

\$~

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

%

Reserved on: 10th October, 2019

Decided on : 16th October, 2019

+ **RFA 962/2018 & CM APPL No.49743/2018, 1365-66/2019**

SATISH KUMAR Appellant

Through : Mr.Naveen Kr Raheja, Advocate

versus

SARJO DEVI & ORS Respondents

Through : Mr.Pinaki Addy and Ms.Arпита Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This appeal is preferred by the appellant/defendant No.1 against the judgment and preliminary decree dated 24.07.2018 passed by the learned Additional District Judge-5/South-West District, Dwarka Courts, Delhi (hereinafter referred as the learned *Trial Court*) in CS No.369/2017.

2. The brief facts that led to the passing of the impugned judgment dated 24.07.2018 are the respondent no.1/Smt.Sarjo Devi had filed Civil Suit for partition in respect of Jhuggi No.450, Indra Camp No.5, Vikas Puri, New Delhi (hereinafter referred as the '*Vikaspuri Property*') and for permanent injunction against appellant herein claiming the appellant was though her son but given in adoption to Ram Kishan, the brother of her deceased husband and since then she had no contact with the appellant till the year 2016 when the appellant had come to her and had requested

her to allow him to stay in her *Vikaspuri* property, which she allowed but later he refused to vacate it despite issuance of a legal notice 19.09.2016 to him by the respondent.

3. Appellant contested the suit and had filed written statement disputing the alleged adoption and claimed besides the *Vikaspuri* Property, late Prem Singh, his father and late husband of his mother/ respondent No.1 had also left behind yet another property bearing No.76/A, New Hari Krishan Nagar, Nilothi Extension, Delhi (hereinafter referred as the '*Nilothi Extension Property*').

4. Issues were framed by the learned Trial Court vide order dated 26.05.2017.

5. A counter claim was also filed by the appellant herein on 28.11.2017 claiming partition in *Nilothi Extension* Property stating *inter alia* such property be also included in the cluster of joint properties for the purpose of this partition. Such counter claim was taken on record and after the evidence, vide the impugned judgment, learned Trial Court held *a)* adoption of the appellant could not be proved; *b)* *Vikaspuri* Property was the only property owned by late Prem Singh; and *c)* the ownership of *Nilothi Extension* Property in the name of late Prem Singh could never be proved by either of the parties.

6. In this appeal, the cross objections were also filed vide CM No.1366/2019. This Court while dealing with the appeal passed the following orders:-

Order dated 30.11.2018

"3. In terms of the impugned judgment the suit filed by the respondent no.1/plaintiff/widow was decreed against the appellant/defendant

no.1/son with respect to the property belonging to the late husband of the respondent no. 1 i.e. the father of the appellant. This property with respect to which a preliminary decree for partition has been passed is the property being jhuggi no. 450, Indira Camp no. 5, Vikas Puri, Delhi.

4. The appellant/defendant no. 1 had however filed a counterclaim that his father and the husband of the respondent no. 1/plaintiff also owned another property bearing no. 76-A, New Hari Kishan Nagar, Nilothi Extension, Delhi, and therefore partition be also ordered of this Nilothi Extension property. Trial court has dismissed the counter claim filed by the appellant/defendant no.1 on the ground that the appellant no.1/defendant no. 1 failed to prove that the Nilothi Extension property was owned by his father Sh. Prem Singh, the late husband of respondent no. 1/plaintiff.

5. Learned counsel for the appellant has drawn the attention of this Court to the cross-examination of the respondent no. 1/plaintiff wherein she has admitted that the Nilothi Extension property belonged to her late husband Sh. Prem Singh. Once that is so, partition decree will have to be passed also for the Nilothi Extension property. Admittedly, respondent no. 1/plaintiff is living in this Nilothi Extension property with her other son, and who is the brother of the appellant, namely, Sh. Sandeep. Under Section 106 of the Indian Evidence Act a person must file all documents in his power and possession which are relevant to determine an issue, and the respondent no. 1/plaintiff as also the defendant nos. 2 and 3/respondent nos. 2 and 3 would very much know the capacity in which they are living in the Nilothi Extension property. Respondent nos. 2 and 3/defendant nos. 2 and 3 have conveniently chosen to remain ex-parte, and therefore in the prima facie opinion of this Court the admission by the respondent no.1/plaintiff in her cross examination on 6.9.2017 that the Nilothi Extension property belonged to her husband Sh. Prem Singh, the suit for partition will have to be decreed with respect to not only the property at jhuggi 450, Indira Camp no. 5, Vikas Puri, Delhi but also with respect to house bearing no. 76-A, New Hari Kishan Nagar, Nilothi Extension, Delhi.

6. Counsel for the respondent no.1/plaintiff at this stage seeks an adjournment to file on record the documents of title of the Nilothi Extension property, and which according to the respondent no.1/plaintiff may show that Nilothi Extension property may not be owned by late Sh. Prem Singh.

7. Accordingly, list on 6th March, 2019.

8. Counsel for the respondents will file photocopies of the title documents of the Nilothi Extension property at least two weeks before the next date of hearing and bring the originals thereof in Court on the next date of hearing.

