

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

% **Date of decision: 18th March, 2019.**

+ **CS(OS) 504/2018 & IA No.13888/2018 (u/O XXXIX R-1&2 CPC)**

MANJU CHOUDHARY **..... Plaintiff**

Through: Mr. Ashish Updhayay, Advocate.

Versus

SUDESH LAMBA & ORS. **..... Defendants**

Through: Mr. Rohit Gandhi, Advocate for D-1
and 3 to 6 with D-3&6 in person.
Ms. Taru Gupta, Advocate for D-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit, for partition of and for rendition of accounts with respect to, property no. 217 Jor Bagh, New Delhi-3, pleading, (i) that the property no. 217 Jor Bagh, New Delhi was auctioned on 7th March, 1953 in favour of the paternal grandfather of the plaintiff and the six defendants namely Late Sh. Captain Risal Singh and the said paternal grandfather of the plaintiff paid consideration for purchase of and raised construction of the suit property; (ii) that Sh. Gian Singh, father of the plaintiff and six defendants inherited a number of properties from his parents; (iii) that the grandfather of the plaintiff Late Sh. Captain Risal Singh died in the year 1955, without leaving any Will and Sh. Gian Singh started enjoying the property, being the legal heir of Late Sh. Captain Risal Singh, as per the family arrangement; (iv) that the parents of the plaintiff and the six defendants were residing in the subject property; (v) that while all the other sisters of the plaintiff i.e. defendants no.1 to 6 got married, the plaintiff chose

to remain un-married and continued looking after her parents; (vi) that in the year 2002, the defendant no. 1 polluted the mind of the parents against the plaintiff and owing thereto the relationship of the plaintiff with her parents got strained, and after a brief period of dispute in the family, the plaintiff had to leave the subject property, though against her wishes, for the sake of peace of mind, and since then has been residing separately; (vii) that after the demise of the parents, the defendants are attempting to dispose of the property; and, (viii) that the plaintiff has 1/7th share in the property.

2. The suit came up first before this Court on 8th October, 2018 when summons thereof were ordered to be issued and *status quo* directed to be maintained with respect to title and possession of the property.

3. Defendants no.1 and 3 to 6 filed applications under Order 7 Rule 11 and under Order XXXIX Rule 4 CPC, which were dismissed/disposed of by the order dated 22nd November, 2018.

4. Pleadings have been completed and the suit is ripe for framing of issues and for consideration of the application for interim relief.

5. The counsel for defendants no.1 and 3 to 6 informs that the appeal preferred by the said defendants against the order dated 22nd November, 2018 has been dismissed insofar as against the dismissal of application under Order VII Rule 11 CPC but notice has been issued qua the order disposing of the application under Order 39 Rule 4 CPC.

6. The pendency of the appeal qua the application under Order 39 Rule 4 CPC does not come in the way of proceeding with this suit.

7. The counsel for the defendants no.1 and 3 to 6 contends that in fact the plaintiff instituted the suit by indulging in concealment, and the plaintiff, notwithstanding the dismissal of the application under Order 7 Rule 11 CPC, is not entitled to maintain the present suit.

8. It is informed, that (i) late Sh. Gian Singh, on 1st June, 2001 instituted Suit No.40/2001 in the court of the District Judge, Delhi against plaintiff, seeking a decree *inter alia* of possession of portion of the subject property in possession of the plaintiff; (ii) thereafter the plaintiff instituted Suit No.962/2001 in this Court against her father Sh. Gian Singh, for permanent injunction restraining him from dispossessing the plaintiff from the property no. 217 Jor Bagh, New Delhi, claiming that the said property was an ancestral property and the plaintiff had a share therein; (iii) the suit filed by the plaintiff in this Court was also subsequently transferred to the District Judge and registered as Suit No.244/2003 of the Court of Sh. A.S. Yadav, Additional District Judge, Delhi; (iv) in both the said suits pending before the same Additional District Judge, a compromise application dated 16th July, 2004 supported by affidavits of the parties was filed, whereunder in Sh. Gian Singh paid Rs.45,00,000/- to the plaintiff and the plaintiff accepted the same by way of full and final settlement of all her claims against the immovable and movable properties and assets of Sh. Gian Singh; (v) that it was pursuant thereto that the plaintiff vacated the portion of the property earlier in her possession, on receipt of the said sum of Rs.45,00,000/-; (vi) that Sh. Gian Singh, on 27th March, 2012 executed a gift deed with respect to the subject property in favour of the defendants no.1 and 3 to 6 and registered the same with the office of the Sub-Registrar and also applied for mutation of the property in the records of NDMC, from the name of Sh. Gian

