

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

+ **RFA No.737/2018**

% **5th September, 2018**

KHEM CHAND (NOW DECEASED) THROUGH ONE OF HIS

LRS Appellant

Through: Mr. Sanjay Sharma, Advocate
(M. No.9810139700).

versus

DIWAN 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. No.36024/2018(exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

**C.M. Nos. 36025/2018(condonation of delay in filing) &
36026/2018(condonation of delay in re-filing)**

2. For the reasons stated in the applications, delay of 14 days in filing and 80 days in re-filing the appeal is condoned.

C.M. stands disposed of.

RFA No.737/2018 and C.M. No.36023/2018(stay)

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the original defendant in the suit (now deceased and represented through his legal heir as he died during the pendency of the suit) impugning the Judgment of the Trial Court dated 28.11.2017 by which trial court has decreed the suit for possession, permanent and mandatory injunction along with *mesne* profits filed by the respondent no. 1/plaintiff with respect to rear portion of the property bearing No.WZ-39, Mukh Ram Park Extension, Tilak Nagar, New Delhi on a plot area admeasuring 15' X 40'.

4. The facts of the case are that the respondent no. 1/plaintiff filed the subject suit pleading that the entire property WZ-39, Mukh Ram Park Extension, Tilak Nagar, New Delhi was owned by the mother Smt. Bholi Devi in terms of a registered Sale Deed dated 30.8.1965. Smt. Bholi Devi expired on 19.2.1996 leaving behind three sons and three daughters. Respondent no. 1/Plaintiff and the erstwhile defendants are the two sons of Smt. Bholi Devi. Smt. Bholi Devi had executed her Will dated 4.12.1991 bequeathing part of

property No. WZ-39 to the respondent no. 1/plaintiff, being the rear portion of the property. This Will was probated by the competent court and challenge thereto was dismissed by this Court on 17.5.2010 and an SLP before the Supreme Court was also dismissed on 19.11.2012. Therefore since the suit property being rear portion of WZ-39 fell to the share of the respondent no. 1/plaintiff, therefore the subject suit was filed as the appellant/defendant failed to vacate the suit property in spite of service of Legal Notice dated 28.2.2013.

5. The appellant/defendant filed written statement and prayed for dismissal of the suit. It was prayed that suit had to be dismissed because the suit property was ancestral property and Smt. Bholi Devi had no right to make a Will. It is also pleaded that the suit property is a property which is different than the property which was the subject matter of the Will dated 4.12.1991 executed by Smt. Bholi Devi.

6. After pleadings were complete trial court framed the issues and parties led evidence and these aspects are recorded in paras 6 to 11 of the impugned judgment and these paras read as under:-

“6.After completion of the pleadings and from material on record, following issues were framed on 10.11.2005:-

Issue no.1 Whether the suit property is the ancestral property as alleged by defendant? OPD

Issue no.2: Whether Smt. Bholi Devi had no legal right to bequeath the suit property by way of WILL? OPD

Issue no.3: Whether the plaintiff is entitled for the relief of recovery of possession of suit property as prayed for? OPP

Issue no.4: Whether the plaintiff is entitled for damages @ Rs.10,000/- per month as prayed for? OPP

Issue no.5: Whether the plaintiff is entitled for decree of permanent injunction as prayed for? OPP

Issue no.6: Relief.

Plaintiff's Evidence

7. In order to prove his case, plaintiff has examined himself as PW-1 and filed his evidence by way of affidavit in examination-in-chief which is Ex.PW1/A wherein he reiterated the contents of the plaint on oath. The plaintiff has relied upon the following documents:-

1. Sale deed dated 30.08.1965 as Ex PW1/1A
2. Death Certificates of Smt. Bholi Devi and Sh. Narain Dass as Ex.P-1/1 and Ex.P-1/2.
3. House Tax Receipts are Ex.P-1/3
4. Site plan as Ex.P-1/4
5. Copy of judgment dated 21.07.2005 as Ex.P-1/5.
6. Copy of judgment and order dated 17.05.2010 as Ex.P-1/6.
7. Copy of order dated 04.06.2010 as Ex.P-1/7.
8. Copy of order dated 19.11.2012 as Ex.P-1/8.
9. Copy of notice dated 28.02.2013 as Ex.P-1/9
10. Reply to legal notice dated 26.03.2013 as Ex.P-1/10.

8. PW-1 was cross-examined on behalf of the defendant and then discharged.

9. Plaintiff has also examined Sh. Ghanshyam, JJA Record Room Sessions as PW-2. He has brought the record of Probate Case no.113/05 titled as Narsi Singh Vs State. He deposed that said file contains the original WILL dated 04.12.1991 executed by Smt. Bholi Devi and identified the copy of the same as Ex.PW2/1 (OSR). He was cross-examined by counsel for defendant no.1(b) and then discharged.

10. Plaintiff also examined Sh. Jitender Gandhi, Architect as PW-3. He identified the site plan prepared by him as Ex.PW3/1. He was cross-examined by counsel for defendant 1(b) and then discharged. No other witness was examined by the plaintiff. Thereafter, PE was closed.

Defendants' Evidence

11. Defendant examined Sh. Surinder Kumar as DW-1. He has tendered his affidavit in evidence in examination-in-chief which is Ex.DW1/A wherein he has reiterated and reasserted the contents of the written statement on oath. DW-1 has not relied upon any document. He was cross-examined by counsel for plaintiff and then discharged. No other witness was examined by the defendant. Thereafter, DE was closed.”