9. Till further orders unless varied by the Court there shall be stay of operation of the impugned judgment dated 24.7.2018 in Civil Suit No.369/2017 titled as Smt. Saroj Devi Vs. Satish Kumar and Ors. passed by the Court of Mohd. Farrukh, ADJ Pilot Court South-West District, Dwarka Courts, New Delhi."

ORDER dated 15.03.2019

"1. The order, dated 30th November, 2018, passed in this appeal, records the fact that learned counsel appearing for the respondent, who was the plaintiff before the learned Trial Court, had sought an

adjournment to file, on record, the documents of title regarding the property at House No. 76-A, New Hari Kishan Nagar, Nilothi Extension, New Delhi (hereinafter referred to as "the Nilothi Extension property"), in order to demonstrate that the said property did not belong to Late Shri Prem Singh, who is the father of the appellant and the husband of the defendant.

2. In view of the said submission, this Court had directed the respondents to file photocopies of the title documents of the Nilothi Extension property, within two weeks and bring the originals of the said documents to this Court on the next date of hearing.

3. Further opportunity, in this regard, was granted on 6th March, 2019.

4. **Today learned counsel for the respondent submits that there are, in fact, no title documents available in respect to the Nilothi Extension property.**

5. This Court had already observed in its order, dated 30th November, 2018, that as she is residing in the said property, Section 106 of the Indian Evidence Act, 1872, cast onus was on the respondent to file documents, under establishing that the Nilothi Extension property did not belong to Late Shri Prem Singh and that in the absence thereof, the impugned judgment of the learned Trial Court could not sustain, as it directed partition only of the property at jhuggi No. 450, Indira Camp, Vikas Puri, Delhi, without directing the partition of the Nilothi Extension property.

6. This Court had noted the fact that, in her cross-examination, the respondent admitted the fact that the Nilothi Extension property belonged to late Shri Prem Singh. Keeping in view the said fact, this Court observed, *prima facie*, that the decree for partition would necessarily have to envelope the Nilothi Extension property."

7. The learned counsel for the appellant has thus argued *Nilothi Extension Property* ought to have been included in the partition suit. It would be appropriate here to refer to issue No.2, as framed by learned Trial Court. It reads:-

"2. Whether the suit property bearing Jhuggi no.450, situated at Indira Camp no.5, Vikas Puri, Delhi and property measuring 50 sq.yds. which is situated at Nilothi Extension bearing House no.76 A New Hari Kishan Ngar, Nilothi Extension, Delhi, are the joint properties of the parties of the suit, if so as to what share the parties are entitled to? (onus to prove is on parties)"

8. The onus to prove this issue was upon *both* the parties. There was an admission by the respondent No.1 that *Vikaspuri property* was owned by her late husband-Prem Singh, though respondent no.1 did not file any document of ownership qua such property. The appellant in the counter

claim averred the *Nilothi Extension Property* was also the property owned by his deceased father – late Prem Singh and hence it be also included in the cluster of joint properties for the purpose of partition. The learned Trial Court though held there is no dispute qua the *Vikaspuri Property* being owned by late Prem Singh, but since the appellant could not prove *Nilothi Extension Property* was also owned by late Prem Singh and since no document of ownership was ever produced or proved on record by the appellant herein, hence in view of specific denial by the respondents qua the ownership of *Nilothi Extension Property*, the said property was not included in the properties meant for partition and hence the counter claim of the appellant was dismissed.

9. Heard.

10. I may here refer to the examination-in-chief of respondent No.1, when she appeared as *PWI* during trial and in her evidence affidavit she did not utter a single word about the ownership of *Nilothi Extension Property* where she has been residing for the last more than 20 years. The onus to prove such property belong to late Prem Singh was upon *both* the parties, including the respondent No.1 also. In her cross examination, held on 06.09.2017, the respondent No.1 had categorically *admitted* the *Nilothi Extension Property* too belong to her late husband namely Prem Singh. There is no denial of the fact she has been residing along with her family members in this very property since last more than 20 years. No ownership document qua *Nilothi Extension Property* was either produced by respondent No.1 as to whether it belong to any person other than her late husband Prem Singh. This is the position even qua *Vikaspuri*

Property as parties also did not file any ownership document for this property either.

11. Now, once the respondent No.1 herein in her cross-examination had admitted *Nilothi Extension* Property was owned by her deceased husband Prem Singh it ought to have been included in the *pool* of the joint properties and a similar order ought to have been passed qua *Nilothi Extension* Property as was passed qua *Vikaspuri* property, though with a rider the status of the properties would be in the estate of the Prem Singh and the person claiming through him and such finding will have no effect on the third person having any independent right in the properties. This would also take care of the plea raised by the respondent No.1 before this Court that *Nilothi Extension* Property is in an unauthorised area and the *Khatoni* shows such land stood in the name of one Mahender.

