

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

+ **RSA No.2/2017**

% **Reserved on: 18<sup>th</sup> September, 2017**  
**Pronounced on: 25<sup>th</sup> September, 2017**

ARUN GANGULI ..... Appellant

Through: Ms. Neela Gokhale and Mr.  
Ilam Pridi, Advs.

Versus

AMARESH GANGULI (DECEASED) THROUGH HIS LEGAL  
HEIRS ..... Respondents

Through: Respondent no.2 in person.

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

To be referred to the Reporter or not?

**VALMIKI J. MEHTA, J**

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit, impugning the concurrent judgments of the courts below; of the trial court dated 20.12.2012 and the first appellate court dated 22.9.2016; by which the suit filed by the appellant/plaintiff for mandatory injunction against the defendant/Sh. Amaresh Ganguli to vacate the first floor of the property being House No.A-16, Chitrangan

Park, Kalkaji, New Delhi admeasuring 320 sq. yds. and handover its possession to the appellant/plaintiff, has been dismissed. Appellant/plaintiff had also claimed *mesne* profits till the delivery of possession.

2. The facts of the case are that the appellant/plaintiff pleaded that he was the owner of the entire property A-16, Chitranjan Park, New Delhi (hereinafter referred to as the suit/subject property) and which was leased to him in terms of a lease deed dated 27.9.1976 by the Ministry of Rehabilitation, Government of India. It was pleaded by the appellant/plaintiff that he had constructed the ground floor portion and occupied the same with his family members and since when he is residing on the ground floor with his family members. It was further pleaded in the plaint by the appellant/plaintiff that he got a plan sanctioned for construction of the first floor in the year 1983 and raised construction thereon in the year 1984. The defendant in the suit was pleaded to be the younger brother of the appellant/plaintiff. I may note that the original defendant in the suit Sh. Amaresh Ganguli expired during the pendency of the proceedings and he was substituted by his legal heirs who are the respondents herein. Reference to the

defendant therefore will, as per the context, mean and include reference to the original defendant or the present respondents. It was pleaded in the plaint that since the defendant was a real younger brother of the appellant/plaintiff and he was staying at the rented house and which was to be vacated hence the appellant/plaintiff allowed the defendant to occupy the first floor of the suit property for some time. It was pleaded that licence of the defendant was terminated initially orally and thereafter by means of a notice dated 18.10.1988. Since the defendant failed to vacate the house, the subject suit for possession and *mesne* profits came to be filed.

3. The defendant contested the suit and pleaded that the appellant/plaintiff was not the owner of the suit property. It was pleaded that the suit property was leased to the father of the parties Sh. Ashutosh Ganguli by the Ministry of Rehabilitation, Government of India vide agreement dated 28.4.1969 and which was duly registered with the Sub-Registrar at Serial No. 2931 in Additional Book No.1, Volume No. 2177 at pages 174-180 on 30.4.1969. It was pleaded that the father of the parties Sh. Ashutosh Ganguli had paid the cost of the plot being the premium amount as also other charges totaling to

Rs.1920+1097+144 as stated in the lease agreement dated 28.4.1969. It was also pleaded that further charges towards the ground rent of the property were also paid by the father Sh. Ashutosh Ganguli. It was pleaded in the written statement by the defendant that the father Sh. Ashutosh Ganguli expired intestate on 4.4.1971 leaving behind a total of 9 legal heirs i.e his widow Smt. L. Ganguli, his sons being the two parties to the present suit namely Sh. Arun Ganguli and Sh. Amaresh Ganguli and the third son Sh. Ashok Ganguli and five daughters namely Smt. Swati Chatterjee, Smt. Meena Banerji, Smt. Shukla Bhattacharya, Smt. Meera Mukherji and Smt. Shubhra Banerji. It was pleaded that all the legal heirs of late Sh. Ashutosh Ganguli were the joint owners of the suit property. It was pleaded that since the appellant/plaintiff said that he was working with the Government of India and he could therefore get a house building loan from the Government of India, therefore, all the legal heirs of the father Sh. Ashutosh Ganguli agreed that the property be mutated in the name of the appellant/plaintiff in the records but that mutation was for the sole purpose of getting the house loan and not for the purpose of making the appellant/plaintiff the sole owner of the suit property. It is pleaded