Singh to the names of defendants no.1 and 3 to 6; and, (vii) that on the date of demise of the father Sh. Gian Singh, he was not even the owner of the property, for the plaintiff to inherit any share therein as heir of the father.

9. The counsel for defendants no.1 and 3 to 6 has drawn the attention to the “joint application under Order 23 Rule 3 CPC and Section 151 CPC” filed in the Court of Sh. A.S. Yadav, Additional District Judge, Delhi, in the case titled ***Ms. Manju Choudhary Vs. Sh. Gian Singh Choudhary***, and supported by the affidavits of Ms. Manju Choudhary i.e. the plaintiff herein and of Sh. Gian Singh. It is appropriate to reproduce the said application herein below:-

“1. That the plaintiff has filed the above noted suit under Section 3(b) and 20 of the Hindu Adoption and Maintenance Act.

2. That the defendant herein has also filed a separate suit against the plaintiff herein for possession and permanent injunction and for recovery of mesne profits/damages in respect of one room, kitchen, bath room on the barsati floor in property bearing No. 217, Jor Bagh, New Delhi being C.S. No. 294 of 2004 and the said suit was consolidated with the above noted suit by this Hon’ble Court vide order dated 6.4.04.

3. That the parties to the suit are related to each other. The plaintiff is the daughter of the defendant. The parties have settled all their disputes and differences and have come to an amicable settlement and have mutually agreed to the following terms:-

i) the plaintiff admits the defendant to be the absolute owner of the residential house bearing No. 217, Jor Bagh, New Delhi-3 and the defendant is entitled to deal with it in any manner he deems fit and proper.

ii) the defendant has agreed to give Rs.45.00 lakhs (Rs.forty five lakhs only) to the plaintiff towards her

residence, permanent maintenance in all respects, in full and final settlement and on receiving the aforesaid sum of Rs.45.00 lakhs (Rs.forty five lakhs only) the plaintiff undertake to handover vacant peaceful physical possession of one room attached bath room and kitchen on the barsati floor as shown red in the site plan attached to the plaintiff of house Bearing no. 217, Jor Bagh, New Delhi-3 in suit no. 294/04 titled as Chaudhary Gian Singh Vs. Manju Chaudhary on or before 3rd of September, 2004 and she has further agreed not to raise any claim whatsoever present or in future in respect of any of the properties movable or immovable of the defendant.

iii) That the defendant has handed over today a cheque of Rs.10.00 lakhs (Rs. ten lakhs only) bearing no. 539980 dated 16.7.04 drawn on Central Bank of India, Jor Bagh, New Delhi in favour of Ms. Manju Chaudhary, the plaintiff and the balance sum of Rs.35.00 lakhs (Rs. thirty five lakhs only) shall be paid to her on or before 3rd September 2004 when the plaintiff handover vacant peaceful physical possession of the barsati floor of House Bearing No. 217, Jor Bagh, New Delhi-3 to the defendant.

iv) It is agreed by the parties to the suit that a decree for possession in respect of barsati floor of property bearing no. 217, Jor Bagh, New Delhi-3 shown as "red" in the site plan be passed in favour of the defendant and against the plaintiff herein in suit no. 294 of 2004 titled as Chaudhary Gian Singh Vs. Manju Chaudhary.

4. That the parties shall be bound by terms and conditions of the present compromise and the present application shall form part of the decree.

