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

Reserved on : 8th March, 2018

Date of Decision: 1st June, 2018

+ **RFA 182/2017 & CM No.6210/2017 (stay)**

SHANKAR GOSWAMI

..... Appellant

Through: Mr. Om Prakash, Advocate.
(M:9899937365) with Appellant in person.

versus

SARITA GOSWAMI & ANR.

..... Respondents

Through: Mr. Sumit Chander, Ms. Shikha Sapra
and Mr. Jatin Choudhary, Advocates.
(M:9810024126 & 8860104587)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. This appeal arises out of order dated 4th November 2016 of the Ld. Trial Court by which the suit filed by Sh. Shankar Goswami-Appellant/Plaintiff (*hereinafter*, 'Plaintiff') has been dismissed as being barred by *res judicata*.

2. The background of this litigation is that a suit came to be filed being CS No.759/2010 (*hereinafter*, 'Suit No.1') by Smt. Sarita Goswami- the wife of Sh. Vijay Goswami. Sh. Shankar Goswami and Sh. Vijay Goswami are real brothers. Smt. Sarita Goswami filed a suit for recovery of possession, damages and mesne profits in respect of property being First Floor K-139 ad measuring 25 sq. yds. situated at Dakshinpuri, New Delhi seeking a recovery of possession and damages against Sh. Shankar Goswami. The prayer sought in the said suit was as under:

"Prayer

In view of the facts and circumstances mentioned above, it is therefore most respectfully prayed that this Hon'ble court may kindly be pleased-
(I) *To pass a Decree of Recovery of Possession of the top floor of the premises bearing No. K-139, Dakshinpuri, Delhi-62 more specifically shown red in the site plan attached in favour of the plaintiff,*
(II) *To pass an order for recovery of damages at the rate of Rs.1,500/- per month excluding the charges from the date of receipt of the notice dated 8/04/10 and till the date of handing over physical vacant possession of the property in question,*
(III) *To the cost of the suit may also be awarded to the plaintiff.*
(IV) *Any other order/orders, which deems fit and proper by this Hon'ble court, may also be awarded to the plaintiff.*

It is prayed accordingly."

3. The issues framed in Suit No.1 are as under:

- "1. Whether there is no cause of action to file the present suit and hence, suit is liable to be dismissed? OPP*
- 2. Whether plaintiff is entitled to decree of possession of the top floor of the suit premises, as prayed in prayer No.A? OPP*
- 3. Whether the plaintiff is entitled to recover the damages as prayed for in prayer No.B? OPP*
- 4. Relief, if any."*

4. Vide final judgment dated 22nd July, 2014, Suit No.1 for possession and damages was decreed by the Civil Judge in the following terms:

"RELIEF

As a consequence to my findings on the above mentioned issues, suit of the plaintiff is decreed and defendant is directed to hand over the vacant possession of the portion at top floor of the suit

property bearing no.K-139, Dakshin Puri, Delhi-110062 particularly shown in red color in the site plan to the plaintiff within one month from today. The plaintiff is also entitled to damages @ 1500/- per month from 23.04.2010 till realization alongwith interest @9% per annum from the date of filing of the suit till realization. No orders as to cost. Decree sheet pre prepared accordingly.”

5. This judgment was carried in appeal and vide judgement dated 12th May, 2015, the appeal was dismissed. A Regular Second Appeal was preferred before this Court against judgment dated 12th May, 2015 which was also dismissed on 4th September, 2015. The SLP against the said order was dismissed on 8th January, 2016. Thus, the decree for possession and damages passed in Suit No.1 acquired finality.

6. Thereafter, the Plaintiff - Sh. Shankar Goswami filed the present suit No.56/2016 (*hereinafter*, ‘Suit No. 2’) for declaration, possession and injunction in which summons were issued on 24th February, 2016. The relief prayed for in this suit is as under:

“PRAYER

In view of the facts and circumstances mentioned above, it is therefore, most respectfully prayed that this Hon’ble Court may kindly be pleased:

(I) To pass a decree of declaration to the effect that the suit property i.e. K-139, Dakshinpuri, New Delhi – 62 is not a self acquired property of the defendant no.1 rather the said property is benami property of the family consisting the plaintiff and the defendant no.2;

(II) To pass a decree of declaration that the judgment and decree dated 22.07.2014 whereby the court of Sh. Vishal Pahuja, Civil Judge – 04, (South) Saket Court, Delhi held that the plaintiff as a licensee of the

defendant no.1 which has been affirmed in the appeal by the First Appellate Court as null and void, unsustainable and unexecutable.

