

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

% **Date of decision: 31st May, 2018**

+ **CS(OS) No.272/2018**

CHANDRA GUPT

.... Plaintiff

Through: Ms. Anju Lal & Ms. Shalu Lal, Advs.

Versus

BHARAT GUPT & ANR.

.....Defendants

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted the present suit for recovery of possession of “ground floor portion shown in red colour in the site plan filed by the plaintiff and the entire first floor including the portion shown in red colour in the site plan and the second floor” of property No.J-53, Ashok Vihar, Phase-I, Delhi-110052 along with *mesne* profits. A perusal of the site plan filed along with the plaint shows only one bed room with WC and bath on the ground floor and one bedroom with WC and bath on the first floor of the property shown in red colour.

2. The plaintiff, in the plaint has pleaded (i) that the plaintiff is the sole and absolute owner of the property No.J-53, Ashok Vihar, Phase-I, ad-measuring 300 sq. yds., by virtue of a Gift Deed dated 9th March, 2016 executed in his favour by his sister Mridula Garg; (ii) that the property, comprises of a two and a half storied residential house; (iii) that the

defendant no.1 is the brother of the plaintiff and the defendant no.2 Yukti Gupta is the wife of defendant no.1; (iii) that the lease of the land underneath the property was granted to Ram Saran Gupta, father of the plaintiff and the defendant no.1, who had constructed the two and a half storied house thereon; (iv) that the defendants were residing in the house as members of the family of Ram Saran Gupta; (v) over a passage of time, relations of the defendants with Ram Saran Gupta and other family members deteriorated; (vi) that Ram Saran Gupta, on 13th December, 1991 filed a suit against the defendants, of mandatory injunction directing the defendants to remove themselves, their children and belongings from the property and to hand over possession thereof to Ram Saran Gupta; (vii) that Ram Saran Gupta in the said suit also sought *mesne* profits; (viii) that the defendant no.1 contested the said suit claiming to be in possession in his own right as owner and also filed a Counter Claim seeking to restrain Ram Saran Gupta from forcibly removing the defendants from the property; (ix) that Ram Saran Gupta expired on 28th August, 2006 leaving behind his widow Shakuntala Devi, daughter Mridula Garg, plaintiff and defendant no.1 as his sons, as his only natural heirs; (x) that the relationship of the defendants with the plaintiff and other family members remains strained after the demise of Ram Saran Gupta

also; (xi) that upon demise of Ram Saran Gupta, the plaintiff, Mridula Garg and their mother Shakuntala Devi were substituted in place of Ram Saran Gupta in the suit aforesaid filed by Ram Saran Gupta against the defendants; (xii) that Ram Saran Gupta left a validly executed last Will dated 19th August, 1991 bequeathing the property in favour of his daughter Mridula Garg, with the condition that Mridula Garg, during the lifetime of Shakuntala Devi, would not be competent to sell, mortgage or otherwise alienate the property; (xiv) that Shakuntala Devi, under an oral family settlement reduced into writing on 24th April, 2009 with Mridula Garg, gave up all her rights in the property under the Will of Ram Saran Gupta; (xv) that the Delhi Development Authority (DDA) also mutated the leasehold rights in the land underneath the property in the name of Mridula Garg and has executed a Conveyance Deed of freehold rights in the land underneath the property in favour of Mridula Garg; (xvi) that Mridula Garg, out of love and affection for the plaintiff, has gifted the property to the plaintiff; (xvii) that the plaintiff requested the defendants to vacate the property but the defendants have not complied; (xviii) that the plaintiff also filed an application under Section 89 of the CPC in the suit aforesaid filed by Ram Saran Gupta, proposing settlement of disputes and the suit and the Counter Claim

