

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

+ **RFA No. 961/2017**

% **15th November, 2017**

KAMLA & ORS.

..... Appellants

Through: Mr. M.K. Gautam and Mr. Jai
Sahai Endlaw, Advocates.

versus

CHARAN SINGH & ORS.

..... Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 41258/2017 (for exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

RFA No. 961/2017 and C.M. Appl. No. 41257/2017 (for stay)

1. This Regular First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugning the judgment of the trial court dated 1.9.2017 by which the suit filed by the appellants/plaintiffs for permanent injunction and rendition of accounts has been dismissed so far as relief of permanent injunction is

concerned. Appellants/plaintiffs had claimed ownership of 80 sq. yards in the property being WZ-35A, Village Naraina, New Delhi. Appellants/plaintiffs claimed to be in possession thereof on account of receiving this 80 sq. yards in an oral partition of the year 2006, and hence permanent injunction was prayed against respondents/defendants disturbing the possession of the appellants/plaintiffs.

2(i). The facts of the case are that admittedly late Sh. Ganga Dass, grand-father of appellant nos. 2 to 4/plaintiff nos. 2 to 4 and father-in-law of appellant no.1/plaintiff no.1, was the owner of four properties as under:-

- i. CB-150, measuring 200 sq. yds., Ring Road, Naraina;
- ii. WZ-35, measuring 240 sq. yds., village Naraina, Delhi;
- iii. WZ-35A, measuring 260 sq. yds., village Naraina, Delhi;
- iv. WZ-250, measuring 50 sq. yds. Village Naraina, Delhi."

We are only concerned with the property WZ-35A, Village Naraina, New Delhi, alleged as per the plaint to be measuring 260 sq. yards.

(ii) The defendant nos. 1 and 2 in the suit, and who are the respondent nos. 1 and 2 herein, were the main contesting private defendants. Respondent nos. 1 and 2 are the sons of Sh. Ganga Dass.

Sh. Ganga Dass as already stated above was the father of the husband of appellant no.1/plaintiff no.1 i.e the husband of the appellant no.1/plaintiff no.1 was the brother of respondent nos. 1 and 2/defendant nos. 1 and 2.

(iii) Appellants/plaintiffs claim that Sh. Ganga Dass during his life time partitioned off his properties and the appellants/plaintiffs received 80 sq. yards of a total of 260 sq. yards in the property no. WZ-35A, Village Naraina, Delhi. The oral partition is pleaded to be of the year 2006. Appellants/plaintiffs claimed to be in possession of 80 sq. yards of property WZ-35A, and hence filed the subject suit to restrain the respondent nos. 1 and 2/defendant nos. 1 and 2 from in any manner encroaching upon the portion of 80 sq. yards of the property WZ-35A claimed to be in the ownership and possession of the appellants/plaintiffs pursuant to the oral partition of the year 2006.

3. Respondent nos. 1 and 2/defendant nos. 1 and 2 contested the suit and pleaded that the property WZ-35A, Village Naraina, Delhi, claimed to be of 260 sq. yards, is in fact only of 186.66 sq. yards and therefore there does not arise an issue of appellants/plaintiffs being given 80 sq. yards out of a total area of 260

sq. yards. It was further the case of the respondent nos. 1 and 2/defendant nos. 1 and 2 that the case of the appellants/plaintiffs of there being an oral family settlement of the year 2006 and appellants/plaintiffs being given 80 sq. yards of WZ-35A is a completely false stand. It was also denied that appellants/plaintiffs were in possession of 80 sq. yards of property WZ-35A, Village Naraina, Delhi. Hence, the suit was prayed to be dismissed.

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

- “1. Whether plaintiff is entitled to a decree of permanent injunction as claimed? OPP
2. Whether plaintiff is entitled to a decree of mandatory injunction as claimed? OPP
3. Whether plaintiff is entitled of rendition of accounts as claimed? OPP
4. Relief.”