(III) To pass a decree of declaration to the effect that the plaintiff is co-owner of the property No.K-139, Dakshinpuri, New Delhi – 62 and is entitled for half share in the said property along-with the defendant no.2.

(IV) To pass a decree of half possession of property bearing No.K-139, Dakshinpuri, Delhi-62 by partitioning the same by meets and bounds which is more specifically shown in red colour in the site plan attached in favour of the plaintiff.

(V) To pass a decree of permanent injunction whereby the defendant no.1 be restrained from dispossessing the plaintiff from the top floor of property no.K-139, Dakshinpuri, New Delhi-62.

(VI) To the cost of the suit may also be awarded to the plaintiff.

(VII) Pass any other order or further order which this Hon'ble Court may deem fit and proper on the facts and circumstances in the interest of justice.

It is prayed accordingly.”

7. The reliefs (II) and (V) as prayed for are clearly not maintainable as they seek to interdict the execution of the earlier decree which has attained finality. Thus, prayer (II) and (V) are liable to be rejected at the threshold. However, the question that arises in the present appeal is as to whether the remaining reliefs sought by the Plaintiff are barred by principles of *res judicata*. The Trial Court has held that Suit No.2 is barred.

8. In the present appeal, the submission of the Plaintiff is that the basic condition of *res judicata* is not satisfied as Suit No.1 was only in respect of top floor of the property and Suit No.2 was in respect of the entire property. Moreover, it was argued that no issue as to ownership of the property was

framed in Suit No.1 and hence the said issue was never gone into. The counsel for the Plaintiff further submits that since, in Suit No.1, the right that was claimed was against a licensee or a tenant, what was adjudicated was not absolute title but only a possessory right. The Plaintiff submits that the question of *res judicata* is a mixed question of fact and law and Suit No.2 could not have been finally dismissed under Order VII Rule 11 CPC.

9. On the other hand, counsel for the Defendant submits that the Plaintiff had the opportunity of raising the issue of ownership in Suit No.1. In fact, the Plaintiff did raise the issue and was rightly non-suited. Hence, the said issue cannot be re-agitated. He relies on a recent judgment of the Supreme Court dated 6th March, 2018 in ***Andanur Kalamma and Ors v Gangamma (Dead) by LRs [C.A. No.423-423 of 2018]*** (hereinafter, '*Gangamma*').

Analysis and Findings

10. Though at first blush it appears that the submission of the Plaintiff is correct, on a deeper examination, it becomes clear that there is a fine issue involved in the present case. In a suit where only a question of right to possession is being adjudicated, the Court examines the nature of the right being asserted by the Plaintiff viz-a-vis, the right of the Defendant therein. The Court does not render conclusive findings as to the title in the said property. On the other hand, while granting a declaration of title, the Court goes beyond the documents put forth and adjudicates the competing rights of the parties. This is clear from ***Sajjadanashin Sayed Md. B.E.Edr. v. Musa Dadabhai Ummer 2000 II AD (SC) 133*** (hereinafter, '*Sajjadanashin Sayed*') where the Supreme Court held that if an issue has been collaterally or incidentally decided in an earlier suit that the same would not constitute

res judicata. The Supreme Court while approving Mulla on this aspect held as under:

“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 Vs. Sarwan Singh: AIR 1965 SC 948 Mohd.S.Labbai Vs. Mohd. Hanifa: AIR 1965 SC 1569). We are of the view that the above summary in Mulla is a correct statement of the law.”

11. The Supreme Court in ***Sajjanashin Sayed (supra)*** goes on to hold that even if an issue is framed in the earlier suit, it has still to be examined as to whether the issue arose directly or collaterally/incidentally. Paragraph 19 of the judgment reads as under:

“19. We have here to advert to another principle of caution referred to by Mulla (p.105). "It is not to be assumed that matters in respect of which issues have

been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the Court considers the adjudication of the issue material and essential for its decision"

12. The Supreme Court also quoted with approval the judgment of Madras High Court in ***Uthiva Somasundareswarar v. Rajanga AIR 1965 Mad 355*** where in an earlier suit for injunction, the question of title was decided, though not raised in the plaint, in the later suit on title the finding of the earlier suit would not be *res judicata*, as the first suit was concerned only with a possessory right.