that no relinquishment deed was executed in favour of the appellant/plaintiff nor was executed any other document making the appellant/plaintiff a sole owner of the suit property. It was also pleaded in the written statement that the mutation NOC which was taken by the appellant/plaintiff did not contain any language of the legal heirs of late Sh. Ashutosh Ganguli relinquishing their rights in the suit property in favour of the appellant/plaintiff or that the appellant/plaintiff was to become a sole owner of the suit property. It was pleaded that the first floor of the suit property was got constructed, not by the appellant/plaintiff, but by the defendant himself after taking loan from his employer being Zakir Hussain College and the appellant/plaintiff had given permission to construct the first floor on the suit plot. It was pleaded that the defendant incurred the entire costs of construction of the first floor and therefore it was denied that the appellant/plaintiff was the owner of the first floor. The suit was accordingly prayed for being dismissed.

4. After pleadings were completed, the trial court framed the following issues:-

- “i. Whether plaintiff is entitled to the decree of mandatory injunction as prayed? OPP

- ii. Whether plaintiff is entitled to the decree of damages/mesne profits? If yes, at what rate and for which period? OPP
- iii. Whether the suit is not maintainable in its present form? OPD
- iv. Relief.”

5. Evidence was thereafter led by the parties who proved various documents and these aspects are stated in paras 5, 5(A), 5(B) and 6 of the judgment of the trial court and these paras read as under:-

“5. The plaintiff examined two witnesses in his evidence in support of his case.

5A. The plaintiff himself stepped in the witness box as PW1 and deposed on the lines of plaint. Further, he proved the following documents:-

- a) Lease Deed dated 27.09.1976:Ex.PW1/1
- b) Site plan of suit property:Ex.PW1/2
- c) Legal notice dated 18.10.1988:Ex.PW1/3
- d) Postal receipt: Ex.PW1/4
- e) A.D. Card:Ex.PW1/5
- f) Reply to notice dated 26.10.1988:Ex.PW1/6

5B. PW2, Sh. R.K. Bhatia, Asstt. L.D.O., Nirman Bhawan, New Delhi, appeared and deposed that property no.A-16, Chitranjan Park, New Delhi, has been leased out in favour of Arun Ganguli vide Lease Deed dated 27.09.1976 Ex.PW1/1.

6. On his turn, defendant examined three witnesses.

6A. DW1, Mohd. Javed Asif, Jr. Asstt. Accountant, Zakir Hussain College, Delhi was summoned to produce some record but the same was not produced by him. His examination in chief was deferred but he was not produced later on.

6B. DW2, Sh. Rakesh Sharma, UDC, L&DO, Nirman Bhawan, Delhi, brought the summoned record and proved the following documents:-

- a) Application form in the name of Ashutosh Ganguli: Ex.DW2/1
- b) Affidavit of Ashutosh Ganguli:Ex.DW2/2
- c) Another affidavit of Ashutosh Ganguli dt. 03.06.1966: Ex.DW2/3
- d) Letter of allotment dt. 24.12.66 in the name of Ashutosh Ganguli: Ex.DW2/4
- e) Allotment letter dt. 01.02.1967 of said plot: Ex.DW2/5
- f) Letter along with challan dated 25.02.1967: Ex.DW2/6 & DW2/7
- g) Letter dated 28.04.1969: Ex.DW2/8
- h) Agreement dated 28.04.1969: Ex.DW2/9
- i) Possession Letter dated 28.04.1969: Ex.DW2/10