aforesaid were referred to the Mediation Centre of District Court; (xix) that in the Mediation Centre, a settlement was arrived at between the parties on 11th November, 2016 and which was signed by the plaintiff as legal representative of Ram Saran Gupta, for himself as well as on behalf of his mother Shakuntala Devi and sister Mridula Garg and the defendant no.1 also signed the said settlement for himself and on behalf of his wife defendant no.2; the settlement was also signed by counsel for the parties and Mediator; (xx) that by virtue of the settlement dated 11th November, 2016, the defendants were to vacate the portions / areas in their occupation and in lieu thereof the plaintiff was to pay a total sum of Rs.2.2 crores to the defendants; (xxi) that the settlement could not be enforced on account of misunderstanding between the parties and the refusal of the defendant no.1 to sell another property bearing No.B-6/16, Safdarjung Enclave, New Delhi-110029 which was jointly owned by the plaintiff and the defendant no.1; (xxii) that the plaintiff gave a new proposal in writing to the defendants but the defendants did not agree thereto also; (xxiii) that the plaintiff being the absolute owner of the property under the Gift Deed aforesaid is entitled to recover possession and *mesne* profits from the defendants who are in unauthorized possession thereof.

3. The suit came up before this Court first on 30th May, 2018, when in the face of the aforesaid pleadings, it was enquired from the counsel for the plaintiff as to how this suit is maintainable and whether not it is by way of re-litigation.

4. The counsel for the plaintiff stated that the earlier suit was filed by the father of the plaintiff and this suit has been filed by the plaintiff and the plaintiff, after becoming the owner of the property after the demise of the father, is entitled to file a fresh suit.

5. It was however put to the counsel for the plaintiff, that the plaintiff being the successor in interest qua title to the property of his father, whether not would be bound by the liabilities attached to his predecessor in interest. It was further enquired as to how, merely by change of hands, a disability in law attaching to an owner of the property, can be done away with.

6. The counsel for the plaintiff then stated that while the earlier suit is for mandatory injunction, the present suit is for recovery of possession.

7. No merit was however found in the aforesaid contention also and it was observed in yesterday's order that merely by change of form, the disability in law cannot be got rid of. It was further enquired from the

counsel for the plaintiff, whether not the relief of mandatory injunction to deliver possession was akin to the relief of recovery of possession.

8. The counsel for the plaintiff then contended that the settlement arrived at before the Mediation Cell had not been acted upon.

9. It was however observed in yesterday's order that even if that be so, the plaintiff, who admits to be substituted in place of his father in the earlier suit and who had arrived at a settlement with defendants, ought to enforce the said settlement in accordance with law and cannot start a fresh litigation.

10. The counsel for the plaintiff then contended that the plaintiff will withdraw the earlier suit.

11. It was however observed in yesterday's order, that once the plaintiff withdraws the earlier suit, this suit in any case would not be maintainable and the plaint will have to be rejected. It was yet further observed that in any case, as of yesterday, the earlier suit was pending and a second suit for the same relief could not be entertained.

12. The counsel for the plaintiff then stated that the earlier suit aforesaid has been dismissed in default and an application for its restoration was pending.

13. It was however observed in yesterday's order that if the plaintiff did not pursue the application for restoration of the earlier suit, the disabilities under Order IX of the CPC would be attracted to the plaintiff.

14. The counsel for the plaintiff then sought to withdraw this suit with refund of court fees.

15. However, it was felt that the counsel for the plaintiff should be given time to collate her thoughts and the suit was adjourned to today.

16. The counsel for the plaintiff has today turned turtle and states that she does not want to withdraw the suit and has argued (a) that while the earlier suit was with respect to portion of the property only, the present suit is for the entire property; (b) has relied on (i) ***Bapusaheb Chimesaheb Naik-Nimbalkar Vs. Mahesh Vijaysinha Rajebhosale*** (2017) 7 SCC 769; (ii) ***Rathnavathi Vs. Kavita Ganashamdas*** (2015) 5 SCC 223; (iii) ***Inbasagaran Vs. S. Natarajan*** (2015) 11 SCC 12; (iv) ***Virgo Industries (Eng.) Pvt. Ltd. Vs. Venturetech Solutions Pvt. Ltd.*** (2013) 1 SCC 625; (v) ***Alka Gupta Vs. Narender Kumar Gupta*** AIR 2011 SC 9; (vi) ***Kunjan Nair Sivaraman Nair Vs. Narayanan Nair*** (2004) 3 SCC 277; (vii) ***Bengal Waterproof Ltd. Vs. Bombay Waterproof Manufacturing Company*** (1997) 1 SCC 99; and, (viii) ***Gurbux Singh Vs. Bhooralal*** AIR 1964 SC 1810; and, (c) has contended

that the parties are family members and closely related and had earlier also arrived at a settlement before the Mediation Cell of the District Court and settlement will be more easily reached before this Court.