13. After discussing the entire law on the subject, the Supreme Court laid down that the test pithily is - Whether the finding as to title was necessary for the grant of relief in the earlier suit, or was the substantive basis for the grant of relief?

14. Analysing the pleadings in the present case, in Suit No.1, Smt. Sarita Goswami asserted ownership of the property based on Agreement to Sell dated 28th April, 1997. Thereafter it is averred that Sh. Shankar Goswami being the younger brother of the husband was allowed to reside with the family on the top floor. However, due to various reasons and domestic disturbances, she called upon him to vacate the property which he did not do and hence Suit No.1 was filed seeking possession of the top floor of the suit property.

15. In the Written Statement in Suit No.1, Sh. Shankar Goswami asserted

that the suit premises was purchased by his brother from his own sources and the Plaintiff had no source of income being a housewife to purchase the premises. In replication, Smt. Sarita Goswami averred that she was working as a house maid for more than 20 years and she had a bank account wherein she was depositing all her savings. Accordingly, the allegation of Sh. Shankar Goswami was rejected. The judgment dated 22nd July, 2014 was thereafter passed in Suit No.1 wherein the Trial Judge recorded as under:

“It is pertinent to mention here that it is not the case that the defendant is denying the registration of documents in the name of the plaintiff, rather he has admitted through out in his testimony that the suit property is in the name of the plaintiff and no document has been executed in the name of the brother of the defendant or in his own name. There have been lot of infirmities in the testimony of DW-1 which has rendered it unreliable. He has stated that he is unaware about the date of the purchase of the said property and stated that the property has been purchased by his brother and he was only staying with him. Defendant could not show any documentary proof with respect to his ownership. Although, there are minor discrepancies in the testimony of PW-4 but the testimony of all the other plaintiff witnesses including plaintiff herself remained unrebutted and unchallenged.”

16. The above finding goes to show that the Defendant therein i.e. Sh. Shankar Goswami tried to assert ownership. He then alleged that Smt. Sarita Goswami had no source of income. In his oral deposition, he alleged that the property was purchased by his brother and that he was staying with him. All these are contradictory pleas which were rejected by the Trial Judge. In the first appeal, the Appellate Judge held as under:

“From the above mentioned facts and appreciation of evidence of both the parties it is now an admitted fact that the property was purchased in the name of plaintiff by way of notarized documents, in the year 1997, and defendant is staying in the premises since the year 2001. Admittedly the title documents include notarized agreement to sell and that to of the year of 1997. Needless to say that the purchaser / plaintiff was entitle to retain the possession of the premises in part performance of the contract in terms of section 53 A of Transfer of Property Act. (pre amendment period i.e. prior to the year 2001) so there is no dispute that possession of the plaintiff/ purchaser is recognized by law and cannot be challenged by the defendant or even by the seller.

Needless to say that defendant has failed to show any of his title documents as claimed by him in his WS, rather in the evidence and at the stage of appeal he has raised additional ground/ allegations regarding benami ownership of plaintiff or that the property was purchased by the husband of the plaintiff which was never the stand of defendant in his WS and therefore, cannot be raised at this stage as they are beyond pleadings.

Once the title or possession of plaintiff over the suit property is unquestionable and in the absence of any independent right of the defendant, the defendant can safely be assumed to be a licensee in the suit premises which is also proved by his own allegations that he was inducted in the premises in the year 2001. Hence, being a licensee he cannot go into the question of title of licensor / plaintiff in view of Section 116 of Indian Evidence Act.”

17. From the above extract, it is clear that Sh. Shankar Goswami raised the issue of Benami ownership in the said proceedings and the Appellate Judge also came to the conclusion that the title and possession over the suit

property of Smt. Sarita Goswami is unquestionable and the Defendant therein has no right in the property. Under these circumstances, the Appellate Judge held that the Sh. Shankar Goswami was only a licensee. These findings have not been disturbed by the High Court. In fact in paragraph 17 of the High Court judgment, the Ld. Single Judge observes as under:

“17. I fail to appreciate how this decision has any application in the facts of the present case. The plaintiff/respondent has a better title than that of the appellant/defendant in the suit property- being the agreement purchaser and holding the general power of attorney from the original owner. The plaintiff did not file the suit to seek a declaration of a title qua the agreement transferor. Since the occupation of the appellant/defendant in the suit property was merely permissive – as he has not been able to establish any other right title or interest in the suit property, the respondent/plaintiff could maintain the suit, without being the recorded owner of the suit property.”