- j) Letter written by Ashutosh Ganguli to Ministry of Rehabilitation: Ex.DW2/11
- k) Letter written to Ashutosh Ganguli by Mr. I.J. Suri, Accounts Officer: Ex.DW2/12
- l) Challan for Rs.1,836/-:Ex.DW2/13
- m) Challan for Rs.1,371.30/-:Ex.DW2/14
- n) Challan for sum of Rs.288/-: Ex.DW2/15
- o) Letter from Ashutosh Ganguli to Administrative Officer, Sh. Janki Nath:Ex.DW2/16
- p) Letter to Janki Nath, Dept. of Rehabilitation: Ex.DW2/17
- q) Letter from Ministry of Rehabilitation for transfer:Ex.DW2/18
- r) Letter dated 07.05.1969:Ex.DW2/19

6C. Defendant, Sh. Amarish Ganguli, entered into the witness box as DW3 and deposed on the lines of written statement. Further, he proved the following documents:-

- a) Certificate issued from Dr. Zakir Hussain college regarding grant of loan:Ex.DW3/1
- b) Letter dt.31.08.83 written by plaintiff to the defendant's employer: Ex.DW3/2
- c) Bills for construction material purchased by defendant:Ex.DW3/4 to DW3/37.
- d) Ration card:Ex.DW3/38
- e) Telephone bill: Ex.DW3/39
- f) Letter for release of telephone connection and receipts:Ex.DW3/40 to DW3/43
- g) Application for electricity connection: Ex.DW3/44
- h) Payment receipt dt.20.04.85: Ex.DW3/45
- i) Letter dt. 21.09.84 written by plaintiff to DESU:Ex.DW3/46
- j) Electricity bills: Ex.DW3/47 & DW3/48
- k) Bill dated 28.02.1986 in the name of defendant: Ex.DW3/49
- l) Letter dt. 06.08.86 written by the plaintiff to defendant: Ex.DW3/51 to DW3/55
- m) Construction and Sanitary fitting bills: Ex.DW3/56 to DW3/64
- n) Statement of Accounts qua construction: Ex.DW3/65
- o) Copy of reply of notice and postal receipt: Ex.DW3/66 to DW3/68
- p) RTI application and related proceedings: Ex.DW3/B1 to Ex.DW3/B6"

6. It has been held by the courts below, and rightly so, that the appellant/plaintiff failed to prove that he had paid moneys of the price/premium/cost of the plot or had made payments towards the

other charges instead of the father Sh. Ashutosh Ganguli and which payments by the father Sh. Ashutosh Ganguli are referred to in the lease deed dated 28.4.1969 executed in favor of the father Sh. Ashutosh Ganguli. This finding of the courts below is justified inasmuch as during the lifetime of the father the lease deed dated 28.4.1969, Ex.DW2/9 was executed by the Government of India in favour of the father Sh. Ashutosh Ganguli and which lease deed mentions the receipt of a sum of Rs.1920+ Rs.1097/-+ Rs.144/- from Sh. Ashutosh Ganguli. Document Ex.DW2/P2 dated 24.6.1976 being the letter from Government of India to the appellant/plaintiff himself shows that the amount of Rs.9,600/- towards costs of the plot was deposited by Sh. Ashutosh Ganguli. Also, the appellant/plaintiff led no evidence to prove that he had paid any moneys towards cost of the plot or for the other amounts as stated in the lease agreement dated 28.4.1969/Ex.DW2/9. The appellant/plaintiff therefore was held as falsely contending, as held by the courts below, that he had paid the cost of the plot and other related charges.

