

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

% **Date of decision: 13th May, 2019.**

+ **CS(OS) 455/2018 & IA No.12498/2018 (u/O XXXIX R-1&2 CPC)**

CHANDER KANT BERI & ANR Plaintiffs
Through: Mr. Shiv Prakash Pandey and Mr.
Rabhav Pandey, Advs.

Versus

RAVI KANT BERI & ANR.Defendants
Through: Mr. R.K. Sahni, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The two plaintiffs, Chander Kant Beri and his wife Kumkum Beri have instituted this suit, for (i) declaration that the plaintiffs are the owners in possession of the first floor of property No.71, Hargobind Enclave, Delhi with proportionate right of ownership of the land underneath; (ii) partition of the said property; and, (iii) permanent injunction restraining the two defendants i.e. Ravi Kant Beri and his wife Sangeeta Beri from alienating, selling or creating third party interest in the said property.

2. It is the case of the plaintiffs in the plaint, (i) that the defendant No.1 Ravi Kant Beri is the younger brother of the plaintiff No.1 Chander Kant Beri; (ii) that the father of the plaintiff No.1 and the defendant No.1 was employed with India Meteorological Department and the family was residing in the government accommodation; (iii) that on retirement of the father of the plaintiff No.1 and the defendant No.1 in the year 1984, the plaintiffs started residing in their own house at 79 H, Sheikh Sarai, New

Delhi owned by plaintiff No.2 and the defendants along with their parents started residing in the house owned by defendant No.1 at 79G, Sheikh Sarai, New Delhi; (iv) that the father, as a member of the I.M.D. Cooperative Group Housing Society, was allotted House No.23, Ritu Apartments in Block A-4, HIG, Second Floor, Paschim Vihar, Delhi; (v) that the father was however keen to purchase a plot of land for building a house in which both of his sons i.e. the plaintiff No.1 and the defendant No.1 along with their families and the parents could reside together; (vi) that the father, impressed with the business acumen of the defendant No.1, in the year 1986, financed purchase by the defendant No.1 of a plot of land admeasuring 200 sq. yds. bearing No.71, Hargobind Enclave, Delhi in the name of the defendant No.2; (vii) that the defendant No.2 is a homemaker, without any income except for being shown as a director / shareholder in some shell companies floated by the defendant No.1 for the purpose of his business; (viii) that the father financed the purchase by defendant No.1 in the name of defendant No.2 of the plot aforesaid on the clear understanding that the house to be built thereon will be jointly owned and enjoyed by both brothers and their wives in equal share; (ix) that to implement this intent, the father authorised the defendant No.1 to sell Flat No.23, Ritu Apartments and invested the consideration amount received with respect thereto also towards the price of land already purchased at House No.71, Hargobind Enclave in the name of the defendant No.2 and for raising construction thereon; (x) that defendant No.1 sold both his house at No.79G, Sheikh Sarai, New Delhi and the house of the plaintiff No.2 at No.79H, Sheikh Sarai, New Delhi and the consideration so received was used by defendant No.1 towards adjustment of the price of land already purchased at House No.71 Hargobind Enclave

and toward costs of construction thereon; (xi) that the defendants along with their children have been residing on the ground floor of House No.71, Hargobind Enclave and the plaintiffs along with their children have been residing on the first floor of the said house, from March, 1987 onwards; (xii) that on 1st March, 1987, oral family settlement and declaration was arrived at between the plaintiffs, defendants and their parents, that House No.71, Hargobind Enclave will be owned and enjoyed by the plaintiffs on the one hand and the defendants on the other hand, jointly and equally, with both having 50% share and right to occupy the same; (xiii) that the father, on 23rd February, 1989, gave Rs.1 lac each to the plaintiff No.1 and the defendant No.1 by cheque, with instructions that the plaintiff No.1 on encashment of the said cheque should issue cheque for Rs.1 lac in favour of the defendant No.2; (xiv) that the plaintiff No.1 accordingly issued a cheque in the name of the defendant No.2 which was encashed and for which the defendant No.2 executed a registered receipt dated 2nd March, 1989 in favour of the plaintiff No.1; (xv) that the father in this way wanted to ensure that plaintiff No.1 and defendant No.1 have equal share in the House No.71, Hargobind Enclave; (xvi) that since 1987, the plaintiffs have been carrying out repairs and renovations at their own cost on the first floor of the house and similarly the defendants have been carrying out repairs and renovations at their own cost on the ground floor of the house; (xvii) that the plaintiff No.1 has been paying house tax in respect of the entire property comprising of both floors; (xviii) that the plaintiff No.1 has also been paying electricity bills with respect to the first floor of the house; (xix) that the plaintiff No.1 has also been paying water bills for both floors of the house; (xx) that the plaintiff No.1 has also been reimbursing 50% of the society charges paid by the