The SLP against this judgment has been dismissed.

18. Sh. Shankar Goswami, taking a cue from the judgment of the High Court appears to have preferred this suit for declaration of title.

19. A perusal of the three elaborately written judgments leaves no matter of doubt that Sh. Shankar Goswami has repeatedly tried to assert his ownership in the portion of the property where he was residing. The issue of his title was not collateral but was directly called for adjudication. He also asserted ownership of his brother qua the entire property. He further asserted *benami* ownership of the Plaintiff. He failed on all counts in Suit No.1.

20. Though, Ld. Counsel for the Plaintiff has attempted to draw a

distinction between his possessory right and a right based on title in Suit No.1, all rights have been adjudicated in respect of the suit property as Sh. Shankar Goswami himself raised the said issues. As part of the issue in respect of entitlement for decree of possession, the title of Smt. Sarita Goswami and the claim to the title of the Sh. Shankar Gowami have been gone into by the Court. It is not always necessary that an issue as to the title has to be separately framed. If title has been adjudicated as part of the issues struck in a suit for grant of decree of possession, the same would bind the parties and no subsequent suit would lie for declaration of title. In Suit No.1, the issue of title was directly in issue and was not a collateral or an incidental issue.

21. Though *res judicata* is a mixed question of facts and law, a reading of the three judgments arising out of Suit No.1 makes it clear that all the issues have been adjudicated and no further facts are open for adjudication or left open. Moreover, the reliefs prayed for in the present suit are clearly in the nature of injunction against execution, which is itself barred. The earlier decree having attained finality, the present suit is clearly not maintainable. Following the dictum in *Gangamma (supra)* if the same issue has directly and substantially arisen in an earlier suit, the same cannot be re-adjudicated. The Supreme Court observed as under:

“28. For arriving at such conclusion, the Trial Court and High Court have applied the settled legal position in reference to the decisions of this Court as noticed by the High Court in the impugned judgment. The principle of res judicata as enshrined in Section 11 of CPC, is founded on the maxim “Nemo Debet Bis Vexari Pro Una Et Eadem Causa”. In a recent decision in the case of Nagabhushanammal Vs. C.

Chandikeswaralingam, 2016 4 SCC 434 this Court observed thus:

“15. “*Res judicata*” literally means a “thing adjudicated” or “an issue that has been definitively settled by judicial decision”.

Black’s Law Dictionary, 8th Edn., 1336-37. The principle operates as a bar to try the same issue once over. It aims to prevent multiplicity of proceedings and accords finality to an issue, which directly and substantially had arisen in the former suit between the same parties or their privies and was decided and has become final, so that the parties are not vexed twice over; vexatious litigation is put an end to and valuable time of the court is saved. (See *Sulochana Amma v. Narayanan Nair*, 1994 2 SCC 14)

16. In *Jaswant Singh v. Custodian of Evacuee Property*, 1985 3 SCC 648 this Court has laid down a test for determining whether a subsequent suit is barred by *res judicata*: (SCC p. 657, para 14)

“14. In order that a defence of *res judicata* may succeed it is necessary to show that not only the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is now seeking in the former proceedings. The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceedings.”

17. The expression “cause of action” came to be interpreted by this Court in *Kunjan Nair Sivaraman Nair v. Narayanan Nair*, 2004 3 SCC 277 at para 16. To quote: (SCC p. 286)

“16. The expression “cause of action” has acquired a judicially settled meaning. In the restricted sense, cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction

coupled with the right itself.

Compendiously the expression means every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Every fact which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove each fact, comprises in "cause of action".

18. In Halsbury's Laws of England (4th Edn.), the expression has been defined as follows: "Cause of action" has been defined as meaning simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. "Cause of action" has also been taken to mean that particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action."

22. The suit filed by Sh. Shankar Goswami is nothing but an attempt to prevent execution of the earlier decree, which has attained finality. Such a suit is completely untenable. The present suit is thus not maintainable. The Trial Court order does not warrant interference.

23. The appeal is, accordingly, dismissed. All pending applications also stand disposed of.

PRATHIBA M. SINGH
JUDGE

JUNE 01, 2018
Rahul