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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ RSA 322/2016
BHATERI DEVI Appellant

Through: Mr. N.S. Dalal and Ms. Suman
Chaudhary, Advs.

Versus

TARA CHAND (DECEASED) THROUGH LRS
& ORS Respondents

Through: Mr. B.S. Maan and Mr. Sumit Singh,
Advs. for R-1 to 8.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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04.09.2018

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 16th September, 2016 in RCA No.41/16/2003 of the Court of the Additional District Judge-16(C), Tis Hazari Courts] of dismissal of First Appeal under Section 96 of the CPC preferred by the appellant against the judgment and decree [dated 26th April, 2003 in Suit No.338/2002 of the Court of the Civil Judge, Delhi] of dismissal of the suit filed by the appellant/plaintiff against the respondents/defendants for permanent injunction restraining the respondents/defendants from interfering with the use and enjoyment of the appellant/plaintiff of the portion shown in red colour in the site plan filed with the plaint of house / property situated within *lal dora abadi* of village Dichaon Kalan, New Delhi and for further restraining the respondents/defendants from interfering with the appellant/plaintiff raising permanent construction thereon.

2. The appeal was entertained and notice thereof issued, though without indicating the substantial question of law if any which the appeal entailed. The suit court record has also been requisitioned. The counsel for the appellant / plaintiff and the counsel for the respondents / defendants have been heard and the suit court record perused.

3. The appellant / plaintiff sought injunction, pleading that in a settlement amongst the members of the family to which the appellant / plaintiff and the nine respondents / defendants belonged, the land aforesaid had fallen to the share of the husband of the appellant / plaintiff and as whose legal heir the appellant / plaintiff was in possession thereof.

4. The respondents / defendants in their joint written statement, though admitted the Family Settlement but denied that the subject land had fallen to the share of the husband of the appellant / plaintiff. Rather, it was their plea that the subject land, in the Family Settlement, had fallen to the share of respondent / defendant no.1. A counterclaim was also made in the suit, for declaration to the said effect.

5. The suit court, on 24th May, 2000, framed the following issues in the suit:

- “1. Whether the suit of the plaintiff is not maintainable in the present form? OPD.
2. Whether the suit of the plaintiff is bad on account of non-joinder of necessary parties? OPD.
3. Whether the plaintiff has got no locus-standi to file the present suit? OPD.
4. Whether there exists any cause of action in favour of the plaintiff and against the defendant for the purpose of the present suit? OPP.

5. Whether any family partition had taken place amongst the family members of the plaintiff and the defendant? OPP
6. Whether the plaintiff is entitled to the relief of permanent injunction, as claimed as per the prayer clause? OPP.
7. Relief.”

and the following issues in the counterclaim:

- “1. Whether there exists any cause of action in favour of the defendants against the plaintiff for the purpose of the present suit? OPD.
 2. Whether there was any oral family partition between the parties? OPD.
 3. Whether the defendant is entitled for the relief of Declaration as claimed as per the prayer clause? OPD.
 4. Whether this court has got no jurisdiction to try the present counter claim? OPP.
 5. Whether the defendants are entitled for the relief of declaration as claimed as per the prayer clause? OPD.
 6. Relief.”
6. The suit court decided issues no.1 to 5 in the suit, in favour of the appellant / plaintiff. However, no finding on merits, on issue no.5 was returned owing to the admission in the written statement of a Family Settlement having taken place. As far as issue no.6 in the suit is concerned, on the basis of the report of the commission issued, it was held that the appellant / plaintiff and the respondent no.1 / defendant were in joint possession of the subject land and the appellant / plaintiff had failed to prove that in the Family Settlement the subject land had fallen to the share of her husband.

7. On the counterclaim, it was held that the respondents / defendants had failed to prove that in Family Settlement the subject land had fallen to exclusive share of respondent / defendant no.1. It was further held that the respondent / defendant no.1 having been found in joint possession with appellant / plaintiff, otherwise also was not entitled to declaration. Resultantly, the suit as well as the counterclaim were dismissed.

8. Neither the respondent / defendant no.1 nor the respondents / defendants challenged the dismissal of the counterclaim as aforesaid and which judgment has attained finality.

9. The appellant / plaintiff preferred first appeal which was dismissed and thus this second appeal.

10. The counsel for the appellant / plaintiff, though has not disputed the report of the commission issued, but has contended that merely because the respondent / defendant no.1 was found to be tethering cattle on the subject land did not amount to being in joint possession with the appellant/plaintiff.

