

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

+ **RFA No.156/2017**

% **16th July, 2018**

RANDHIR SINGH Appellant
Through: Ms. Suman Chaudhary,
Advocate.

versus

SATISH KUMAR & ORS. Respondents
Through: Mr. M.C.Premi and Mr. Naveen
Tyagi, Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

CM No. 5609/2017 (delay in filing of 16 days)

For the reasons stated in the application, delay in filing is
condoned, subject to just exceptions.

CM stands disposed of.

RFA No. 156/2017 & CM No. 5608/2017 (stay)

1. This Regular First Appeal under Section 96 of the Code
of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit
impugning the Judgment of the Trial Court dated 16.8.2016 by which

the trial court has rejected the suit as barred by *res-judicata* by applying Order VII Rule 11 CPC.

2. The facts of the case are that the appellant/plaintiff claims that his father Sh. Hari Singh was the owner of 275 sq. yds in Khasra No. 59/25 (0-15) situated in extended Lal Dora Abadi of Village Malik Pur, Delhi and that after the death of Sh. Hari Singh by virtue of partition between the four sons of late Sh. Hari Singh, appellant/plaintiff became owner of 93 sq. yds out of 275 sq. yds which is shown in blue colour in the site plan along with the plaint. Appellant/plaintiff claims that after partition and receiving 93 sq. yds the land was mutated in his name on 24.3.1998 and all the family members have accepted the ownership and possession of the appellant/plaintiff. The subject suit for declaration, partition, possession and permanent injunction was accordingly filed and reliefs prayed with respect to the claim of the appellant/plaintiff to 93 sq. yds of land out of 275 sq. yds of land forming part of Khasra No. 59/25 (0-15) situated in extended Lal Dora Abadi of Village Malik Pur, Delhi.

3. Respondents/defendants filed an application under Order VII Rule 11 CPC and pleaded that identical issue of ownership of the

appellant/plaintiff of the suit property was decided in the earlier suit for injunction bearing no.573/2011 filed by the appellant/plaintiff and the claim of the appellant/plaintiff to ownership of the suit property was rejected by a Judgment and Decree dated 8.12.2015 passed by a Civil Judge in Suit No. 573/2011.

4. Trial court has held that the issue with respect to ownership was very much directly and substantial in issue between the parties in the earlier suit and this issue was decided against the appellant/plaintiff in the earlier Judgment and Decree dated 8.12.2015. In the Judgment and Decree dated 8.12.2015 it is seen that while deciding issue no.3 it was held that appellant/plaintiff is not the owner of the suit property inasmuch as in fact partition of all the properties of the family had taken place in the year 1986 and appellant/plaintiff with respect to his share had got a property being Plot No. 54, Gali No.1, New Basti Bakner, Near Railway Crossing, Narela, Delhi of 260 sq. yds. Accordingly, the judgment and decree dated 8.12.2015 dismissed the suit for injunction filed by the appellant/plaintiff. The relevant paragraphs of the Judgment dated 8.12.2015 deciding the issue of ownership claim of the appellant/plaintiff of 93 sq. yds against

the appellant/plaintiff are paras 14 to 24 and these paras read as under:-

“ISSUE NO.3: Whether the plaintiff is entitled to a relief of permanent injunction, as prayed for? OPP.

14. Onus to prove the aforesaid issue was upon the plaintiff. It is submitted by counsel for the plaintiff that plaintiff has been able to discharge the aforesaid onus in as much as, according to him, admittedly the suit property was being owned by father of the plaintiff and the defendants and during the life time of father of plaintiff and defendants, the suit property was divided between the parties and during partition, the property shown in red colour in the site plan has fallen to the share of plaintiff who is in continuous and uninterrupted possession of the same till date. Thus, according to him, the defendants are liable to be restrained from interfering with his enjoyment/user of the suit property. Ld. counsel for the plaintiff has relied upon following judgments in support of his submissions:

- (i) *Arjan Singh Vs. The Financial Commissioner, 2001 (1) Civil Court Cases 645 (P & H)*
- (ii) *T. Lakshmipathi Vs. P. Nithyananda Reddy 2003(3) RCR (Civil) 306 (SC)*
- (iii) *Mukanda Vs. Kura Ram, 2003 (2) CCC (P & H) 301*
- (iv) *Smt. Lakshamma Vs. M.P.Krishnappa 1999 (1) CCC 650 (Karnataka)*

15. On the other hand, it is submitted by Ld. counsel for the defendants that plaintiff has failed to prove on record that he is either the owner of the suit property or is in possession of the same, whereas, according to him the defendants have proved their exclusive possession over the property since 1986 when partition had taken place between the parties during the life time of their father. Accordingly to him, during his cross examination, the plaintiff has admitted the case of defendants that the property in question was divided between the parties during the life time of their father in the year 1986 in contradiction to the stand taken by him in the plaint. In the plaint, plaintiff had taken a stand that the suit property was divided between the parties after the death of their father in the year 1998. Thus, according to him, since the plaintiff has failed to prove his possession over the suit property as on the date of filing of suit, suit of the plaintiff is liable to be dismissed.