PRAYER

In view of the submissions made above, it is most respectfully prayed that this Hon'ble Court be pleaded to:-

- a) record the compromise between the parties to the suit and the suit be disposed of in terms of the compromise and*
- b) pass any order or further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

10. Counsel for the defendants no.1 and 3 to 6 has argued that the plaintiff, in the aforesaid compromise unequivocally admitted the property aforesaid to be a self acquired property of the father Sh. Gian Singh and to his entitlement to deal therewith as absolute owner thereof and the father Sh. Gian Singh, exercising such rights has executed a gift deed with respect to the said property, gifting the same to the defendants no.1 and 3 to 6 and thus the plaintiff has no right to claim partition with respect to the subject property. Attention is also invited to the gift deed placed on record whereunder, Sh. Gian Singh gifted the property to defendants no.1 and 3 to 6. It is further contended that the plaintiff has not challenged the said gift deed. Attention is yet further invited to the replication titled 'rejoinder' filed by the plaintiff to the written statement of the defendants no.1 and 3 to 6, where the plaintiff has pleaded that:

"It is further submitted that through this present suit the plaintiff is claiming her share right over the ancestral property not in the property of her father i.e. the suit property as the grandfather of the plaintiff namely Captain Risal Singh had died intestate who has purchased the suit property. Therefore, the plaintiff has right over the ancestral property i.e. suit property and this fact was clearly mentioned in the civil suit filed by the plaintiff against her father. It is pertinent to mention here that father of the plaintiff has made absolutely wrong statement in civil suit filed by him against the plaintiff stating that the suit property

was purchased jointly by him with his brother namely Choudhary Sardar Singh despite the factual position that the suit property was allotted to the grandfather of the plaintiff after a public auction held in January/February, 1953 vide Letter dated 7.3.1953 of the Land and Development Office, Government of India attached herewith”.

11. I have at the outset wondered, whether the order of dismissal of the application earlier preferred by the defendants no.1 and 3 to 6 under Order 7 Rule 11 CPC and the order of dismissal of the appeal preferred there against prevents me, from at this stage going into the aspect of maintainability of the suit.

12. A perusal of the order dated 22nd November, 2018 dismissing the application under Order 7 Rule 11 CPC does not show that this Court at that stage was seized of the gift deed executed by the father Sh. Gian Singh in favour of defendants no.1 and 3 to 6. On the contrary, a perusal of the order indicates that rejection of the plaint at that stage was sought only on the ground, of the plaintiff having earlier settled with the father, being not entitled to maintain the suit and which plea was rejected observing that the plaintiff, after the demise of the father, as a natural heir of the father, would not be prevented from getting a share in the property notwithstanding having earlier withdrawn the suit filed against the father claiming a share in the property. A perusal of the application under Order 7 Rule 11 CPC also does not show any mention therein of the gift deed executed by the father. I have also perused the order dated 8th February, 2019 of the Division Bench of this Court in FAO(OS) 29/2019 preferred thereagainst and do not find anything

in the said order also so as to bar this Bench from considering the aspect aforesaid at this stage.

13. The plaintiff, in the compromise application filed in the litigation with the father, unequivocally admitted the father Sh. Gian Singh to be the absolute owner of the property, entitled to deal with it in any manner he deemed fit and also agreed to suffer a decree for possession with respect to the portion in her possession, all for consideration of Rs.45,00,000/- received from the father. It is now not open to the plaintiff, to again contend that the father was not an absolute owner of the property or that the property was ancestral property, as is now being claimed, and that the plaintiff, independently of the father, has a share therein.

14. A litigant before a Court, cannot be permitted to blow hot and cold and the plaintiff is estopped from contending contrary to the settlement arrived at with the father.

15. Though the plaintiff, notwithstanding the said settlement with the father, after the demise of the father, as an heir in law of the father, could have claimed a share in the property but only if the father had died leaving the subject property. There is on record, a registered gift deed, by which the father, in his lifetime only divested absolute title held by him in the property thus the said property did not form part of the estate of the father, for the plaintiff to have a share therein as a natural heir.

