

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 16th July, 2018

+ RSA 51/2018

BHAGAT SINGH & ANR

..... Appellants

Through: Mr. Ashok Tobria & Mr. M.Y. Yadav,
Advs.

Versus

PALTU RAM & ORS

..... Respondents

Through: Mr. K. Venkatraman & Mr. Dinesh
Chawla, Advs. for R-1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.15318/2018 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

RSA 51/2018, CM No.14261/2018 (for early hearing) & CM No.15317/2018 (for stay)

3. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 31st January, 2018 in RCA No.65/2017 (CNR No.DLST01-006314-2017) of the Court of Additional District Judge (ADJ), District South, Saket Courts, New Delhi] of dismissal of First Appeal under Section 96 of the CPC preferred by the two appellants against the judgment and decree [dated 6th July, 2017 in CS No.84545/2016 of the Court of the Civil Judge-02, South District, Saket Courts, New Delhi] allowing the suit filed by the respondent no.1 / plaintiff *inter alia* for mandatory injunction directing the two appellants / defendants as well as respondents no.2 and 3 / defendants to remove their belongings

from property No.93 Hauz Rani, Malviya Nagar, New Delhi and to vacate and handover physical possession thereof to the respondent no.1 / plaintiff and to also pay *mesne profits* to the respondent no.1 / plaintiff from 1st September, 2013 till the date of vacation at the rate of Rs.15,000/- per month.

4. This appeal came up first before this Court on 4th April, 2018, when on request of the counsel for the appellant, it was adjourned to 16th April, 2018. On 16th April, 2018, the counsel for the appellant sought time to obtain instructions and to locate the application for stay of the judgment and decree which was claimed to have been filed and the matter was renotified for 19th April, 2018. On 19th April, 2018, though notice of the appeal was ordered to be issued but without recording or indicating as to what substantial question of law arises; execution was also stayed vide the same order.

5. All the three respondents are reported to be served.

6. Only the counsel for the respondent no.1 / plaintiff appears. None appears for respondents no.2 to 3 / defendants.

7. The counsel for the respondent no.1 / plaintiff, on enquiry states that the respondents no.2 and 3 / defendants did not file any First Appeal against the judgment and decree insofar as against them.

8. The counsel for the appellants argues, (i) that the appellant no.1 is the son and the appellant no.2 is the daughter-in-law of the respondent no.1/plaintiff; (ii) that the property is ancestral property and the appellants have been residing therein; (iii) that the Courts below have decided in favour of the respondent no.1 / plaintiff only for the reason of the appellant no.1 / defendant in his cross-examination having deposed that he was residing in the property with the permission of his father respondent no.1/plaintiff; (iv)

however the aforesaid answer in cross-examination was owing to the manner in which the question was put during cross-examination; else, the property is ancestral; and, (v) that there is on record a house tax receipt with respect to the property in the name of the father of the respondent no.1/plaintiff and which proves that the property is ancestral.

9. No other argument has been urged.

10. After arguing so, the counsel for the appellants seeks adjournment stating that the adjournment is required for preparing the matter.

11. There is no reason as to why the counsel did not come prepared for today.

12. Advocates, after obtaining interim order, cannot be permitted to prolong the proceedings.

13. Though the Suit Court file has not been requisitioned but the appellants along with this appeal have filed copies of some part of the record and the counsel for the respondent no.1 / plaintiff has handed over the copies of the remaining part of the Suit Court record.

14. The respondent no.1 /plaintiff instituted the suit, from which this appeal arises, pleading (a) that he is the absolute owner and in physical possession of house No.93, Hauz Rani, Malviya Nagar, New Delhi, being his self-acquired and self-constructed property, having become the owner thereof by virtue of Family Settlement / Compromise arrived at between the respondent no.1 / plaintiff and his brothers in Suit No.770/1989 decided on 4th November, 1993; (b) that the appellant no.1 / defendant Bhagat Singh and the respondent no.2 / defendant Raghvar Dayal are the sons of the respondent no.1 / plaintiff and the appellant no.2 / defendant Rekha and respondent no.3 / defendant Geeta are the respective daughters-in-law of the

respondent no.1 / plaintiff; (c) that the respondent no.1 / plaintiff had allowed the appellant / defendant no.1 to reside with him in the said house only as a son and else the appellants / defendants had no right, title and interest in the property; (d) that since the appellants/defendants and the respondents no.2 and 3 / defendants were harassing the respondent no.1 /plaintiff and were a threat to his life, he did not desire them to continue living in his house and had asked them to leave but inspite thereof they failed to leave; and, (e) that the respondent no.1/plaintiff had thus debarred and disowned the appellants/defendants and respondents no.2 and 3 / defendants from inheriting any portion of his estate. Hence, the suit was filed (i) for mandatory injunction directing the appellants / defendants and the respondents no.2 and 3 / defendants to vacate the property, (ii) for recovery of *mesne profits*, and, (iii) to restrain the appellants / defendants and respondents no.2 and 3 / defendants from dealing with the property.

