery of *mesne* profits and which relief was declined by the trial court vide its judgment dated 17.5.2016.

3. The facts of the case are that the respondents/plaintiffs Sh. Jag Ram and Sh. Amar Nath filed the subject suit pleading that they

are the owners of the suit property and that the present appellant Smt. Gayatri Devi is the widow of late Sh. Shiv Ram and is in illegal possession after termination of her license. The appellant was married with Sh. Shiv Ram in the year 1998 and Sh. Shiv Ram died on 28.9.2005. Sh. Jag Ram/respondent no.1 is the brother-in-law (jeth) of the appellant Smt. Gayatri Devi. The appellant was residing along with her late husband in the suit property and it was pleaded by the appellant that there was a joint family of the appellant and her husband with the family of the respondents and in-laws. Appellant pleaded that the suit property was a joint family property though it was acquired in the name of the respondent no.1/Sh. Jag Ram. It was the case of the appellant that after the death of her husband Sh. Shiv Ram partition took place and as per this oral partition, the suit property was allotted to the appellant and her two children as their share of the joint family properties.

4. The respondents pleaded that it is the respondent no.1 who is the absolute owner of the suit property. Respondent no.2 is the son and attorney holder of the respondent no.1. It was pleaded by the respondents that the suit property was purchased by the respondent no.1 from his own earnings and when the suit property was purchased the husband of the appellant was only about 7-8 years of age. Father of

the parties had no source of income at that time. For the completion of narration it is required to be stated that two properties Y-330 and Y-331 were the subject matter of the suit filed by the respondents but the present appeal concerns only the property no. Y-330, and only with respect to which the suit was decreed by the trial court vide its judgment dated 17.5.2016.

5. After the pleadings were complete, the trial court framed the following issues:-

- “1. Whether plaintiffs are entitled for relief of declaration as prayed for? OPP.
2. Whether plaintiffs are entitled for relief of permanent injunction as prayed for? OPP.
3. Whether plaintiffs are entitled for relief of mandatory injunction as prayed for? OPP
4. Whether suit (21/12) is without the cause of action? OPP.
5. Whether defendants are entitled for decree of mandatory injunction as prayed for regarding property no.Y-330? OPD.
6. Whether defendants are entitled for permanent injunction as against plaintiff as prayed for? OPD
7. Whether defendants are entitled for any future user/occupancy charges/mesne profits/damages of the suit property no.Y-330 as prayed for? OPD.
8. Relief.”

6. Evidence was thereafter led by the parties and the documents filed and proved in evidence, as also the depositions of the witnesses, are referred to in paras 10 and 11 of the judgment of the trial court and which paras read as under:-

“DEFENDANTS EVIDENCE

10. Defendants in order to prove their case have examined themselves. Defendant no.1 has tendered his evidence by way of affidavit Ex.DW-1/1 in suit no.43-A/11 and Ex.PW-1/1 in suit no.21/12 and has relied upon following documents.

1. Title documents of property no.Y-330, Mangol Puri, Delhi are Ex.DW-1/A colly.
2. Copy of title documents of property no.Y-331, Mangol Puri are Mark D/A colly.
3. Affidavit executed by tenants of property no.Y-331, Mangol Puri, are DW-1/B Colly.
4. GPA and Will executed by defendant in favour of his son with respect to suit property is Ex.DW-1/C (colly)
5. Site plan is Ex.PW-1/D in suit no.21/12 and shall be referred a DW-1/D.
6. Mark A is election ID Card.

11. Defendant no.2 has examined himself as PW-2 in suit no.21/12. He shall be referred as DW-2. He has relied upon the same documents as relied upon by DW-1.”

7. The trial court as per its judgment dated 17.5.2016 held that the appellant failed to prove that there was any partition by which the suit property was allotted to the appellant and her children. Respondent no.1 as DW-1 proved the original documents of the suit property executed in his favour by one Sh. Mushtaq on 1.8.1981 being the agreement to sell, general power of attorney, affidavit etc and accordingly the trial court accepted the ownership of the respondent no.1 over the suit property. The trial court also notes that admittedly the suit property being Y-330 was purchased in the name of the respondent no.1 and not in the name of the deceased husband of the appellant. Trial court also notes that the father-in-law of the appellant, being also the father of the respondent no.1 expired in the year 2001 and though the properties were alleged to have been partitioned in the

year 2000, it could not be believed that the appellant had no knowledge of the partition directly or through her husband till the death of the husband of the appellant in the year 2005. Trial court notes that appellant as PW-1 had taken contradictory stands in evidence because at one point of time it was stated by the appellant that the father-in-law had partitioned the property in his lifetime whereas on the other hand the appellant deposed that prior to the death of her husband in the year 2005 there was no partition. Accordingly the trial court held in favour of the respondent no.1 that it was the respondent no.1/Sh. Jag Ram who was the owner of the suit property and he continued to remain the same because there was no oral partition allotting the suit property to the appellant and her children.