5. Parties led evidence and leading of evidence is referred to in paras 11 to 13 of the impugned judgment of the trial court and which paras read as under:-

- “11. Plaintiffs have examined four witnesses i.e. plaintiff no.1/Smt. Kamla as PW-1, Shri Joginder Singh Tanwar as PW-2, Ms. Bimla as PW-3 and Smt. Krishna Devi as PW-4.
12. PW-1 Smt. Kamla tendered her affidavit in evidence vide Ex.PW-1/A and relied upon documents such as certified copy of award no. 693 vide Ex. PW-1/1; site plan vide Ex.PW-1/2, photocopy of letter written by Shri Ganga Das to Delhi Cantonment Board dated

30.09.2013 vide Ex.PW-1/3; Photocopy of ration card vide Mark A; Photocopy of GPA vide Ex. PW-1/5 and Ex.PW-1/6; Photocopy of letter dated 17.03.2013 vide Ex.PW-1/7; Photocopy of WILL dated 04.04.1981 vide Mark B;

PW-2 Shri Joginder Singh Tanwar, PW-3 Ms. Bimla and PW-4 Smt. Krishna Devi were examined by way of affidavit in evidence vide Ex.PW-2/A, Ex.PW-3/A and Ex.PW-4/A respectively.

13. In order to prove their case, defendants examined three witnesses i.e. Shri Charan Singh as DW-1, Shri Hari Kishan as DW-2 and Shri Chanderhas as DW-3. Defendants no.1 Charan Singh and defendant no. 2 Hari Kishan, both sons of Late Ganga Dass, examined themselves by way of tendering their affidavits in evidence vide Ex.DW-1/A and Ex.DW-2/A respectively.

DW-3 Shri Chanderhas tendered his affidavit in evidence vide Ex.DW-3/A and relied upon WILL dated 17.04.2010 vide Ex.DW-3/1. DW-3 has been examined as a witness to the execution of WILL Dated 17.04.2010.”

6. The main issue are issue nos. 1 and 2 and these issues were rightly decided against the appellants/plaintiffs by the trial court by arriving at the following conclusions:-

(i) Appellants/plaintiffs failed to prove that the total area of the property was 260 sq. yards, and which area of 260 sq. yards was a *sine qua non* because appellants/plaintiffs claim that they received 80 sq. yards out of the area of 260 sq. yards.

(ii) Appellants/plaintiffs had filed a suit only for injunction, and which suit would be maintainable only if the appellants/plaintiffs were in possession, however no evidence at all was led by the appellants/plaintiffs that they were in physical possession of the 80 sq.

yards of property no. WZ-35A. Hence the suit for injunction was not maintainable.

(iii) The case of the appellants/plaintiffs of there being an oral partition of the year 2006 was disbelieved by the trial court by disbelieving the mere oral testimonies of the appellants/plaintiffs and their witnesses, as oral testimonies was held not to be sufficient discharge of onus of proof in the facts of the present case to deprive rights of the respondents/defendants in an immovable property. This was all the more so because in a Will dated 17.4.2010, Ex.DW3/1, jointly executed by Sh. Ganga Dass and his wife Smt. Shanti Devi, the suit property being WZ-35A was bequeathed to the respondent no.1/defendant no. 1/Sh. Charan Singh, and showing therefore that the appellants/plaintiffs had no rights in the suit property even assuming for the sake of arguments that the suit property is 260 sq. yards.

7. In addition to the aforesaid conclusions of the trial court of there being no oral partition of the year 2006 as claimed by the appellants/plaintiffs, one of the best methods to prove the oral partition was to show that the oral partition was acted upon by the appellants/plaintiffs by seeking mutation of 80 sq. yards of the

property WZ-35A in the municipal records, but admittedly, the appellants/plaintiffs did not apply for any mutation of property WZ-35A on the ground that they have become owners of the same. In fact in no public record the appellants/plaintiffs ever declared or claimed that they were owners of 80 sq. yards of the property at WZ-35A. For this additional reason also the conclusion of the trial court is justified that there was no oral partition of 80 sq. yards of the property at WZ-35A as claimed by the appellants/plaintiffs.

