

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

+ **RFA No.638/2017**

% **21st July, 2017**

SH. HEMANT KUMAR AND ANOTHER Appellants

Through: Mr. Arun Kumar Singh,
Advocate.

versus

SH. RAJ KUMAR Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.25551/2017 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

C.M. No.25552/2017 (for condonation of delay)

2. For the reasons stated in the application, delay of 959 days in filing the appeal is condoned and this is especially for the reason that the sole defendant in the suit did not appear, did not cross-examine the witnesses of the appellants/plaintiffs and nor lead evidence, and as is noted by the trial court in paras 4 and 5 of the

judgment of the trial court. Thus once the respondent/defendant was *ex-parte* there is no prejudice caused to him by condoning the delay.

This application is therefore allowed and delay in filing the appeal is condoned.

RFA No.638/2017 and C.M. No.25550/2017 (stay)

3. This Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is filed by the appellants/plaintiffs impugning the judgment of the trial court dated 27.8.2014. As already stated above, since the defendant in the suit was *ex-parte*, and he did not lead evidence, there is hence no need of issuing any notice in the appeal to the respondent/defendant.

4. The facts of the case are that the appellants/plaintiffs filed the subject suit for partition and injunction pleading that the suit property was originally owned by Sh. Ladhu Ram, the grandfather of the parties. The suit property is the property no. 5348, Gali No.68, Reghar Pura, Karol Bagh, New Delhi-110005 built on a plot of 75 sq. yds. It was pleaded by the appellants/plaintiffs that Sh. Ladhu Ram by his Will dated 15.6.1957 bequeathed his property in favour of his son Sh. Hira Lal and life interest in the property to his widow Smt. Amari

Devi. It is pleaded that after the death of Smt. Amari Devi, the plaintiffs and defendant, who are the children of late Sh. Hira Lal, have become co-owners of the suit property and hence the suit for partition be decreed with respect to the suit property.

5. As already stated above, the sole defendant in the suit did not put in appearance, did not cross-examine the witnesses of the appellants/plaintiffs and also did not lead evidence. In any case, by decreeing of the suit, no prejudice is caused to the respondent/defendant because respondent/defendant on grant of the partition decree will in fact be held entitled to 1/3rd share in the suit property.

6. The court below has dismissed the suit by observing that the appellants/plaintiffs failed to file any documents to show that Sh. Hira Lal was the owner of the suit property. This is so observed in paras 4 to 8 of the judgment of the trial court and which paras read as under:-

“4. To prove his case, plaintiff examined himself as PW-1 and tendered his evidence by way of affidavit Ex.PW1/1. He further relied upon document i.e. site plan exhibited as Ex.PW1/A, death certificate of Sh. Hira Lal exhibited as Ex.1/C, portion shown in green colour in site plan as Ex.PW1/D. There is no document on the record which is exhibited as Ex.PW1/B. Defendant was given opportunity to cross examine PW-1.

However, Defendant did not appear despite repeated opportunities. Therefore, by order dated 27.05.2014 opportunity for cross examination by defendant to PW-1 stood forfeited and in terms of the statement made by Id. counsel for the plaintiff, P.E. was closed on the same day.

5. On 16.07.2014 this court observed that despite repeated calls none appeared on behalf of the defendant and finally, by order dated 17.07.2014 D.E. was also closed as defendant did not come forward to lead evidence.

6. I have gone through the entire records of the case including pleadings of the parties.

7. Since in this case plaintiff has not brought any document pertaining to the possession and title qua the suit property and as he only brought site plan and death certificate of his late father Sh. Hira Lal which are insufficient to prove the title, rights qua the suit property of the plaintiff. Plaintiff has also not proved any Will executed in favour of Sh. Hira Lal as no such document has been brought on the record except the photocopy. This document has also not been proved in accordance with Section 68 of the Indian Evidence Act.

8. During arguments, Id. counsel for the plaintiff submits that since the Will executed in favour of Sh. Hira Lal is more than thirty years old document, therefore presumption goes in favour of the defendant about the duly execution of this document. This Court does not agree with the submissions made by Id counsel for the plaintiff as the presumption has been given in Section 90 of the Indian Evidence Act, where certain conditions have to be fulfilled and these conditions have not been fulfilled as original document has also not been brought on the record. Therefore, presumption as per Section 90 of the Indian Evidence Act is not in favour of the plaintiff.”