16. I have heard the submissions made on behalf of the parties and have also perused the material available on record.

17. It is settled legal position that in a suit for permanent injunction of the nature filed by the plaintiff, the Court is concerned with the possession of plaintiff over the suit property as on the date of filing of suit by him and even if the plaintiff is unable to prove his title over the suit property, he has got a right to protect his possession from any unlawful interference by the defendants. As per the pleadings in the plaint, the father of the plaintiff and the defendants was a co-sharer to the extent of 1/3rd of share in plot situated in Khasra No.59/25 (0-15), Village Malikpur, Delhi. The aforesaid plot, according to the plaintiff, was divided between the co-sharer during the life time of his father and an area measuring 275 sq. yards had fallen to the share of father of the parties. Subsequently, according to him, after the death of their father on 24.03.1998, the suit property was mutated in the name of parties and was thereafter partitioned between them and during partition, the suit property shown in red colour in the site plan was allowed to the plaintiff and the remaining portion of the plot shown in yellow colour was allotted to defendant no.1 and 2.

18. On the other hand, case of defendants as per written statement is that the suit property was partitioned between the parties during the life time of their father in the year 1986 in which the entire property shown in red and yellow colour in the site plan had fallen to the share of defendants as the plaintiff had taken another plot bearing no.54, Gali No.1, New Basti Bakner, near railway crossing, Narela, new Delhi admeasuring 260 sq. yards (approximately). As such, according to the defendants, the plaintiff is neither the owner nor was in possession of the suit property as on the date of filing of the present suit.

19. In his replication, the plaintiff has alleged that the property situated in Narela was not an ancestral property as the same was purchased by him in the name of his wife out of funds received from the father of his wife. Thus, according to him, he has got 1/3rd share in the property which is specifically shown in the site plan in the red colour.

20. The plaintiff has examined two witnesses in support of his case. He has examined himself as PW-1 whereas his wife was examined as PW-2. During their cross-examination, both the plaintiff's witnesses have admitted that all the ancestral properties of the parties were partitioned during the life time of their father in the year 1986 as per the case of the defendants in their written statement. In view of the aforesaid admission, the stand taken by plaintiff in his plaint, regarding partition of suit property taking place after the death of his father has been proved to be false.

21. Admittedly, the plaintiff is a resident of House No.54, Gali No.1, new Basti Bakner, near Railway crossing, Narela, New Delhi and he has never been living in the suit property since 1977. On the other hand, the defendants have been able to prove their possession over suit property since atleast from the year 1986 through the testimonies of DW1 to DW3.

22. It is submitted by Ld. Counsel for the plaintiff that a partition in a Hindu Undivided Family can be oral and there is no requirement for reducing the oral partition into writing and if the parties are shown in possession of specific portions parties allotted to them during oral partition, evidencing that the oral settlement/partition has already been acted upon, the same does not require any registration and the parties in possession are entitled to protect their possession against interference by any of the co-sharer even if the land is shown as joint in the revenue records. There cannot be any dispute about the aforesaid prepositions of law laid down in the judgments relied upon by Ld. Counsel for the plaintiff. In the case in hand, admittedly the suit property has already been partitioned between the parties in the year 1986 during the life time of their father. The only dispute between the parties is that as to whether the suit property has fallen to the share of defendants only or a part of the same which is shown in the red colour in the site plan had fallen to the share of plaintiff also. The plaintiff has failed to lead any independent evidence otherwise than by way of his own testimony and the testimony of his wife that the portion shown in the red colour in the site plan had fallen to the share of the plaintiff during the oral partition in the year 1986. As has already been observed that the aforesaid testimony of plaintiff and his wife as to allotment of suit property in favour of plaintiff during partition in the year 1986 is contrary to his own pleadings wherein the plaintiff has alleged partition after 1998. Even otherwise, testimony of PW1 and PW2 regarding the property situated at Narela not being ancestral property and the same having been purchased from the funds received from father in law of plaintiff is found to be contradictory. There is material contradiction in the testimony of PW-1 and PW-2 as to the receipt of consideration amount of Rs.10,000/- by the plaintiff from his father-in-law. Though as per the testimony of PW-1 the amount of Rs.10,000/- was handed over by his father-in-law to the wife of the plaintiff whereas as per the testimony of the PW-2 the said amount was handed over by father-in-law of the plaintiff to one Sh. Pratap Singh. Though according to the plaintiff's witnesses the documents, Ex.PW-1/X1 (colly.) were prepared in their presence and in the presence of Pratap Singh and father-in-law of the plaintiff, however, in none of the documents, Ex.PW-1/X1(colly.) name of either the plaintiff or his wife or of said Sh. Pratap Singh or father-in-law of the plaintiff has been mentioned as an attesting witness. The plaintiff has failed to prove on record that the property situated in Narela was the self-acquired property of wife of the plaintiff. Though certain document,