8. The relevant paras of the impugned judgment of the trial court which contain the relevant discussion and conclusions are paras 15 to 20 and these paras read as under:-

“15. ISSUE NO. 1 & 2

Whether plaintiff is entitled to a decree of permanent injunction as claimed? ... OPP

AND

Whether plaintiff is entitled to a decree of mandatory injunction as claimed? ... OPP

Onus to prove these issues is upon the plaintiff. Plaintiffs have filed the suit for permanent and mandatory injunction seeking to restrain the defendants from dispossessing them from area measuring 80 sq. yds. out of property bearing no. WZ-35A, Village Nariana, New Delhi with further directions to the defendants not to raise construction over the entire area of suit property. The plaintiffs have sought this relief on the ground that area measuring 80 sq. yds. was given to the plaintiff and remaining 180 sq. yds. to defendant no.1. Accordingly to plaintiff, the total area of this property is around 260 sq. yds. As per the plaintiff, the said portion was given by the father in an oral partition to give equal shares in his properties. Father of plaintiff had given 80 sq. yds. out of property bearing no. 35A to plaintiff due to the reason that property bearing no.

CB-150 was given to the plaintiff and the portion of around 80 sq. yds. of the same was acquired by the government for widening the road. Defendants have totally denied the claim of plaintiffs on the ground that no such division of property was made by their father, in fact the properties were partitioned by their father Late Ganga Dass by execution of WILL Ex.DW-3/1, according to which property bearing no. WZ-35A, Naraina Village, New Delhi was given to Shri Charan Singh/defendant no.1, whereas the house bearing no. CB-150 was given to the successor of Late Nahar Singh, the husband of plaintiff no.1 and father of plaintiffs no.2 to 4. Not only that, in order to divide the property equally and in order to avoid any confusion, Late Ganga Dass had also divided the property bearing no. CB-150, the total area measuring 200 sq. yds. in two parts and transferred the same equally amongst plaintiff no. 2 & 3 by way of registered GPAs which are Ex.PW-1/5 and Ex.PW-1/6. Defendants have denied the oral partition as stated by the plaintiffs in the present suit. Defendants have also denied the possession of the plaintiffs over the suit property and stated that the same has always been in the possession of defendant no.1 and plaintiffs have never been in possession of the same. Defendants have also denied the measurement of property as 260 sq. yds. In fact it is stated that the total area is measuring 180 sq. yds.

16. The onus to prove these issues was casted upon the plaintiffs as they have sought a decree of permanent and mandatory injunction on the ground that they are in possession of the property and the same is being constructed by the defendants after demolishing the entire portion of the same. Therefore, plaintiffs were required to establish (i) whether the property is measuring 260 sq. yds? (ii) Whether plaintiff was in possession of 80 sq. yds in the portion of 260 sq. yds.? (iii) Whether there was an oral partition which resulted in awarding 80 sq. yds. of WZ-35A to the plaintiff?

17. Plaintiffs have examined four witnesses. Not even a single piece of document has been produced by the plaintiffs in their entire evidence to show that property was measuring 260 sq. yds. Since onus to prove these issues is upon the plaintiff, they were required to establish this fact. Section 101 of Indian Evidence Act 1872 defines the "burden of proof", the burden to prove the fact always lies on the person who asserts the fact. Only such party is liable to discharge the burden, the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies, has been able to discharge his burden until he arrives at such a conclusion, he cannot proceed on the basis of weakness of other party. Here in this case, plaintiffs have not been able to show how the measurement of property was 260 sq. yds. He could have filed the title documents of the property or could have called the documents from the person who is in possession of the same but no such step has been taken.

Moreover, the plaintiffs have also failed to breach the testimony of defendants' witnesses on this point. Defendants have denied the claim of plaintiff being the measurement of property as 260 sq. yds. In such situation, it was plaintiffs who were required to establish this fact, either by way of documentary evidence or by breaching the testimony of defendants' witnesses.