7. Learned counsel for the appellants/plaintiffs prays that this Court should exercise its powers under Order XLI Rule 27 CPC and take on record the judgment passed by the Court of Sh. Lal Singh, ADJ, Delhi in RCA No.59/2005 titled as ***Shri Hira Lal Vs. Smt. Prem Lata*** decided on 29.7.2006. Once this judgment is seen, and this judgment is passed in the suit filed by Sh. Hira Lal s/o Sh. Ladhu Ram, it is clear that the deceased grandfather Sh. Ladhu Ram was the

owner of the suit property. Since the respondent/defendant was *ex-parte* in the suit, I exercise my powers under Order XLI Rule 27 CPC as per the oral request made on behalf of the appellants/plaintiffs and am considering the said judgment dated 29.7.2006. The relevant paras of the judgment dated 29.7.2006 decreeing the suit of Sh. Hira Lal are paras 7, 9 and 10 and these paras read as under:-

“7. Appellant examined DW2 Jaipal Singh Patwari who deposed as under “I have brought the summoned record of suit property khasra no.372 area 150 sq. yards situated at Basti Regar C-block Karol Bagh. As per the record this land originally was in the name of Sh. Ladhu Ram who was owner of one half and the other half was in the name of Sh. Hardasmal, S/o Ganga Das. After the death of Ladhu Ram property was mutated in the name of Smt. Amri Devi W/o Ladhu Ram through mutation no.19711 dated 17.11.61 and in our record the property still exists in the name of Smt. Amri Devi who is the co-owner to the extent of one half. The above mutation is Ex.DW2/1 and the frad jama bandi of the year 1975-76 is Ex.DW2/2. This mutation was affected on the basis of the Will. I cannot say whether the will referred by me in our record. I cannot produce the same as the same is not traceable.

XXXXX XXXXX XXXXX

9. As per the above deposition of DW2, the mutation no.19711 dated 17.11.61 in favour of Amri Devi was affected on the basis of will. In his cross-examination, it is not extracted from him that it was a different will to Ex.PW1/2 on the basis of mutation was effected in favour of Amri Devi. There is no suggestion to DW2 that mutation was not affected on the basis of will. Thus, this testimony has gone un rebutted. Had the mutation been on intestate basis then there were two alive married daughter and one son besides widow of Ladhu Ram. All the heirs were of class I and were entitled 1/4th share each simultaneously immediately after the death of Sh. Ladhu Ram. The property could not have been mutated in the name of widow only. Thus the authorities did not enter the name of daughters and son of deceased Ladhu Ram because of the will as stated by DW2. The testimony of DW2 could not be impeached to falsify his statement that mutation was based on the will. No suggestion has been given that there was any other basis of mutation in favour of Amri Devi. PW1 did not know about execution of will Ex.PW1/2. PW1 claimed that will Ex.PW1/2 is

forged or fabricated document. Plaintiff has failed to prove that the will Ex.PW1/2 is forged and fabricated. Therefore, it has become quite clear that the mutation in favour of Amri Devi was effected on the basis of will Ex.PW1/2. If it was same will it has provision of inheritance of entire property to son i.e., appellant after the death of Amri Devi. Ld. Trial court has not dealt a very important aspect as to why other class I legal heirs of Ladhu Ram were ignored from inheritance when only the name of Amri Devi was entered in mutation. The preponderance of evidence is in favour of probability of will with terms shown in copy of will Ex.PW1/2. Appellant has produced certified copy of will on record during hearing of appeal, copy of which is already on trial court record as Ex.PW1/2. Now if a document is relied it is to be relied as whole, if rejected it has to be rejected whole. The same will could not be accepted to the extent in favour of Amri Devi and rejected to the extent in favour of the appellant. Ld Trial Court did not give any finding that basis of mutation in favour of Amri Devi was other than the will stated by DW2. There is no finding that DW2 has deposed false that mutation was affected on the basis of will but on some other basis. Plaintiff failed to lead any cogent evidence to establish any other basis of mutation. Because appellant has alleged that mutation was affected on the basis of will. In correspondence of para no.2 of replication, plaintiff has not claimed specifically that Smt. Asha Devi had interest according to will dated 15.6.1957. The existence of will is not disputed but alleged it is forged. But there is no evidence to establish forgery in will by plaintiff. Thus, Ld. Trial Court has fallen in error to ignore the fact of mutation on the basis of will. The para no.22, 23, 24 and 25 of the impugned judgment dt. 16.8.95 are sufficient to express the view of Ld. Trial Court. Hence, the same are reproduced as following:-

“22. It is further stated by him that this mutation was effected on the basis of a will but the same will cannot be produced as the same was not traceable in the record.

23. However, it was for the defendant to prove contents of this will after leading evidence as per law.

24. Section 90 of Evidence Act provides that where any document purporting to be 30 years old is produced from the proper custody, the court may presume that the signature and every part of such document is in the handwriting of any particular person and the document was duly executed and attested by the person, by whom it purports to be executed and attested.

25. However, in the present case original will was never produced in the court. Defendant alleged that original of the will was with Smt. Amri Devi meaning thereby he was not in the possession of the original will. Therefore, he filed mere a photocopy, but at the same time it has to be seen that plaintiff has alleged that the will was forged and fabricated. In that situation, plaintiff was to be given a proper opportunity to assail this will, but defendant did not prove even any copy of this will, after taking

permission from the court to lead secondary evidence. In these circumstances, I come to the conclusion that defendant failed to establish the fact that he became absolute owner of the property on the basis of any will executed by late Sh. Ladhu Ram. There is no other defence on the part of the defendant.”