8. The first appellate court as per its judgment dated 29.11.2016 while accepting the findings of the trial court has also simultaneously decreed the suit for *mense* profits and which relief was denied by the trial court. The first appellate court in this regard has made the relevant observations in para 8 of its judgment and which para 8 reads as under:-

“8. In the light of above mentioned facts which have not been explained by Gayatri Devi during arguments, it is reflected and I am of the considered opinion that a contrary presumption has to be considered in such circumstances, that Gayatri Devi has not to state anything in this regard. Such conduct on the part of Gayatri Devi implies and infers that she is not disputing the ownership and title deeds of Jag Ram as there is no evidence led by her during the entire trial. This submission is further strengthened

from the fact that Gayatri Devi nowhere during the entire trial of both the cases took any steps in this regard. With these background, the trial court record and impugned judgment is perused again. Vide impugned judgment, Ld. Trial court has considered all these aspects and more particularly the issue pertaining to ownership of Gayatri Devi and I am of the considered opinion that Ld. Trial court has rightly come to the conclusion that she has failed to establish any prima facie legal right in her favour qua the suit property in question. Thus, Ld. Trial court has rightly observed that she is neither aware from whom the property was purchased or how and when the documents have been manipulated nor she has been successful in establishing her contention that oral partition had taken place. It is further reflected from the record that not even a single document or oral evidence from either side has come on record vide which it could be considered that partition in between the parties had taken place. Thus, I concur with the findings given by Ld. Trial court while passing the impugned judgment that Gayatri Devi has failed to establish her legal right qua the suit property in question and has failed to discharge the burden of proving her case. Thus, all the grounds taken by the Gayatri Devi vide these two appeals are not tenable in the eyes of law. I do not find any illegality or infirmity in the impugned judgment dated 17.05.2016. Hence, the appeals filed by Gayatri Devi bearing RCA No.19/16 and RCA No.20/16 are dismissed.”

9. A second appeal under Section 100 CPC lies only if there is a substantial question of law. Arriving at conclusions on the basis of evidence on record falls in the realm of the jurisdiction of the trial court and the first appellate court, and such findings and conclusions will not raise a substantial question of law unless such findings and conclusions are shown to be perverse or in complete contradiction or in variance with the evidence on record. The courts below have rightly held that once the suit property was purchased in the name of the respondent no.1/Sh. Jag Ram, the onus of proof that there was a joint family and there was an oral partition by which the suit property was allotted to the appellant and her children, was upon the appellant, and the appellant miserably failed to discharge this onus because no

documentary evidence was filed to prove that either at all there was an oral partition pursuant to which the suit property was allotted to the appellant and her children.

10. An application being C.M. No.22128/2017 has been filed by the appellant in this Court for leading additional evidence under Order XLI Rule 27 CPC and by this application the appellant seeks to place on record affidavits of family members that there was an oral family settlement and partition with respect to the joint family properties, however, the object of Order XLI Rule 27 CPC is not to allow a party to lead evidence once the suit has reached to the stage of second appeal, and more so evidence which is only a convenient evidence being self-serving oral statement of certain witnesses given on affidavits as regards a partition taking place. Such fragile and flimsy evidence cannot be permitted by this Court at the stage of second appeal under Section 100 CPC and that too when admittedly such affidavits were always available for being proved in accordance with law. Also, I would like to note that by the application of additional evidence the appellant also seeks to prove on record rent agreements with respect to tenants, however, it is seen that rent agreements are with respect to tenants in property no.Y-331 and the property no.Y-331 is not the subject matter of the present appeal

inasmuch as subject matter of the preset appeal as also the judgments and decrees of the courts below are with respect to property no.Y-330. Para 27 of the judgment of the trial court dated 17.5.2016 decreeing the suit of the respondents/plaintiffs reads as under:-

“RELIEF

27. The suit of the plaintiff bearing no.43-A/11 is dismissed. The suit of the defendants bearing no.21/12 is allowed for the relief of mandatory and permanent injunction. Plaintiff no.1 is directed to hand over the peaceful vacant possession of the portion in her possession as shown red in colour in the site plan Ex.DW-1/D of the property no.Y-330, Mangol Puri, Delhi to defendants. Plaintiff no.1 is further permanently restrained from inducting any tenant in the suit property or creating any third party interest in the suit property i.e portion in her possession as shown red in colour in the site plan Ex.DW-1/D of the property no.Y-330, Mangol Puri, Delhi. No order as to costs. Decree sheet be prepared accordingly. File be consigned to record room.”

11. In view of the above discussion it is seen that no substantial question of law arises for this regular second appeal to be entertained under Section 100 CPC. Dismissed.

MAY 31, 2017
Ne/ib

VALMIKI J. MEHTA, J