7. (i) The courts below have further rightly held that when the father Sh. Ashutosh Ganguli died and when letters and NOC were

given for mutation of the suit property by the other legal heirs of Sh. Ashutosh Ganguli these documents did not state that the legal heirs had relinquished their rights in favour of the appellant/plaintiff. The letter Ex.DW2/P1 dated 5.6.1976 of the mother being Smt. L. Ganguli as also the affidavit of the legal heirs Ex.DW2/P1 dated 24.5.1976, and which do not show any relinquishment of the rights of the legal heirs in favour of the appellant/plaintiff, are reproduced below:-

**“Letter**

To

The Secretary to the Govt. of India,  
Ministry of Supply & Rehabilitation,  
Department of Rehabilitation,  
New Delhi

Subject:-ALLOTMENT OF PLOT NO.16 IN CHITARANJAN PARK,  
NEW DELHI TO SHRI ASHUTOSH GANGULI REQUEST FOR  
TRANSFER.

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Sir,

I invite a reference to the correspondence resting with your letter No.22(342)/66-Genl./Kalkaji/1055 dated 17-1-1976 on the subject cited above and to request that the above referred to Plot of land may please be transferred in the name of Shri Arun Ganguli, resident of G-424, Nauroji Nagar, New Delhi, who is one of the legal heir of late Ashutosh Ganguli as desired. Two affidavits, in this respect duly attested by a Notary Public are also enclosed in original for further necessary action at your end.

ii) A true copy of the death certificate in respect of late Ashutosh Ganguli is also enclosed as desired in your above referred to letter.

iii) Kindly acknowledge the receipt.

Encl:- Two affidavits  
Death Certificate

Yours faithfully,  
Sd/-  
(L. GANGULI)

Dated:-5-6-1976  
G-424, Nauroji Nagar,  
New Delhi-110016.

**Affidavit**

**AFFIDAVIT**

We, Meera Mukherjee (Nee Ganguli), daughter, Meena Banerjee (nee Ganguli), daughter, Ashoke Ganguli, son, Swati Chatterjee (nee Ganguli), daughter, Shubhra Banerjee (nee Ganguli), daughter, Amaresh Ganguli, son, Shukla Bhattacharya (nee Ganguli), daughter, respectively of Ashutosh Ganguli, since deceased, do hereby solemnly declare

i) that we are the legal heirs of the immovable property owned by late Ashutosh Ganguli, situated at Chittaranjan Park, New Delhi bearing Plot No.16.

ii) that our mother, Smt. Labanya Prabha Ganguli, aged 60 years, is also one of the legal heirs of the above mentioned plot of Land of late Ashutosh Ganguli.

iii) that we have no objection to the transfer of the above mentioned Plot of Land in the name of our brother, Arun Ganguli, aged 37 years resident of G-424 Narouji Nagar, New Delhi-110016.

iv) that we have no objection in passing of the amounts so far paid by our late father, Ashutosh Ganguli, since deceased, towards premises and ground rent etc. paid in respect of the above mentioned Plot for adjustment against the amounts to be payable in future in case of 'transfer of the plot in our brother's name.

v) that besides the legal heirs mentioned in this Affidavit therein no other legal heirs (either major or minor) of late Ashutosh Ganguli, since deceased.

Signed on this 24<sup>th</sup> day of May, Nineteen Hundred Seventy Six.

|                            |                         |
|----------------------------|-------------------------|
| Sd/-                       | sd/-                    |
| (Mrs. Meera Mukherjee)     | (Mrs. Swati Chatterjee) |
| Daughter                   | Daughter                |
| Sd/-                       | sd/-                    |
| (Mrs. Meena Banerjee)      | (Mr. Ashok Ganguli)     |
| Daughter                   | Son                     |
| Sd/-                       | sd/-                    |
| (Mr. Amaresh Ganguli)      | (Mrs. Shubhra Banerjee) |
| Son                        | Daughter                |
| Sd/-                       |                         |
| (Mrs. Shukla Bhattacharya) |                         |
| Daughter                   |                         |

(ii) In my opinion, the courts below have rightly held that NOC and affidavit given by the other legal heirs of the deceased Sh. Ashutosh