17. I have perused the compilation of judgments aforesaid handed over by counsel for the plaintiff and am still unable to find the present suit to be maintainable.

18. The plaintiff, along with the plaint in the present suit, is found to have filed the plaint in the earlier suit now stated to be pending as Suit No.172/2016 of the Court of Civil Judge (Central), Tis Hazari Courts, Delhi. A perusal of the said plaint shows the relief claimed therein of mandatory injunction, to be with respect to the portions of the property in occupation of the defendants and in particular from the portions shown in red colour in the site plan filed with that plaint. The plaintiff has not filed before this Court the site plan filed along with the previous suit. The plaintiff in the plaint in the present suit also has not pleaded that the earlier suit is for a lesser portion of the property than the portion qua which the present suit is being filed. It is not the plea that the defendants, after institution of earlier suit, have occupied any other portions of the property. I have hereinabove quoted the prayer in this suit and have also recorded that the site plan with reference to which the prayer clause is worded,

shows only one bedroom, WC and bath on ground floor and one bedroom, WC and bath on first floor in red colour. Moreover, the prayer in the plaint in the earlier suit is with reference to “premises in suit bearing No.J-53, Ashok Vihar, Phase-I, Delhi-110052 and in particular from the portion which are more fully shown bounded by red colour in the sit plan Annexure A thereto”. Thus, even if any other portion has been occupied by defendants, it is covered by the said relief. Even otherwise, if the defendants, after the institution of the suit for mandatory injunction for removing them from the portion of the property in occupation of the defendants at the time of institution of the suit have occupied any other portions of the property also, the plaintiff in my view cannot institute a separate suit therefor and has to amend the plaint to include the additional portion also in the prayer paragraph in the suit. Thus the contention of the counsel for the plaintiff, of the present suit being for a portion of the property different from the portion of the property for which the earlier suit was filed, is without any pleadings or basis and appears to have been taken off the cuff.

19. Supreme Court, in ***Sant Lal Jain Vs. Avtar Singh*** 1985 (2) SCC 332 held that a plaintiff should not be denied relief of recovery of possession of immovable property merely because he had couched the plaint in the form of a

suit for mandatory injunction. It was held that in pursuance to a decree for mandatory injunction, the plaintiff is entitled to recover possession of the property. I may notice that the previous suit for the relief of mandatory injunction between the parties is also of 1991 vintage and the plaintiff herein, as successor-in-interest of his father Ram Saran Gupta, cannot also, after the suit for mandatory injunction has remained pending for last nearly 27 years, be told that he has adopted the wrong form in claiming the relief of mandatory injunction. Dicta aforesaid of the Supreme Court in ***Sant Lal Jain*** (supra) was followed in ***Joseph Severance Vs. Benny Mathew*** (2005) 7 SCC 667. Yet again, in ***Maria Margarida Sequeira Fernandes Vs. Erasmo Jack De Sequeira*** (2012) 5 SCC 370, it was held that a trespasser in settled possession cannot be dispossessed without recourse to law i.e. by a suit for mandatory injunction. A Division Bench of this Court in ***Prabhu Dayal Vs. Roop Kumar*** AIR 2005 Del 144 also held a suit for mandatory injunction to recover possession to be maintainable and directed that if the defendant in spite of mandate did not forthwith deliver possession to the plaintiff, it will be open to the plaintiff to execute the decree and obtain possession. Reference in this regard may also be made to ***Satish Vs. Om Bati*** AIR 2017 Del 15 and ***Om Prakash Singhal Vs. K.L. Kurian*** 2014 SCC OnLine Del 761.