7. At the outset, it may be noted that since the probate has been granted with respect to the Will dated 4.12.1991 of Smt. Bholi Devi and which probate has become final till the Supreme Court, therefore the counsel for the appellant/defendant does not dispute the finality of the Will dated 4.12.1991 executed by Smt. Bholi Devi, however it is argued that whereas the Will of Smt. Bholi Devi was with respect to the property bearing no.WZ-39, Mukh Ram Park Extension, Tilak Nagar, New Delhi, however in the sale deed which is relied upon by the respondent no. 1/plaintiff Ex.P1/1A dated 30.8.1965 reference is made not to the property no.WZ-39 but to a Plot no.30, Mukh Ram Park Extension, and therefore, and hence the Will dated 4.12.1991 of Smt. Bholi Devi will not confer any rights upon the respondent no. 1/plaintiff with respect to the suit property

no.WZ-39 and which is a different property than the property which was subject matter of the Sale Deed dated 30.8.1965 in favour of Smt. Bholi Devi.

8. In my opinion, trial court has rightly rejected this argument in the later part of para 16 of the impugned judgment, and this para 16 of the impugned judgment reads as under:-

“Issue No.2: Whether Smt. Bholi Devi had no legal right to bequeath the suit property by way of Will? OPD

16. As the findings on both the issues are interconnected therefore, both the issues shall be decided together. The onus of proving these issues was upon the defendant. Defendant has stated in the preliminary objections in the written statement that Smt. Bholi Devi was not the owner of the suit property and the same is the ancestral property. In order to prove the averments made in the written statement, defendant has examined one witness namely Shri Surinder Kumar. He is one of the son of deceased defendant Sh. Khem Chand. In the affidavit Ex.DW1/A, it has been deposed that the suit property is ancestral property and same issue was also raised in probate case which was left open. However, besides this deposition no other evidence has been adduced by the defendant to show that the suit property is an ancestral property. In fact, DW-1 in his cross-examination has admitted that Smt. Bholi Devi has purchased the property no.WZ-39, Mukh Ram Partk Extension, Tilak Nagar, New Delhi. The another objection raised by the defendant is that the sale deed Ex.P1/1A executed in favour of Smt. Bholi Devi is not pertaining to property no.WZ-39, Mukh Ram Park Extension, Tilak Nagar, New Delhi. Perusal of the said sale deed shows that it nowhere mentions the property number but only mentions the Khasra number and plot number. Hence, it cannot be said that the property as mentioned in the sale deed does not refer to WZ-39, Mukh Ram Park Extension, Tilak Nagar, New Delhi. Further, in the plaint in para no.3 plaintiff has mentioned that Smt. Bholi Devi was absolute owner of property bearing no.WZ-39, Mukh Ram Park Extension, Tilak Nagar, New Delhi. In reply to the said para in the written statement, defendant has stated that contents of para no.3 deserves no reply. This shows that the defendant has not denied the fact that Smt. Bholi Devi was the absolute owner of property bearing no.WZ-39, Mukh Ram Park Extension, Tilak Nagar, New Delhi. As per the provisions of Code of Civil Procedure, any fact which is not specifically denied in the written statement is deemed to be

admitted by the defendant. In the present case, defendant has admitted in the written statement that Smt. Bholi Devi was absolute owner of property bearing no.WZ-39, Mukh Ram Park Extension, Tilak Nagar, New Delhi and has also not led any evidence to show that the said property was an ancestral property. Only a vague submissions has been made. Defendant has not even mentioned as to how the suit property was purchased or there was a joint Hindu family and the suit property was purchased out of the joint Hindu family funds. Hence, a mere argument that Smt. Bholi Devi was not entitled to execute any WILL with respect to suit property does not hold good. Hence, both the issues at hand are decided in favour of the plaintiff and against the defendant.”

(underlining added)

9. A reading of the aforesaid para shows that trial court has rightly observed that no doubt the Sale Deed only mentions the plot number, but in the plaint when the respondent no. 1/plaintiff mentioned that Smt. Bholi Devi was the owner of the property no.WZ-39, Mukh Ram Park Extension, Tilak Nagar, New Delhi, the appellant/defendant did not dispute this position.

10. To the aforesaid reasoning of the trial court, I would like to add that it is not the case of the appellant/defendant that Smt. Bholi Devi owned any other property than the property which was subject matter of the Sale Deed Ex.P1/1A dated 30.8.1965, and once that is so it cannot be argued on behalf of the appellant/defendant that subject matter of the Will of Smt. Bholi Devi dated 4.12.1991 was not the property which was owned by Smt. Bholi Devi in terms of the Sale Deed dated 30.8.1965. In fact the confusion created by the appellant/defendant is not difficult to

resolve because the suit property is not part of a regular MCD colony and was a plot which was carved out of an agricultural land. At the relevant time when the Sale Deed dated 30.8.1965 was executed in favour of Smt. Bholi Devi, reference to the suit property was by a plot number, but when subsequently the suit property would have fallen within the jurisdiction of the local Municipal Corporation, the Municipal Corporation gave this property a Municipal number being WZ-39. I may also note that it is clear that the subject matter of the Sale Deed was a plot of 100 sq yds forming part of Mukh Ram Park Extension and the property no.WZ-39 is also a plot of 100 sq yds property at Mukh Ram Park Extension, with the fact as already stated above that it is not the case of the appellant/defendant that Smt. Bholi Devi owned any other property in Mukh Ram Park Extension except the suit property and which property was subject matter of the Will dated 4.12.1991 of Smt. Bholi Devi. Therefore the sole argument urged on behalf of the appellant/defendant is rejected.

11. In view of the aforesaid discussion, there is no merit in the appeal. Dismissed.

SEPTEMBER 05, 2018/ Ne

VALMIKI J. MEHTA, J