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defendant No.2; (xxi) that in April, 2017, the defendant No.1 conveyed to the plaintiff No.1 that the defendant No.1 intended to demolish the entire property and raise new construction and enquired from the plaintiffs, when the plaintiffs would vacate the property; (xxii) that the defendant No.2 also got served a legal notice dated 27th June, 2017 on the plaintiff No.1 calling upon the plaintiffs to vacate the property; (xxiii) that the plaintiffs, in their reply pleaded the facts, as aforesaid; (xxiv) that the defendant No.2 has filed a civil suit against the plaintiff No.1 for recovery of possession and *mesne* profits with respect to the portion of the property in possession of the plaintiffs; (xxv) that the plaintiff No.1 in his written statement again pleaded the aforesaid facts; (xxvi) that the defendant No.2 filed an application under Order XII Rule 6 of the Code of Civil Procedure, 1908 (CPC) in the said suit for possession; (xxvii) that the said application was dismissed vide order dated 9th July, 2018 of the Additional District Judge before whom the suit is pending; (xxviii) that the defendants have turned dishonest in denying the joint ownership of the plaintiffs to the property; and, (xxix) that the plaintiffs are entitled to declaration of their ownership rights in the property and to partition.

3. The suit was entertained and summons thereof ordered to be issued.

4. The defendants have filed a written statement *inter alia* pleading (a) that the proceedings in the present suit are liable to be stayed under Section 10 of the CPC on account of the pendency of the earlier suit for recovery of possession filed by the defendant No.2; (b) that the claim in the plaint is barred by the Prohibition of Benami Property Transactions Act, 1988; (c) that the suit is barred by limitation; (d) that the suit is not correctly valued

for the purposes of court fees and jurisdiction; and, (e) otherwise, specifically denying the averments in the plaint (however the need to deal with the same herein is not felt).

5. The plaintiffs have filed a replication and the need to deal with the same also is not felt.

6. The suit is listed today for framing of issues.

7. Though the counsel for the plaintiffs as well as the counsel for the defendants have handed over proposed issues but the counsel for the defendants has also argued that since the claim in the plaint is barred by the Prohibition of Benami Property Transactions Act, the suit be dismissed outrightly.

8. Though the counsels have been heard on the said aspect but I refrain myself from adjudicating the said aspect, for the reasons following:

(A) The defendants in their written statement have pleaded that in the suit for possession filed by the defendant No.2 against the plaintiff No.1 for recovery of possession of portion of the property in possession of the plaintiffs and pending before the Court of Additional District Judge, the following issues have been framed:

- “a. Whether the suit of the plaintiff is not valued properly for the purpose of court fees and jurisdiction? OPP*
- b. Whether any oral family settlement dated 01/03/1987 was ever entered into, if so, its effect? OPD*
- c. Whether defendant and his wife are owners by virtue of adverse possession of the entire First Floor of property bearing No.71, Hargovind Enclave, Delhi? OPD*

- d. *Whether the plaintiff is entitled to decree of possession, as claimed? OPP*
- e. *Whether the plaintiff is entitle for permanent injunction as claimed? (OPP)*
- f. *Whether plaintiff is entitle to any mesne profit, if so, at what rate and for what period? OPP*
- g. *Relief.”*

(B) The plaintiffs in their replication have not disputed framing of issues as aforesaid, though denied that the proceedings are liable to be stayed, claiming (I) that the parties to the present suit are different from the parties to the previously instituted suit; (II) that the reliefs claimed in the two suits are different; (III) that the cause of action for the two suits are different; and, (IV) that any finding in the previously instituted suit would not be binding on the plaintiff No.2, who is not a party thereto.

(C) I am of the opinion that the application under Order XII Rule 6 of the CPC of the defendant No.2, who is the plaintiff in the previously instituted suit, having been dismissed and the said order having attained finality and the parties having been relegated to trial in the previously instituted suit on the same pleas on which the plaintiffs in this suit are claiming the relief of declaration and without which declaration, the question of the plaintiffs being entitled to the relief of partition and injunction does not arise, it would not be appropriate for this Court to pronounce on the bar pleaded of the Prohibition of Benami Property Transactions Act and which

adjudication will have a bearing on the outcome of the previously instituted suit in which the parties have already been relegated to trial.

(D) In fact, it is inexplicable as to why the present suit has been instituted, when the pleas on the basis whereof plaintiffs seek declaration of title to the property are already subject matter of adjudication in the previously instituted suit. The plaintiffs, by instituting this suit have taken the grave risk of inviting a finding at the threshold only, of their claim being barred by the Prohibition of Benami Property Transactions Act.

(E) As far as the plea taken in the replication of the plaintiff No.2 herein being not a party to the previously instituted suit and hence being not bound by the findings in the previously instituted suit, is concerned, it is not as if the interest of the two plaintiffs is not one and the same or that there are any differences *inter se* the plaintiffs. Rather, the pleas constituting the defence of the plaintiff No.1, who is defendant in the previously instituted suit, in defence are the same on which the plaintiffs together in this suit are seeking declaration. Once a finding by a Court of competent jurisdiction is returned on the said pleas, the plaintiff No.2 claiming under the same title cannot seek any re-adjudication thereof. The process of the Court is not to be abused in this manner.