Ganguli do not amount to relinquishing of their rights in the suit property in favour of the appellant/plaintiff. Relinquishment, if it existed, had to be by means of specific language, and may be even a specific relinquishment deed, and that the letter of Smt. L. Ganguli as also the affidavit of legal heirs dated 24.5.1976, cannot be interpreted to be the relinquishment deed. Also, these documents cannot be a transfer deed because if there is transfer of an immovable property, the same had to be by means of a registered document in terms of Section 17(1)(b) of the Registration Act, 1908. The expression 'transfer' used in the affidavit of the legal heirs as also in the letter of the mother dated 5.6.1976 therefore will not amount to a transfer deed of the suit property by the other legal heirs of Sh. Ashutosh Ganguli in favour of the appellant/plaintiff.

8. The courts below have further rightly held that it is the defendant who had made construction of the first floor of the suit property inasmuch as the defendant had proved on record the letter dated 31.8.1983 Ex.DW3/2 of the appellant/plaintiff to the Principal of Zakir Hussain College permitting the defendant to make construction on the first floor of the house. At this stage, I may note that the

defendant in the suit was wrongly called DW-2 as per his affidavit by way of evidence and his documents were also proved in the DW-2 series, however, the evidence of the defendant is actually recorded as DW-3 and therefore though the documents are marked in the DW-2 series, the courts below have taken them in DW-3 series. The certificate Ex.DW2/1 (3/1) issued by the Zakir Hussain College shows that the defendant was paid a loan of Rs.94,000/- from his Provident Fund account for the purpose of payment of building at the suit property and which payments totaling to Rs.94,000/- are for the period from 11.11.1983 to 12.4.1988. The defendant had also filed and proved on record documents with respect to purchase of material, cement, fittings etc for construction on the first floor of the suit property and these documents have been proved and exhibited as per the affidavit by way of evidence filed by the defendant/Sh. Amaresh Ganguli as Ex.DW2/3 to Ex.DW2/37 and Ex.DW2/56 to Ex.DW2/64, and these documents will actually be Ex.DW3/3 to Ex.DW3/37 and Ex.DW3/56 to Ex.DW3/64. The appellant/plaintiff on the contrary did not file any documentary evidence of having incurred any costs of construction on the first floor of the suit property. The courts below

were hence justified in giving benefit of Section 60(b) of the Easements Act, 1882 to the defendant that the defendant had made works of a permanent nature assuming that the defendant was a licensee, but in view of the work of permanent nature done on the suit property by building of the first floor by the defendant therefore the licence granted to the defendant became irrevocable.

9. The findings of the courts below as stated above are neither illegal nor perverse much less there existing any gross illegality and perversity, and therefore, no substantial question of law arises under Section 100 CPC for this Regular Second Appeal to be entertained.

10.(i) Learned counsel for the appellant/plaintiff firstly sought to argue that the lease deed dated 28.4.1969 Ex.DW2/9 executed by the Government of India in favour of the father Sh. Ashutosh Ganguli is only a leave and licence agreement, and therefore, such a leave and licence agreement did not give any legal right in the suit property to the father Sh. Ashutosh Ganguli and therefore it is the appellant/plaintiff who is the owner of the suit property in terms of the

registered lease deed Ex.PW1/1 executed by the Government of India in favour of the appellant/plaintiff

(ii) The argument urged on behalf of the appellant/plaintiff is misconceived because the agreement dated 28.4.1969 Ex.DW2/9 is a perpetual lease agreement and not a licence agreement though as is expected from government departments there are administrative errors because at certain places the words licence and licence fee are used. However, right at the beginning of Ex.DW2/9 dated 28.4.1969, the relationship between the Government of India and the deceased father Sh. Ashutosh Ganguli is specifically stated to be a lessor and lessee and which expressions appear repeatedly in the agreement dated 28.4.1969. Therefore, merely writing of licence fee or licence at two places in the agreement dated 28.4.1969 will not make this document a leave and licence agreement. In any case every document has to be read as per its substance and the substance of the Ex.DW2/9 dated 28.4.1969 shows that though the agreement is titled as a memorandum of agreement, in sum and substance it is a lease agreement, and thus for this reason the lease agreement was registered at Serial No.2931 in Additional Book No.1, Volume No.2177 at pages 174-180 on