11. There is some merit in the aforesaid contention inasmuch as the principle qua open land is that possession is presumed to be of title holder and mere use by another of open land, does not amount to possession. Reference in this regard may be made to *Anathula Sudhakar Vs. P. Buchi Reddy* (2008) 4 SCC 594, *Savyasachi K. Sahai Vs. Union of India* 2017 SCC OnLine Del 8818, *Institute of Human Behaviour & Allied Sciences Vs. Govt. of NCT of Delhi* ILR (2012) 3 Del 247, *Pankaj Bajaj Vs. Meenakshi Sharma* 2013 SCC Online Del 2303, *S.S.P. Buildcon P. Ltd. Vs. MCD* 2010 (119) DRJ 57, *Ishmali Devi Vs. Delhi Development Authority* 2009 SCC OnLine Del 2550, and, *Navalram Laxmidas Devmurari*

Vs. Vijayaben Jayvantbhai Chavda AIR 1998 Guj 17. However, the appellant / plaintiff in the present case has also failed to establish title to the subject land i.e. that the same, in the Family Settlement, had fallen to the share of the husband of the appellant / plaintiff.

12. Though the counsel for the appellant / plaintiff has attempted to contend that once the counterclaim stands dismissed and there is an admission of Family Settlement, it has to be presumed that in such Family Settlement the subject land fell to the share of the appellant / plaintiff but I am unable to find any such legal proposition and the counsel for the appellant / plaintiff also has been unable to substantiate the same.

13. I have however enquired from the counsel for the respondents / defendants, whether not once the appellant / plaintiff and the respondents / defendants both have been found to be in possession, both are required to maintain *status quo* qua title and possession.

14. The counsel for the respondents / defendants states that he has no objection to the same and such an order may be made in this second appeal.

15. The counsel for the appellant / plaintiff then contends that if the appellant / plaintiff is not found to have proved that the subject land has fallen to her share in the Family Settlement, then the appellant / plaintiff would be entitled to maintain a suit for partition of the entire estate of the father-in-law of the appellant / plaintiff and the father of the respondents / defendants and in which the appellant / plaintiff through her husband, or in her own right, will have a share.

16. The counsel for the respondents / defendants is agreeable to the same also.

17. The counsel for the appellant / plaintiff has been unable to satisfy me

on the basis of evidence on record, of the appellant / plaintiff having proved that the subject land had fallen to the exclusive share of the appellant / plaintiff in the Family Settlement aforesaid. In my opinion, there is no proposition of law that if the defendant admits the Family Settlement claimed by the plaintiff but controverts the plaintiff's version thereof and fails to prove his own version thereof, the version of Family Settlement pleaded by plaintiff and controverted by defendant, even if not proved by plaintiff, has to be believed. Rather, it is the contention of the counsel for the respondents / defendants, that it is the plea of the respondents / defendants that in the Family Settlement, another property had fallen to the share of the appellant / plaintiff / her husband.

18. Accordingly, with the consent of the parties through counsels, this appeal is disposed of with the following order:

- (i) that the appellant / plaintiff shall be entitled to institute a suit for partition of the estate / properties of her father-in-law, who was the father of the respondents / defendants, notwithstanding the claim of the appellant / plaintiff of a Family Settlement and further notwithstanding the admission of the respondents / defendants thereof.
- (ii) In the aforesaid suit, if filed, all pleas will remain open to the parties, notwithstanding any finding returned in the suit or in the first appeal preferred thereagainst from which this appeal arises, save as to the finding of joint possession of the appellant / plaintiff and the respondent / defendant no.1 of the subject land.

- (iii) However, it shall not be open to the respondents / defendants or respondent / defendant no.1 in the aforesaid suit, if any instituted by the appellant / plaintiff, to again take the plea of sale of another land by the father-in-law / father to the respondent / defendant no.1 and the finding in which regard will continue to bind the parties.
- (iv) The appellant / plaintiff and the respondents / defendants shall maintain *status quo* qua the subject land till 10th October, 2018; if no such suit as aforesaid is filed by the appellant / plaintiff, the said order of *status quo* qua title, possession and construction shall automatically lapse; however if such a suit is filed by the appellant / plaintiff and the appellant / plaintiff along with the said suit files an application for interim relief, the further continuation of the said order beyond 10 October, 2018 shall depend upon the orders if any passed in the application for interim relief in the said suit.
- (v) The impugned judgments of the suit court and the first appellate court shall stand modified in terms of above.

No costs.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 04, 2018

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