16. As far as the gift deed pleaded by the defendants no.1 and 3 to 6 is concerned, the plaintiff, in the replication to the written statement of the defendants no.1 and 3 to 6, has pleaded:

“It is specifically denied that father of the plaintiff became the sole and absolute owner in view of the facts of the matter. And therefore not in the power of Shri G.S. Choudhary to either bequeath the same or gift it to anyone... Any execution of Will or Gift Deed of an ancestral property is null and void abinitio being illegal and contrary to the provision of law”.

It is thus clear that the plaintiff does not controvert the gift deed by the father and only controverts the entitlement of the father to gift the property, by averring the same to be ancestral property and the plaintiff having share therein. However, the same claim was made by the plaintiff in the earlier litigation with the father and which claim was withdrawn by the plaintiff in the compromise aforesaid arrived at with the father. The said claim of the plaintiff, again in this suit, is barred by Order XXIII Rules 1&3 of the CPC.

17. Counsel for the plaintiff, during the course of arguments, on enquiry as to the date of demise of the paternal grandfather Late Sh. Captain Risal Singh, has given the year of demise as 1957 and on the premise thereof it was also enquired from the counsel for the plaintiff as to how and under which law the plaintiff, on the demise of her paternal grandfather in the year 1957 i.e. after coming into force of Hindu Succession Act, 1956, acquired a share in the property. The counsel for the plaintiff, at that stage generally stated that there is a provision to such effect but could not name the said provision. A copy of the Hindu Succession Act was handed over to the counsel for the plaintiff to enable the counsel for the plaintiff to show the requisite provision but the counsel still was not able to show the same. However, while dictating this order and perusing the plaint, it has transpired

that the grandfather is pleaded to have died in the year 1955 and not in the year 1957 as earlier stated by the counsel for the plaintiff. The counsel for the plaintiff, during the course of dictation also interrupted to contend that the plaintiff has a share in terms of Section 6 of the Hindu Succession Act. The counsel for the plaintiff has been given opportunity to say whatever he wants to say further and he states that apart from pointing to Section 6 of the Hindu Succession Act he does not want to show/say anything else. The counsel for the plaintiff, on further enquiry, how he relies upon Section 6 of the Hindu Succession Act, states that since the father of the plaintiff Sh. Gian Singh died after the year 2005, the plaintiff has a share.

18. There is no merit in the aforesaid contention. Section 6 of the Hindu Succession Act, as it stood prior to the amendment with effect from the year 2005, saved the ancient Hindu Law as applicable to coparceneries. Under the ancient Hindu Law, a daughter was not a coparcener or member of the coparcenary and did not have any share in the coparcenary property. It was only the male descendants of Hindu, who by birth acquired a share in the immovable property of the coparcenary. The said Section 6 was amended in the year 2005 to place the daughters at par with the sons of a Hindu. The plaintiff, on the date of demise of her paternal grandfather, even if prior to coming into force of Hindu Succession Act, being a daughter, did not acquire any right, title, interest or share in the subject property, even if of a coparcenary, though there is no plea to the said effect. Moreover, even if it were to be held that there was a coparcenary of father of plaintiff, though there is no plea to the said effect, the plaintiff, by entering into compromise dated 16th July, 2004, i.e. prior to coming into force the amendment to the Hindu Succession Act with effect from 9th September, 2005, did not acquire

any rights on 9th September, 2005, for the plaintiff to have any right, title or share under Section 6 of the Hindu Succession Act.

19. Thus, whichever way one looks at, on a reading of the plaint and the documents which are not disputed, the plaintiff is not found to have any share in the property, to be entitled to maintain a suit for partition.

20. The counsel for the defendant no. 2 also appears and states that defendant no. 2 supports the plaintiff.

21. Once the plaintiff herself fails, the support of defendant no. 2 is of no avail. At best it can be observed, that if defendant no. 2 has any right, title, claim or interest, the dismissal of the suit will not come in the way of defendant no.2 agitating the same.

22. The suit thus fails and is dismissed with costs of Rs.30,000/-. However, unless the plaintiff takes the matter further, the defendants no.1 and 3 to 6 will not be entitled to recovery of the said costs from the plaintiff.

Decree sheet be drawn up.

MARCH 18, 2019

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(corrected & released on 3rd April, 2019)

RAJIV SAHAI ENDLAW, J.