(F) In *Gupte Cardiac Care Center and Hospital Vs. Olympic Pharma Care Pvt. Ltd.* (2004) 6 SCC 756 also though there were two plaintiffs and two defendants in the suit at Nashik and only one plaintiff and one defendant in the suit at Delhi, but finding substantial

identity of the parties in the two suits and the issues arising for decision to be the same it was held that only one of the two suits could be decreed and the decree in one suit in favour of the plaintiff in that suit would entail the dismissal of the other suit and that duplication of evidence has to be avoided and the time and energy of the parties and the courts has to be saved. This Court also in ***Board of Control for Cricket in India Vs. Essel Sports Pvt. Ltd.*** 167 (2010) DLT 176 held that there may be instances when parties are unidentical but there is an identity of interest or undisassociability of interest. It was held that same parties means the parties as between whom the matter substantially in issue has arisen has to be decided and complete identity of the parties is not required. Reference in this regard may also be made to ***Wahid-un-Nissa Bibi Vs. Zamin Ali Shah*** AIR 1920 All 70, ***The Laxmi Bank Ltd. Vs. Harikisan*** AIR 1948 Nag 297, ***Shorab Merwanji Modi Vs. Mansata Film Distributors*** AIR 1957 Cal 727 (DB), ***Arun General Industries Ltd. Vs. Rishabh Manufacturers Private Ltd.*** AIR 1972 Cal 128 (DB), ***Dwarika Das Agrawal Vs. Har Prasad Agrawal*** 1975 SCC OnLine All 360 and ***Kanulal Krishnalal Trivedi Vs. Karanlal Krishnalal Trivedi*** 1997 SCC OnLine Guj 713.

(G) The previously instituted suit is still at the stage of trial and it can safely be assumed that the party aggrieved from the decision therein would avail of the remedy of appeals. The plaintiffs, till succeed in the issues framed in the previously instituted suit, have no cause of action for the relief claimed in the present suit, of partition.

As far as the relief of declaration claimed in the present suit is concerned, the same is a primary relief having precedence in adjudication even over the defence of the plaintiffs in the previously instituted suit. Once it is the own admission of the plaintiffs that there is a cloud over their title, the same has to be adjudicated and adjudication whereof has to cross the threshold of the bar of the Prohibition of Benami Property Transactions Act. The plaintiffs are however unwilling to give up their right to trial on issues framed in previously instituted suit.

(H) Once, it is found that there was no cause of action for the plaintiffs at present to institute the present suit, till the title claimed by them and under adjudication in the previously instituted suit is adjudicated, it is not deemed appropriate to stay the proceedings in the present suit and keep the present suit pending.

(I) There is no reason whatsoever for the plaintiffs to institute the present suit at this moment. Suits without reason are not to be instituted to be kept stayed. It is not as if the claim of the plaintiffs for partition of the property is independent of the adjudication of the issues framed in the previously instituted suit on the claim of ownership under an oral family settlement. Once, Issue (b) as reproduced above in the previously instituted suit is decided in favour of the plaintiff No.1, who is the defendant therein, the question of the defendant No.2, who is the plaintiff therein, being entitled to a decree for possession would not arise and there would also be no need for the plaintiffs to then seek the relief of declaration.

(J) The suit, instead of proceedings therein being stayed, is thus liable to be disposed of with liberty to the plaintiffs to seek the relief of partition, if so desire, subject to the outcome of the previously instituted suit.

(K) However, before parting with this judgment, I may observe that I do not find any issue to have been struck in the previously instituted suit on the plea herein raised by the defendants of bar of the Prohibition of Benami Property Transactions Act. I may remind the counsels that Section 4 of the said Act bars not only a claim with respect to any property held benami against the real owner thereof but also a defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person.

(L) From the issues framed in the previously instituted suit, it appears that the plaintiff No.1, who is defendant in the previously instituted suit, besides pleading the defence of oral family settlement has pleaded the defence of having become owner by adverse possession. Attention of the counsels in this regard is invited to ***Pushpa Rathi Vs. Jugnu Bansal*** 2017 SCC OnLine Del 10881, ***DDA Vs. Kumud Makhija*** 2018 SCC OnLine Del 11075, ***Manmohan Bedi Vs. Ramesh Kumar Guria*** 2018 SCC OnLine Del 9948, ***T. Anjanappa Vs. Samolingappa*** (2006) 7 SCC 570, ***P.T. Muni Chikkana Reddy Vs. Revamma*** (2007) 6 SCC 59, ***L.N. Aswathama Vs. P. Prakash*** (2009) 13 SCC 229 and ***Mohan Lal Vs. Mirza Abdul Gaffar*** (1996) 1 SCC 639 holding that a plea of adverse possession is

antithetical to a plea of lawful title and the two are mutually destructive and inconsistent and cannot co-exist.

The parties/counsels, if so desire, may take appropriate action in this respect in the previously instituted suit.

9. The suit is thus disposed of, leaving the parties to bear their own costs and with liberty to the plaintiffs, as aforesaid.

MAY 13, 2019
'bs'..

RAJIV SAHAI ENDLAW, J.