20. The plaintiff, along with the plaint, has also filed a copy of the proceedings dated 16th November, 2016 of the Mediation Centre, Tis Hazari Courts, Delhi recording the settlement arrived at in the previous suit and in the Counter Claim thereto, as under:

“In the matter of:

- (i) Civil Suit No.172/2016 titled as Ram Saran Gupta vs. Bharat Gupt & Anr.
- (ii) Counter Claim No.362/2016 titled as Bharat Gupt Vs. Ram Saran Gupta
- (iii) M.No.41/2016 titled as Bharat Gupt Vs. Ram Saran Gupta

All the matters have been referred by the court of Sh. Harun Pratap, Civil Judge-04, Central, Tis Hazari Courts, Delhi

11.11.2016

Present: Sh. Chandra Gupt, LR of the plaintiff for himself as well as on behalf of his mother Smt. Shakuntla Devi and sister Smt. Mridula Garg, being Power of Attorney Holder (both being legal heirs of Late Sh. Ram Saran Gupta) along with Sh. V.K. Sidharthan, Advocate.
Sh. Bharat Gupt, defendant no.1 in person as well as on behalf of defendant no.2 along with Sh. Sundaram, Advocate.

The above noted cases are in relation to the family dispute have been referred by the Court of Sh. Harun Pratap, Civil Judge-04, Central, Tis Hazari Courts, Delhi and assigned to me for mediation. Process of mediation explained to the parties. Single and joint sessions were held.

After due discussions, both parties have agreed to settle their disputes in full and final on the following terms and conditions:-

1. It is agreed between the parties that the defendant no.1 shall vacate the portion in issue of the premises bearing no.J-53, Ashok Vihar, Phase-I, Delhi-110052 and in lieu of the same, the legal heirs of the plaintiff have agreed to pay a total sum of Rs.2.2 crores to the defendants.

2. It is further agreed that the above said payment shall be paid by the legal heirs of the plaintiffs to the defendants on or before seven months from today i.e. (11th June, 2017).
3. It is further agreed between the parties that the afore-said amount of Rs.2.2 crores shall be given a banker's cheque /demand draft before the Hon'ble referral court and at the same time, the defendants shall hand over the keys of the vacant portion which is under their possession in respect of the premises bearing no.J-53, Ashok Vihar, Phase-I, Delhi-110052. Along with that the defendants shall issue a handing over possession letter to the plaintiffs and the plaintiffs shall issue a taking over possession to the defendants.
4. It is further agreed that the plaintiffs as well as the defendants are having a joint property bearing no.B6/16, Safdarjung Enclave, New Delhi-110029 which they both have agreed to dispose off / sell the same as the whole of the property on or before 11.06.2017 for which both the parties shall cooperate with each other in doing the needful.
5. It is further agreed that after the afore-said terms get satisfied, both the parties shall withdraw their respective suits as no claim would be left over between the parties against each other.
6. It is further agreed between the parties that they shall not initiate any further complaint or legal proceedings against each other in respect of the premises in question.

This settlement has been voluntarily arrived at between the parties with their own free will and without any force, pressure or coercion and both the parties are bound by the terms and conditions mentioned herein above. The contents of the settlement have been explained to the parties in vernacular and they have understood the same and have admitted the same to be correct.

Sd/-
(Chandra Gupta)
LR of the plaintiff for himself
as well as on behalf of his
mother Smt. Shakuntla Devi
and sister Smt. Mridula Garg

Sd/-
(Bharat Gupta)
Defendant no.1 for himself
and on behalf of defendant no.2

Sd/-
(V.K. Sidharthan)
Advocate for the plaintiff

Sd/-
(Sundaram)
Advocate for the defendants

Parties are directed to appear before the court concerned on 16.11.2016 i.e. the date already fixed, for making their respective statements.