15. The appellants / defendants contested the suit by filing the written statement denying that the respondent no.1/ plaintiff was the absolute owner of the property or that the property was the self-acquired property of the respondent no.1 / plaintiff and pleading, (i) that the property was ancestral property which was undivided and the appellants / defendants had a right to reside in the same; (ii) that the respondent no.1 / plaintiff was realising the rent of the shops in the property as karta of the family; and, (iii) that the appellants / defendants were residing in the property in their own right.

16. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 23rd December, 2014:

- “1. Whether the plaintiff is entitled to decree of mandatory injunction as prayed in clause A of the prayer? OPP

2. Whether the plaintiff is entitled to decree of permanent injunction as prayed in clause B of the prayer? OPP
3. Whether the plaintiff is entitled to damages / *mesne profits* as prayed in Clause C of the prayer? OPP
4. Relief, if any.”

17. The Suit Court, on the basis of the evidence of the respondent no.1/ plaintiff and five other witnesses examined by the respondent no.1/ plaintiff and on the basis of deposition of appellant / defendant no.1, allowed the suit as aforesaid, finding / observing / reasoning (i) that though the respondent no.1 / plaintiff had failed to produce on record any title documents to show his ownership of the property but the ownership was not disputed by the appellant / defendant no.1; rather the appellant no.1 / defendant during his cross-examination admitted that the respondent no.1 / plaintiff was the owner of the property and that the appellant no.1 / defendant and the other defendants were residing in the property with the permission of the respondent no.1 / plaintiff; (ii) that the appellant no.1 / defendant had also not disputed that electricity and water connection in the property had been installed in the name of respondent no.1 / plaintiff and the house tax of the property has also been paid by the respondent no.1 / plaintiff; (iii) that from the said evidence / admissions, it was clear that the appellants / defendants and respondents no.2 and 3 / defendants were in permissive accommodation of the property; (iv) that the appellants / defendants had claimed the property to be ancestral but the appellant no.1 / defendant during cross examination admitted the respondent no.1 / plaintiff to be the owner and further deposed that he could not show any document to prove that Prabhati Ram i.e. the father of the respondent no.1 / plaintiff was the owner of the property and also could not show any document to show the property to be ancestral; (v) that the appellant no.1 / defendant, in cross-examination also admitted the

partition between the respondent no.1 / plaintiff and his brothers under which the said property came to the share of the respondent no.1 / plaintiff. Hence, the decree for mandatory injunction directing the appellants to vacate the property, a decree for permanent injunction restraining the appellants / defendants from dealing with the property and the decree for *mesne profits*.

18. The First Appellate Court has dismissed the appeal preferred by the appellants / defendants, recording / reasoning (a) that the respondent no.1 / plaintiff had proved his ownership by proving the settlement arrived at in the suit instituted by his two brothers against him; the said compromise arrived at on 4th November, 1993 recited that the respondent no.1 / plaintiff was the sole owner of the property with his brothers having no concern therewith; (b) that the respondent no.1 / plaintiff, in his cross-examination also, deposed that the property was purchased by him but the deed of purchase was in possession of his brother; (c) that the witness from the House Tax Department examined by the respondent no.1 / plaintiff deposed about deposit of property tax by the respondent no.1 / plaintiff since the year 1996 and proved the house tax receipt; in cross-examination, he admitted receipt of house tax for the year 1966-67 to be in favour of Prabhati Ram and admitted that there was no ownership document on record; (iv) that the witness from the electricity supplier examined by the respondent no.1 / plaintiff proved the electricity connection in the property to be in the name of the respondent no.1 / plaintiff; (v) that the witness from the Jal Board also proved the water connection to be in the name of the respondent no.1 / plaintiff; (vi) that thus all the witnesses examined by the respondent no.1 / plaintiff had deposed of all documents with respect to the property being in the name of the respondent no.1 / plaintiff; (vi) that the appellant no.1 /

defendant in his cross-examination admitted respondent no.1 / plaintiff to be the owner and clearly stated that he was not in possession of any record or document that the property was ancestral or that his parental grandfather was ever the owner thereof and that further admitted he was residing in the property with the permission of the respondent no.1 / plaintiff ; and, (vii) that it was thus evident that the respondent no.1 / plaintiff had a better title to the property than the appellants / defendants. However, the First Appellate Court reduced the rate at which the Suit Court had awarded the *mesne profits*. Else, the decree of the Suit Court was confirmed.

19. It is evident from a perusal of the contents of the written statement of the appellants / defendants enumerated hereinabove, that the appellants / defendants did not controvert the ownership of the respondent no.1 / plaintiff; they only claim that the appellant no.1 / defendant also had a share therein, by virtue of the property being ancestral.