30.4.1969. This argument of the appellant/plaintiff is therefore rejected.

11.(i) Learned counsel for the appellant/plaintiff then argued that as per the lease deed Ex.PW1/1 executed in favour of the appellant/plaintiff, he cannot transfer the suit property to anyone else and therefore the defence of the defendant had to be rejected which would amount to transfer of the suit property in favour of the defendant.

(ii) This argument urged on behalf of the appellant/plaintiff is also misconceived because the relevant clause in the lease deed executed in favour of the appellant/plaintiff is to prevent an ordinary transfer by means of a sale by the appellant/plaintiff to any third person or transfer in any other manner of right, title and interest in the suit property, however, that relevant clause in Ex.PW1/1 cannot be read by the appellant/plaintiff as if that in terms of the said clause of the lease deed, even if the appellant/plaintiff is not the sole owner of the suit property yet the appellant/plaintiff should be considered as the sole owner of the suit property. The courts below in this regard have rightly accepted the case of the defendant that the suit property when

allowed to be mutated in the name of the appellant/plaintiff, and pursuant to which the lease deed Ex.PW1/1 was executed in favour of the appellant/plaintiff, was only for the limited purpose of mutation and there was no relinquishment of rights in the suit property by all other legal heirs of late Sh. Ashutosh Ganguli in favour of the appellant/plaintiff. Also, as noted above there is no transfer of the suit property in favour of the appellant/plaintiff by any registered document under Section 17(1)(b) of the Registration Act and which registration is a *sine qua non* for transfer of title as per Section 49 of the Registration Act. This argument of the appellant/plaintiff is also therefore rejected.

12. The third argument of the appellant/plaintiff was that there was no HUF and hence defendant cannot claim to be the joint owner of the suit property, however, even this argument is misconceived because the defendant did not claim existence of an HUF in the classically and conventional sense and the suit property being joint property is pleaded only because the property belonged to the father Sh. Ashutosh Ganguli, and who since had died intestate, all the legal heirs had become the joint owners in the suit property with

the fact that mutation was done in the name of the appellant/plaintiff only for the limited purpose of mutation and not for the purpose of the appellant/plaintiff becoming the sole owner of the suit property, much less by the legal heirs of Sh. Ashutosh Ganguli relinquishing their rights in the suit property in favour of the appellant/plaintiff. This argument of the appellant/plaintiff is therefore rejected.

13. The next argument urged on behalf of the appellant/plaintiff is that benefit of the Easements Act cannot be given to the defendant in view of the fact that there is a lease deed in favour of the appellant/plaintiff being Ex.PW1/1, however, this argument is nothing but a re-moulding of the first and second argument, and therefore, this argument is accordingly dismissed in terms of the reasoning given while rejecting the first and second argument urged on behalf of the appellant/plaintiff.

14.(i) Learned counsel for the appellant/plaintiff then argued that the defence decided in favor of defendant of co-ownership right of the defendant by the impugned judgment was hit by the doctrine of *res judicata* on account of the judgment dated 3.12.2005 passed in Suit No. 699/2002 titled as ***Amaresh Ganguli vs. Arun Ganguli and***

*Others.* It is argued that as per this judgment dated 3.12.2005, it was held that Sh. Amaresh Ganguli (and who was the defendant in the present suit), plaintiff in the earlier court, can only get himself declared to be a co-owner of the suit property by a proper suit seeking declaration and the earlier simplicitor suit for injunction filed by him was not maintainable. It is therefore argued that merely by raising a defence in the written statement of co-ownership the defendant hence could not have got decided the issue of his co-ownership and in fact he had to file a suit for declaration of his co-ownership of the suit property. On behalf of the respondents, the argument was rebutted by arguing that no such plea has ever been taken before the courts below and also that the document which is relied being the judgment dated 3.12.2005 has not been proved and exhibited in the trial court.