Sd/-
(Rajiv Thukral)
Mediator, Mediation Centre
Tis Hazari Courts, Delhi/11.11.2016

[Emphasis added]”

21. As would be evident from the above, the defendants under the aforesaid settlement have agreed to deliver vacant possession of portion under their possession in the property to the plaintiff against receipt of Rs.2.2 crores. I may highlight that the defendant has in the settlement agreed to deliver possession of whatsoever portion may be in his possession and not with reference to any particular portion of the property. I fail to see as to what remains now for the plaintiff to fight this suit.

22. Though the plaintiff has not filed before this Court the orders of the Court in which the suit was pending after the date when settlement was so reached before the Mediation Centre of the District Court but the position in law does not admit of any ambiguity. This Court in **Surinder Kaur Vs. Pritam Singh** (2008) 154 DLT 598 has held (i) by amendment of the year 2002 to the CPC, Section 89 provides for settlement of dispute outside

Court; (ii) that Section 89(2) mandates the Court to effect a compromise between the parties where the matter has been referred to mediation and has been compromised; and, (iii) once the matter has been compromised as per terms contained in the settlement before the Mediator and of which the Mediator has sent a report, decree in terms thereof is to be passed. Yet again, the Division Bench of this Court in *Naresh Kumar Vs. Ashok Arora* MANU/DE/9778/2007 held (a) if settlement is arrived at before the mediator, one cannot back out; (b) if such an attempt is permitted, it would negate the very purpose for which Section 89 has been inserted by the Parliament by way of amendment to the CPC; (c) if the Courts were to start entertaining pleas to back out of the settlement arrived at before the Mediation Cell in terms of Rules 24 & 25 of the Mediation and Conciliation Rules, 2004, the sanctity and purpose of amicable settlement between the parties would stand totally eroded; (d) amicable resolution of disputes and negotiated settlement is public policy in India; (e) Section 89 of the CPC, Arbitration & Conciliation Act, 1996 as well as Legal Services Authorities Act, 1995 call upon the Court to encourage settlement of legal dispute through negotiations between the parties; (f) if amicable settlements are discarded and rejected on flimsy pleas, the parties would be wary of

entering into negotiated settlement and making payment thereunder as a shrewd party, after entering into negotiated settlement, may take the amount received under it and thereafter challenge the settlement and re-agitate the dispute causing immeasurable loss and harassment to the party making payment thereunder; and, (g) this tendency has to be checked and such litigants discouraged by the Courts.

23. It is thus inexplicable as to why the plaintiff, who has already been substituted in place of his father in the previous suit, instead of seeking a decree in terms of the settlement aforesaid arrived at, is choosing to file this fresh suit.

24. It appears that the plaintiff is not satisfied with the litigation in the previous suit stated to be pending since the year 1991 and when the said litigation has culminated, instead of enforcing the settlement having force of decree therein, desires to file a fresh suit and to keep it pending for a few more decades. This is a classic case of a person approaching the Court, instead of being interested in the relief, being only interested in remaining before the Court.

25. Else, it was held in ***K.K. Modi Vs. K.N. Modi*** 1998 3 SCC OnLine 573 that one example of abuse of process of the Court is re-litigation; it is an

abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him; re-agitation may or may not be barred as *res judicata*; but if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of the Court; a proceeding filed for a collateral purpose amounts to abuse of the process of the Court and the Court has the power to stop such proceedings summarily and prevent the time of the public and the Court from being wasted. Reference may also be made to ***Mother Teresa Institute of Management Vs. Guru Gobind Singh Indraprastha University*** 2014 SCC OnLine Del 1847, ***S.K. Sehgal Vs. Delhi Administration*** (2016) 229 DLT 261 and ***Bimla Devi Vs. Laxmi*** 2017 SCC OnLine Del 11727.

26. As far as the judgments referred to by the counsel for the plaintiff are concerned:

- A. In ***Bapusaheb Chimesaheb Naik-Nimbalkar*** supra, Order II Rule 2 of the CPC was held to be not attracted because the cause of action in the former suit was found to be different from that in the latter suit. The property subject matter of the latter suit was not found to be included in the earlier suit.