20. In ***Neelam Vs. Sada Ram*** 2013 SCC OnLine Del 384 and thereafter again in ***Kamlesh Devi Vs. Shyam Sunder Tyagi*** 2017 SCC OnLine Del 12701 and in ***Saurabh Sharma Vs. Om Wati*** 2018 SCC OnLine Del 9186, it has been held that inspite of the ancient Hindu Law, in which the concept of ancestral property was prevalent, having been abrogated by the Hindu Succession Act, 1956, more than half a century ago, citizens including advocates continue to take pleas in the Court, of the grandson having a share in the property of his paternal grandfather. Need for an elaborate discussion is not felt since it has been thrashed out in detail in ***Surender Kumar Vs. Dhani Ram*** 2016 SCC OnLine Del 333.

21. A perusal of the written statement of the appellants / defendants does not show any pleas of the appellant no.1 / defendant having acquired a right

by birth in the property. Neither was the existence of a Hindu Undivided Family or Coparcenary pleaded nor was the date of demise of the father of the respondent no.1 / plaintiff and parental grandfather of the appellant no.1 / defendant pleaded. If the father of the respondent no.1 / plaintiff and parental grandfather of the appellant / defendant no.1 died after the coming into force of the Hindu Succession Act, 1956, the inheritance of his property by the respondent no.1 / plaintiff would be thereunder and in his personal individual capacity and in which the appellant no.1 / defendant as the son of the respondent no.1 / plaintiff would have no share.

22. Recently in *A.N. Kaul Vs. Neerja Kaul* 2018 SCC OnLine Del 959 again, it was held:

“13. The concept of ancestral property, as existed under the ancient Hindu Law, was done away with on coming into force of the Hindu Succession Act, 1956. Thereafter, the ancient Hindu Law survived only under Section 6 of the Hindu Succession Act and not otherwise. The ancient Hindu Law discriminated between the male descendants and the female descendants. Section 6 provided that when a male Hindu dies after the commencement of the Succession Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Succession Act. Under the ancient Hindu Law only the male descendant could be the members of the coparcenary. Section 6, so preserving ancient Hindu Law, was however amended by the Hindu Succession (Amendment) Act, 2005, to do away with the discrimination as existed under ancient Hindu Law, between grandsons and granddaughters. Section 6 as amended provides that with effect from the Hindu Succession (Amendment) Act, 2005, in a joint Hindu family, governed by Mitakshara law, the daughter of a coparcener shall by birth,

become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son.”

Nothing of the sort was pleaded and pleas sought to be taken were merely of the property being ‘ancestral’. It is not the case that the property was acquired by any ancestor prior to Prabhati Ram being the father of the respondent no.1 / plaintiff and the parental grandfather of the appellant no.1 / defendant. Rather, from the argument of the counsel for the appellants / defendants, of the house tax for the year 1966 having been paid by Prabhati Ram and from the argument that the respondent no.1 / plaintiff was 15 years of age at that time and could not have had an income, it is evident that the said Prabhati Ram was alive at least till 1966 and even if the respondent no.1 / plaintiff, inherited the property aforesaid from the Prabhati Ram, the appellant no.1 / defendant as the son of the respondent no.1 / plaintiff, under the provisions of the Hindu Succession Act, would not have any right, title or share therein.

23. In fact, a perusal of the certified copy of the suit, in which settlement dated 4th November, 1993 aforesaid was arrived at, shows that Prabhati Ram was a party thereto and alive on 4th November, 1993 and had also made a statement to the effect that the respondent no.1 / plaintiff was the exclusive owner of the said property and that the brothers of the respondent no.1 / plaintiff who had filed the suit had withdrawn the suit.

24. Form the documents also, the title of the respondent no.1 / plaintiff stands proved.

25. The onus of proving the property to be ancestral and/or of the appellant no.1 / defendant having any right therein was on the appellants /

defendants and which appellants / defendants have failed to discharge. So much so, the appellants / defendants did not even seek framing of an issue on their said plea.

26. In the facts aforesaid no question of law, lest substantial question of law arises. Supreme Court, in *Veerayee Ammal Vs. Seeni Ammal* (2002) 1 SCC 134 held that merely because on appreciation of evidence another view is also possible would not clothe the High Court to assume jurisdiction on issue of fact framed by the Trial Court by terming the question as substantial question of law. As far back as in *Sir Chunilal V. Mehta Vs. Century Spinning and Manufacturing Co. Ltd.* AIR 1962 SC 1314 reiterated in *Kashmir Singh Vs. Harnam Singh* (2008) 12 SCC 796, it was held that the proper test for determining whether a question of law raised in a case is substantial, is whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is an open question in the sense it is not finally settled or is not far from difficulty or calls for discussion of alternative views; if the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles, it would not be a substantial question of law. It was further held that it is not within the domain of the High Court to investigate the grounds on which the findings were arrived at by the last Court of fact being the first Appellate Court. Mere appreciation of facts, documentary evidence was held to be not raising a question of law. Even in *Santosh Hazari Vs. Purushottam Tiwari* (2001) 3 SCC 179 it was held:

“To be “substantial” a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material

bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned.”

27. Hence, the Second Appeal cannot be entertained.

Dismissed.

No costs.

Decree sheet be prepared.

JULY 16, 2018

‘gsr’..

RAJIV SAHAI ENDLAW, J.