(ii) In my opinion the argument urged on behalf of the appellant/plaintiff on merits has no legs to stand upon because of various reasons. The first reason is that the judgment dated 3.12.2005 was passed in a simplicitor suit for injunction filed by Sh. Amaresh Ganguli (defendant in the present suit) and accordingly civil court which pronounced the judgment dated 3.12.2005 held the simplicitor

suit for injunction not to be maintainable so far as the relief of declaration of ownership is concerned, and therefore, Sh. Amaresh Ganguli who was the plaintiff in the said suit (defendant in the present suit) could not get the relief for injunction once there existed a dispute as to ownership and in which circumstances declaration of co-ownership title was held to be necessary. Such issues decided as to the lack of proper form of a suit is not in the nature of *res judicata* as per Section 11 CPC inasmuch as Order VII Rule 13 makes it clear that where a suit is dismissed or a plaint rejected on the ground that it is not in proper form, the plaintiff can after making out a correct cause of action in the correct form file a fresh suit and which will not be hit by the doctrine of *res judicata*. Order VII Rule 13 makes it clear that rejection of a plaint on any ground contained under Order VII Rule 11 does not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. The decision as to technical non-maintainability of a suit is not merits of the suit, and therefore, is not “heard and finally decided” as per Section 11 CPC for the decision on the technical issue to operate as *res judicata*. Accordingly, the

appellant/plaintiff cannot argue and press the doctrine of *res judicata* on the basis of judgment dated 3.12.2005.

(iii) The second reason is that the issue of maintainability of the suit of claiming declaration of ownership will only arise if the suit/plaint was filed by the defendant. To a defence of a written statement neither the bar of limitation applies nor any issue of form of the defence not being as per a cause of action in a suit plaint. The subject suit was filed claiming right of possession to the first floor of the suit property and therefore it was open to the defendant to urge all defences of facts and law so as to dispute the claim of possession. Such defences therefore cannot in any manner be said to be hit by the doctrine of *res judicata*, much less on account of the judgment dated 3.12.2005 which held that a simplicitor suit for injunction cannot lie unless there is a claim of declaration of title of co-ownership once there arise a valid dispute of tile of the suit property.

(iv) Thirdly, it is correctly argued on behalf of the respondents that appellant/plaintiff having never argued this issue in the courts below, then in a second appeal under Section 100 CPC, such an issue cannot be raised for the first time to the prejudice of the respondents and who

would have otherwise overcome this stand of any shortcoming in the defence of the defendant, if the plea which is now sought to be urged of *res judicata* was taken in the suit. I may also note that there is no issue which is framed in the suit of *res judicata* against the defendant as I have already reproduced the four issues framed in the earlier part of the judgment.

(v) Accordingly, the arguments urged on behalf of the appellant/plaintiff of application of doctrine of *res judicata* is rejected.

15. Finally I would like to note that the subject suit was only a suit for possession of the first floor portion in favour of the appellant/plaintiff and it is in that context that the suit has been dismissed by the courts below holding that appellant/plaintiff is not the sole owner of the suit property. Really therefore there will have to be further partition proceedings between the parties, in the nature of suit for partition, and the judgments which are passed in the present case would have the effect of the suit of the appellant/plaintiff being dismissed with respect to first floor portion of the suit property. Of course, the issues between the parties in these proceedings would also stand decided in terms of the judgment of the trial court and this

judgment, and decision on such issues will operate as *res judicata* between the parties in terms of Section 11 CPC.

16. In view of the above discussion, no substantial question of law arises. Dismissed.

**SEPTEMBER 25, 2017**  
ib/Ne/Godara

**VALMIKI J. MEHTA, J**