Ex.PW-1/X1 (colly.) were produced by the plaintiff during his cross-examination, however, the same have not have properly proved by the plaintiff by examining the author of the aforesaid documents or the attesting witnesses thereof. Similarly, the plaintiff has failed to prove that the said property was purchased by him in the name of his wife out of the fund received from his father-in-law. The plaintiff has further failed to prove his possession over the suit property.

23. On the other hand, the defendants have examined three witnesses in support of their case including the defendant no.1, fourth brother and real sister of parties. All the aforesaid witnesses have categorically deposed that the suit property was partitioned by the parties in the year 1986 and during the aforesaid partition the entire portion of the property shown in red and yellow colour in the site plan had fallen to the share of defendants only as plaintiff has preferred the plot situated at Narela. They have further deposed that the defendants are in possession of suit property. All the aforesaid witnesses were duly cross-examined by counsel for the plaintiff, however, in my considered opinion no material contradictions have been brought out by the plaintiff during cross-examination of defendant's witnesses. In fact, the counsel for plaintiff had kept on putting different suggestions to the different witnesses which were not only beyond the pleadings and evidence of the plaintiff but were also contradictory to each other. No doubt DW-2 had admitted during his cross-examination that he was not aware about the contents of his affidavit as the same was being in English language, however, he has categorically deposed during his cross-examination that the suit property had fallen to the share of defendants during partition in the year 1986. The aforesaid testimony of DW-2 has remained uncontroverted. Similarly DW-3 has deposed during his cross-examination that initially the plaintiff was having a share in the suit property but after partition during the life time of father of parties he had been left with no share in the suit property.

24. Admittedly, the defendants are in exclusive possession of the suit property since 1986 whereas plaintiff is residing in Narela since the year 1977. **Plaintiff has not only failed to prove his ownership over any portion of the suit property** but has also failed to prove his possession over any portion of the suit property as on the date of filing of the present suit. In the absence of proof of possession of plaintiff over the suit property as the date of filing of the present suit, the plaintiff is not entitled to the relief of permanent injunction prayed for by him. The issue is accordingly decided against the plaintiff.” (emphasis is mine)

5. A reading of the aforesaid paras 14 to 24 of the judgment in the earlier suit passed between the parties dated 8.12.2015, and

more importantly para 24, shows that claim of ownership of the suit property was very much in issue in the earlier suit No.573/2011 and that issue was decided against the appellant/plaintiff, and that appellant/plaintiff was held neither to be the owner nor to have possession of the suit property.

6. It is noted that in the impugned Judgment dated 16.8.2016 which is subject matter of this appeal, trial court has gone into the issue that whether only because the earlier suit was a suit for injunction, whether the earlier Judgment dated 8.12.2015 would or would not be *res-judicata* for the present suit, and trial court in this regard by relying upon the ratio of the judgment of the Supreme Court in the case of ***Sajjadanashin Sayed MD. B.E. EDR. (D) by LRS Vs. Musa Dadabhai Ummer and Others, (200020002) 3 SCC 350*** has held that once in a suit for injunction title is in issue and decided, the said finding of title will operate as *res judicata* in a subsequent suit where title is in issue. The relevant paras of this judgment in this regard are paras 16 to 20 and these paras read under.

“16. What now remains to be seen is whether the matter directly and substantially in issue in the present case was directly and substantially in issue in the former suit also.

17. The subject matter of the previous suit between the parties i.e Suit No.573/11 was also plot of land measuring 93 sq. yds out of the bigger plot measuring 750 sq. yds falling Khasra No.59/25 situated in the Extended Lal Dora of village Malik Pur, Delhi, which is the subject matter of the present suit also.

18. It has been argued by the learned counsel for the plaintiff that the title of the plaintiff to the suit property was not in issue at all in the previous suit no.573/11 as the plaintiff had filed the said suit purely for obtaining an injunction restraining the defendants from interfering into his peaceful possession of the same. His submission is that the finding of the learned Civil Judge in the judgment dated 08.12.2015 passed in that suit that the plaintiff has failed to prove his ownership of the suit property was purely incidental and, therefore, the same is not binding upon the parties in the instant suit. He would submit that since the observations with regards to title of the plaintiff over the suit property given by the learned Civil Judge in that suit do not operate as *res judicata* in the present case.