- B. In *Rathnavathi* supra also, Order II Rule 2 of the CPC was held to be not attracted because while the first suit was for permanent injunction restraining forcible dispossession, the second suit was for specific performance of the Agreement to Sell. Hence, the cause of action in the two suits was held to be different.
- C. In *Inbasagaran* supra also, the former suit was for permanent injunction restraining interference with possession and enjoyment of the property and the second suit was for specific performance of the agreement of sale and which two causes of action were held to be different.
- D. In *Virgo Industries (Eng.) Pvt. Ltd.* supra, the former suit was for permanent injunction restraining alienation and encumbrance of the properties which were subject matter of Agreement to Sell and the second suit was for specific performance of the Agreement to Sell. The second suit was held to be barred under Order II Rule 2 of the CPC holding that the cause of action for the relief of specific performance had accrued on the date of institution of the first suit.

- E. In *Alka Gupta* supra, it was held that in the absence of a plea and an issue thereon and evidence of pleadings in the earlier suit, the suit could not have been dismissed as barred by Order II Rule 2 of the CPC. The counsel for the plaintiff drew attention to para no.19 of the judgment holding that where summons have been issued and the suit is listed for consideration of a preliminary issue, the Court cannot make a roving enquiry into the alleged conduct of the plaintiff and the suit cannot be short circuited by deciding issue of fact merely on pleadings and documents without trial.
- F. In *Kunjan Nair Sivaraman Nair* supra also, Order II Rule 2 of the CPC was held to be not attracted because the first suit was for mere title and injunction and the second suit was for recovery of possession and *mesne* profits on the strength of title.
- G. In *Bengal Waterproof Ltd.* supra, it was held that the plea of Order II Rule 2 of the CPC could be adjudicated only if the defendants file in evidence the pleadings in the previous suit. On facts, the second suit was held to be not barred owing to the cause of action being a recurring one.

H. Lastly, in *Gurbux Singh* supra also it was held that for adjudication of plea of Order II Rule 2, evidence of pleadings in the earlier suit is necessary.

27. As would be obvious from the above, in the aforesaid judgments, either on facts the causes of action in the former suit and in the latter suit were held to be different or it was held that for dismissal of a suit as barred by Order II Rule 2 of the CPC, pleadings in the earlier suit before the Court is essential. The counsel for the plaintiff however argued that without putting the suit to trial, it cannot be dismissed as barred by Order II Rule 2 of the CPC.

28. Merely because in some of the judgments, on a finding of fact, Order II Rule 2 of the CPC has been held to be not attracted would not mean that even where the causes of action are the same, the said plea is not available. In the facts of the present case, it has been found that not only was the former suit for the same relief as the present suit, but also that a mediated settlement akin to a decree has already been arrived at therein and whereunder the plaintiff is entitled to recover possession. However the plaintiff, instead of wanting to recover possession, notwithstanding having pursued the earlier suit for 27 years, wants to start another cycle of 27 years

and for which the counsel for the plaintiff has no explanation. Malice of re-litigation is writ large. What surprises me more is that it is at the instance of a successful plaintiff when normally such attempt is made by an unsuccessful plaintiff or an unsuccessful defendant. As far as the contention of the counsel for the plaintiff and reliance on paragraph aforesaid of **Alka Gupta** is concerned, here, when on the basis of averments in the plaint and the copies of the pleadings in the earlier suit filed by the plaintiff himself before this Court, it is clear that the present suit is barred by way of re-litigation, the insistence of the counsel for the plaintiff, to instead of giving reasons for wanting to re-litigate, somehow or the other have the suit put to trial, is also inexplicable. This Court would not allow its time to be abused by a plaintiff who has already got the relief sought, in an earlier litigation.

29. Thus, suit as aforesaid is found to be by way of re-litigation and is dismissed at the threshold.

30. I however refrain from imposing any costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MAY 31, 2018

‘gsr’..

(corrected & released on 11th June, 2018)