10. However, on perusal of affidavit of DW1, the copy of affidavit has been exhibited Ex.PW1/2 in para no.9. In cross-examination, its existence is not disputed but only suggested that said will is forged and fabricated documents. Therefore, it appears that Ld. Trial court lost sight of this fact. Further what is the evidentiary value of the copy of will Ex.PW1/2. The case of appellant/defendant is that original will was with his mother as he was very young child. Subsequently, it is reported from DDA not traceable. In other words, the original will is lost or it is in possession of respondent/plaintiff i.e., adverse party given by Ld. Smt. Amri Devi. In both condition, appellant was entitled to secondary evidence under clause (a) and (c) of section 65 of the Indian Evidence Act. When document is not traceable or lost or in possession of opposite party, the original cannot be produced. Now question arises as to what is secondary evidence. According to section 63(1) of the Evidence Act the certified copies given under the provisions hereinafter contained. The copy of will in this case is certified by Kanoongo the government officer as required under section 79 of Indian Evidence Act raising presumption of the truthfulness of the content of document as given in certified copy, as same being admissible. Thus document Ex.PW1/2 copy of will which was shown placed on record has to be presumed to be true in all respect and excludes the oral evidence of plaintiff/respondent u/s 91 of the Evidence Act. The appellant has also placed Hindi version of Will in Urdu language. Thus, in terms of will, the defendant/appellant has become the absolute owner. Now, no need to repeat that Amri Devi inherited suit property according to the said will dt. 5.6.57. Thus the first portion is answered in affirmative.” (underlining added)

8. Learned counsel for the appellants/plaintiffs relies upon the judgment delivered by this Court in the case of ***Bhagwat Parshad Aggarwal Vs. Hans Raj Banga (Deceased) & Anr. 190 (2012) DLT 203*** to argue that the judgment in an earlier case can be taken as evidence of title with respect to a property. In the judgment in the case of ***Bhagwat Parshad Aggarwal (supra)*** this Court has referred to

two judgments of the Supreme Court and held that a judgment passed with respect to title to a property is a very relevant evidence as per Section 13 of the Evidence Act. Para 8 of the judgment in the case of ***Bhagwat Parshad Aggarwal (supra)*** reads as under:-

“8. I may note that though a judgment may not be inter parties and yet the same is binding on a person who is not a party to the earlier litigation when the issue of title is decided in the earlier litigation. Two Division Benches of the Supreme Court, of four Judges and three Judges, in the cases of ***Sital Das Vs. Sant Ram and Ors. AIR 1954 SC 606*** and ***Shrinivas Krishnarao Kango Vs. Narayan Devji Kango & Ors. AIR 1954 SC 379*** have so held that a judgment which holds that a person is an owner, such a judgment is very much admissible in evidence to show assertion of title inasmuch as the judgment is a transaction pertaining to the subject matter of the dispute under Section 13 of the Indian Evidence Act, 1872. In my opinion, this is another reason to hold that respondent No.1/plaintiff is owner of the subject property, and the challenge which is led by the appellant/objector is without any basis.”

9. Therefore in view of the fact that there is an earlier judgment dated 29.7.2006 holding Sh. Hira Lal to be the owner of the suit property on the basis of the Will dated 15.6.1957, and which is also relied upon by the appellants/plaintiffs in this case, thus applying the ratio in the case of ***Bhagwat Parshad Aggarwal (supra)*** and the ratios of the judgments of the Supreme Court in the cases of ***Sital Das Vs. Sant Ram and Ors. AIR 1954 SC 606*** and ***Shrinivas Krishnarao Kango Vs. Narayan Devji Kango & Ors. AIR 1954 SC 379***, it is held that appellants/plaintiffs had proved that the suit property originally

belonged to the grandfather of the parties Sh. Ladhu Ram, who had executed his Will dated 15.6.1957 in favour of Sh. Hira Lal with life interest to his widow Smt. Amari Devi and accordingly Sh. Hira Lal became owner of the suit property and therefore the parties to the suit being the children of Sh. Hira Lal are accordingly owners of 1/3rd share each in the suit property on the death of Smt. Amari Devi. Therefore, the appellants/plaintiffs are entitled to a decree of partition holding that the two appellants/plaintiffs and the sole defendant/respondent are each entitled to 1/3rd share in the property.

10. In view of the above discussion, this appeal is allowed. Impugned judgment of the trial court dated 27.8.2014 is set aside. The suit for partition is decreed by passing a preliminary decree declaring two appellants/plaintiffs as 1/3rd owners each in the suit property and the respondent/defendant also as 1/3rd owner in the suit property.

11. Parties to appear before the District & Sessions Judge (Central) Tis Hazari Courts, Delhi and the District & Sessions Judge will mark the suit to a competent court for further disposal for passing of the final decree.

JULY 21, 2017/ Ne

VALMIKI J. MEHTA, J