So far as possession of plaintiffs on 80 sq. yds. or in the portion of property bearing no. WZ-35 is concerned, similarly no document in evidence has been produced by the plaintiffs to show that they were even in possession of the property. Plaintiffs could have produced the water bill, electricity bill, telephone bill or any document issued by the government authority on the said address in order to establish their possession. Plaintiffs even have not been able to take out this fact of the said possession over the suit property in the cross examination of defendants' witnesses. All the witnesses examined by the defendants have outrightly rejected the plaintiffs' claim of being in possession of 80 sq. yds. of property in question at any time.

However, plaintiffs have examined one witness namely Smt. Krishna Devi /PW-4 who has stated that she has seen the plaintiffs residing at the portion of 80 sq. yds. comprising of two rooms, latrine, bathroom on the said property before its demolition. Testimony of this witness is not going to support the case of plaintiff to a greater extent in view of the fact that plaintiffs have failed to prove the measurement of property as 260 sq. yds. and not documentary evidence has been produced to support the testimony of PW-4 who is the summoned witness of plaintiffs. PW-4 has not stated in her examination-in-chief as to how and in what capacity she knows the plaintiffs. Whether she was a relative or a neighbour, who has seen the plaintiffs residing in the suit property.

There is one more witness Ms. Bimla/PW-3 examined by plaintiff who is also a summoned witness. The affidavits filed in evidence of PW-3 & PW-4 are same and identical word by word and PW-3 has also repeated that she has seen the plaintiffs residing in the portion of 80 sq. yds. of the suit property in question. The reliance also cannot be placed upon the testimony of this witnesses as she appears to be an interested witness who is the real sister of plaintiff no.1.

There is one more summoned witness namely Shri Joginder Singh Tanwar/PW-1 who has been examined by the plaintiffs to prove their possession over the suit property. His affidavit in evidence is also identical to the affidavits of PW-3 & PW-4. This witness has also not stated in his affidavit as to how he knows the plaintiffs and how he has seen them residing in the suit property. This witness has also not stated as to how he came to know about the partition of the property by the father of defendants in favour of plaintiffs by awarding 80 sq. yds. Of property bearing no. WZ-35A.

In view of the abovesaid observations, plaintiffs have failed to show their possession of the suit property.

18. Testimony of plaintiffs' witnesses is also not believable in view of the fact that they have repeated the version of plaintiff without actually knowing the factum of oral partition between the parties due to the reason that WILL Mark B and two GPAs Ex.PW-1/5 and Ex.PW-1/6 were executed by Late Ganga Dass in favour of the parties by dividing the portions of all his properties amongst them. These are plaintiff's own documents in evidence. Defendants have been able to prove the execution of WILL Ex.DW-3/1 by examining one of the attesting witness to the same as per relevant provision of Indian Evidence Act. DW-3 Chanderhas is the attesting witness who has proved the execution of WILL by Late Ganga Dass and he deposed that deceased had executed the said WILL with respect to all his four properties. DW-3 has stated that contents of the WILL were read over to Shri Ganga Dass and Smt. Shanti Devi, DW-3 himself as well as Shri Ishwar Singh, another attesting witness to the same. Ex.DW-3/1 is the WILL which was executed by Shri Ganga Dass and his wife Smt. Shanti Devi jointly thereby testified and bequeathed their four properties in favour of plaintiffs as well as defendants. As per the WILL, property bearing no. CB-150 was given to the father of plaintiff no. 2 to 4 and husband of plaintiff no.1; property bearing No. WZ-35 was given to defendant no.2/Hari Kishan and property bearing no. 250 was also given to Hari Kishan; and **House no. 35A was given to Charan Singh/defendant no.1.** Plaintiffs have failed to breach the testimony of defendants as well as the attesting witnesses DW-3 in order to declare the WILL as forged and fabricated.