19. The distinction between the matter directly in issue and a matter collaterally or incidentally in issue has been explained by the Supreme Court succinctly in Sajjadanashin Sayed Vs. Musa Dadabhai Ummer, (2000) 3 SCC 350 after a detailed consideration of law in India and elsewhere in this regard. It has been observed as under:

"15. Difficulty in this area of law has been felt in various jurisdictions and therefore some tests have been evolved. Halsbury says (Vol. 16, para 1538) (4th Ed.) that while the general principle is clear,

"difficulty arises in the application of the rule in determining in each case what was the point decided and what was the matter incidentally cognizable, and the opinion of judges seems to have undergone some fluctuations".

16. Spenceer Bower and Turner on 'The Doctrine of Res Judicata' (2nd Ed, 1969) (p. 181) refer to the English and Australian experience and quote Dixon, J. of the Australian High Court in Blair v. Curran⁹ CLR at p.553 to say :

"The difficulty in the actual application of these conceptions is to distinguish the matters fundamental or cardinal to the prior decision on judgment, or necessarily involved in it as its legal justification or foundation, from matters which, even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation of a groundwork of the judgment".

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18. In India, Mulla has referred to similar tests (Mulla, 15th Ed, p. 104). The learned author says : a matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter 'directly and substantially' in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was 'directly and substantially' in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the test for deciding into which category a case falls? One test is that if the issue was 'necessary' to be decided for adjudicating on the principal issue and was decided, it would have to be treated as "directly and substantially' in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case, (Mulla, p. 104). One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (Ishwar Singh v. Sarwan Singh 12 Syed Mohd. Salie Labbai v. Mohd. Hanifa). We are of the view that the above summary in Mulla is a correct statement of the law.

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24. Before parting with this point, we would like to refer to two more rulings. In Sulochana Amma v. Narayanan Nair , this Court held that a finding as to title given in an earlier injunction suit would be res judicata in a subsequent suit on title. On the other hand, the Madras High Court, in Selliamman Ayyanar Uthiva Somasundareswarar Temple v. Rajanga held (see para 8 therein) that the previous suit was only for injunction relating to the crops. May be, the question of title was decided, though not raised in the plaint. In the latter suit on title, the finding in the earlier suit on title would not be res judicata as the earlier suit was concerned only with a possessory right. These two decisions, in our opinion, cannot be treated as being contrary to each other but should be understood in the context of the tests referred to above. Each of them can perhaps be treated as correct if they are understood in the light of the tests stated above. In the first case decided by this Court, it is to be assumed that the tests above referred to were satisfied for holding that the finding as to possession was substantially rested on title upon which a finding was felt necessary

and in the latter case decided by the Madras High Court, it must be assumed that the tests were not satisfied. As stated in Mulla, it all depends on the facts of each case and whether the finding as to title was treated as necessary for grant of an injunction in the earlier suit and was also the substantive basis for grant of injunction. In this context, we may refer to Corpus Juris Secundum (Vol. 50, para 735, page 229) where a similar aspect in respect to findings on possession and incidental findings on title were dealt with. It is stated:

“Where title to property is the basis of the right of possession, a decision on the question of possession is res judicata on the question of title to the extent that adjudication of title was essential to the judgment; but where the question of the right to possession was the only issue actually or necessarily involved, the judgment is not conclusive on the question of ownership or title”.

(emphasis supplied)

20. To put it briefly, if in an earlier suit for injunction, there is an incidental finding on the title, the same will not be binding in a later suit or proceedings where title is directly in question. Unless it is established that it was necessary in the earlier suit to decide the question of title for granting or refusing the injunction and that the relief for injunction was found or based on the finding of title.”

7. In view of the aforesaid discussion, it is seen that the claim of ownership of the appellant/plaintiff of the suit property of 93 sq. yds was already decided against the appellant/plaintiff in terms of the judgment dated 8.12.2015 in Suit No. 573/2011, and therefore, the trial court was justified in dismissing the present suit as being barred by *res-judicata* inasmuch as once the appellant/plaintiff does not have ownership of the suit property, and which ownership issue is already decided against the appellant/plaintiff, appellant/plaintiff is not

entitled to the reliefs claimed in the suit especially on application of the doctrine of *res-judicata*.

8. In view of the aforesaid discussion, there is no merit in the appeal. This appeal being an abuse of the process of law, and the appellant/plaintiff is found to be unnecessarily and repeatedly harassing the respondents/defendants, and it is also noted that by the impugned judgment the trial court has not granted any costs in favour of the respondents/defendants, hence this appeal is dismissed with costs of Rs.25,000/-. Costs shall be paid by the appellant to the respondents within a period of six weeks from today.

JULY 16, 2018/ib

VALMIKI J. MEHTA, J

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