It is needless to mention here that in the cases, titled as Pratap VS. Shiv Shankar, RFA No. 651/1998 of Hon'ble High Court of Delhi and in Rahul Behl and Ors. VS. Smt. Ichayan Behl & Anr., DRJ 1991 (21) 205 held that ".....Thus by applying the provisions of Section 8 of the Act, the Single Judge held that defendant no.2 therein alone inherited the property to the exclusion of his sons because the said property devolved on him in his individual capacity and became his self-acquired property, and therefore, would not form a part of or become a coparcenary property."

19. By applying the ratio of abovesaid finding of our Hon'ble Superior Courts, there remains no doubt that despite the fact that the suit properties were the ancestral in the hand of Late Ganga Dass but was well within his right to execute the WILL with respect to the same. Plaintiffs being the legal heirs of deceased son of Late Ganga Dass got the property bearing no. CB-150, Naraina Village, New Delhi out of the share of their deceased father Nahar Singh.

Even if the averment of plaintiffs with respect to the oral partition are to be believed, then also WILL Ex.DW-3/1 and another WILL Mark B and GPAs Ex.PW-1/5 and Ex.PW-1/6, executed by the deceased are sufficient to show the intention and the manner of deceased with respect to

partition of the property amongst his legal heirs. From these documents it is nowhere transpired that deceased was having any intention of transferring any portion of WZ-35A in favour of the plaintiffs. Moreover, the version of plaintiffs is also not believable on the ground that verbal partition which has been averred in his plaintiff, there is no date of the same has been mentioned anywhere in the plaint. Whereas the documents produced from the defendants' side have clearly established the manner of partition amongst the parties.

20. Therefore, in view of the above discussion plaintiffs have failed to show their right, title or interest over the 80 sq. yds. of the portion of WZ-35A. Since plaintiffs have not been able to prove their right, title or interest, therefore, no right is accrued in their favour to ask for permanent and mandatory injunction thereby restraining the defendants from dispossessing them from the suit property as well as seeking directions to forbid defendant no.1 from raising any construction over the suit property.

In view of my abovesaid findings, the Issue No.1 & 2 are decided against the plaintiff.” (emphasis added)

9. In my opinion, the trial court was completely justified in deciding issue nos. 1 and 2 against the appellants/plaintiffs for the reasons given above. In fact, this Court has given additional reasoning that if there was a family settlement of the year 2006 then the same should have been shown to be acted upon, especially in public records, but appellants/plaintiffs failed to lead any evidence of having applied for mutation or having shown their ownership of 80 sq. yards of the property WZ-35A in the public records. Also, the trial court was justified in holding that Will Ex.DW3/1 was proved through the attesting witness Sh. Chanderhas and this Will Ex.DW3/1 and which showed that the property WZ-35A was bequeathed by late Sh. Ganga

Dass and Smt. Shanti Devi to the defendant no. 1/respondent no. 1/Sh. Charan Singh.

10. Learned counsel for the appellants/plaintiffs argued that when the appellants/plaintiffs wanted to cross-examine DW-1/respondent no. 1/Sh. Charan Singh as regards the contents of the Will, the trial court did not allow him to do so on 13.7.2016 and that therefore it should be taken that the Will Ex.DW3/1 is not proved. To this argument I put a query to counsel for the appellants/plaintiffs that whether did the appellants/plaintiffs seek the right to cross-examine DW-1 after the Will was proved through the attesting witness DW-3, but counsel for the appellants/plaintiffs admits that no application was filed after the deposition of DW-3 by which the appellants/plaintiffs sought to cross-examine DW-1 as regards the contents of the Will and which was denied on 13.7.2016. I, therefore, reject the argument of the appellants/plaintiffs of they having being denied a right to cross-examine DW-1 as regards the contents of the Will Ex.DW3/1. In any case, the conclusion of the trial court predicated on the Will Ex.DW3/1 is only one of the reasons given by the trial court to discard the story of family settlement of the year 2006 and there are also other

independent and sufficient reasons for this Court and the trial court to disbelieve the family settlement, and as already stated above.

11. There is therefore no merit in the appeal, and the same is hereby dismissed.

NOVEMBER 15, 2017

VALMIKI J. MEHTA, J

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