12. Admittedly, the respondent No.1 is not paying any rental of *Nilothi Extension* Property to anyone, much less, to the alleged owner since last more than 20 years and is residing therein as an owner of property. Neither such Mahender nor any one else has either filed any suit till date claiming any independent right in respect of such property, hence this property also need to be included for the partition amongst the parties and to this effect the impugned judgment and decree need modification.

13. The second limb of argument raised is qua the legality of adoption of appellant. Admittedly, no *datta homam* or any other *ceremony* of *handing over or taking over* of child was ever proved by the respondents. A bare perusal of evidence affidavit of *PW1* reveals the appellant herein was given to Sh.Ram Kishan, the brother of her husband and that Shri

Ram Kishan had always treated the appellant as his son. However, the wife of Ram Kishan has denied this fact. Rather PW1, i.e. the respondent in her cross-examination had also deposed the appellant to be her son and no document of adoption being available with her.

14. DW3 Kailasho Devi, wife of Ram Kishan, the alleged adoptive mother of the appellant herein on the other hand, in her evidence affidavit had categorically denied that Ram Kishan - her husband ever adopted the appellant herein and there was never any adoption deed executed. Though, the learned counsel for the respondent has taken resort to the cross-examination of Smt.Kailasho Devi (DW3) wherein she had deposed that she looked after the appellant as her son and that the appellant was brought to her when he was only two months old and was given to her by late Prem Singh saying he would come back after about 30 years to take the appellant back, but did not come and hence she used to maintain and look after the appellant. However, she also deposed though she had conducted the marriage of appellant but the name of Prem Singh, the natural father of the appellant was shown in the marriage card and admittedly, all identification documents of appellant reveal the parentage of appellant to be of Late Prem Singh, his natural father and not Ram Kishan, the alleged adoptive father.

15. The learned Trial Court in the impugned judgment has also dealt with this issue in the following manner:-

"12. The onus to prove this issue is placed on the plaintiff. The case set out by the plaintiff in her plaint is that defendant no.1 has no right, title or interest in the suit property of her deceased husband i.e. Prem Singh who is also the father of defendants as defendant no.1 has already been given in adoption to late Shri Ram Kishan when defendant no. 1 was aged about one and a half years. In order to prove her case, the plaintiff has examined herself as PW1 and filed her affidavit in lieu of

examination in chief deposing the aforesaid fact of adoption besides other averments, however, she has not filed any material or document to show adoption of defendant no.1 by late Sh.Shri Ram Kishan. No details with regard to the adoption are set out in the plaint. Significantly, the plaint filed by the plaintiff does not mention even the date of adoption. No reference is made to any ceremony having been performed for adoption. There is also no allegation that there was a formal giving and taking as held in *Kishorilal vs. Challibai* AIR 1959 SC 504, where it was held that the evidence in support of the case of adoption should be such that it is free from all suspicion of fraud and so consistent and probable as to leave no occasion for doubting its truth. The Hon'ble Supreme Court pointed out that as an adoption results in changing the course of succession, transferring properties to comparative strangers or more remote relations, it is necessary that the evidence to prove the adoption should be of such a nature as would not leave any alternative to the Court to accept the same. In the present case, the plaintiff has examined Smt. Phoolwati who is the mother of the plaintiff and she deposed in her affidavit that Sh.Ram Kishan adopted the defendant no.1 as his own son when defendant no.1 was aged about one and a half years and since then he resided with Sh. Ram Kishan as his adopted son, however, in her cross examination, she deposed that she did not know the contents of her affidavit in evidence Ex. PW2/A. She deposed that no document was prepared at the time of adoption of defendant no.1 by his uncle. In *A. Raghavendra vs. A. Chenchamma* [1964] 2 SCR 933 it was laid down by the Hon'ble Supreme Court that a person who seeks to displace the natural succession to property by alleging an adoption, must discharge the burden that lies upon him by proof of the factum of adoption and its validity. In the present case, the plaintiff has failed to prove by leading any positive and affirmative evidence that defendant no.1 was in fact given in adoption by her or her husband to Ram Kishan.

13. Per contra defendant no.1 in his evidence has proved on record his school leaving certificate as Ex.DW1/4 showing that the school record of defendant no.1 shows the name of his biological father of Prem Singh as his father. The said school leaving certificate was issued on 16.04.2003. Defendant no.1 has also tendered in evidence his voter ID card which is Ex.DW1/1, Aadhar Card as Ex.DW1/2, driving license as Ex.DW1/3, his health card as Ex.DW1/5 showing deceased Prem Singh as his father. Counsel for the plaintiff heavily relied upon the cross examination of DW1 to contend that defendant no.1 admitted that he was two months old when his parents sent him to his uncle, however, plaintiff has not proved the ceremony of giving and taking over. The ceremony of actual giving and taking over is necessary with intent to transfer the child from the family of its birth to the family of its adoption. Though there is no particular mode of manner of giving and taking over, however, there have to be some act of giving and taking over. There is no adoption deed proved on record.

14. Their Lordships of the Hon'ble Supreme Court in *Lakshman Singh Kothari v. Smt. Rup Kanwar*, : AIR 1961 SC 1378 (V 48 C 258), 1378 have held that transfer of adoptive boy by ceremony of giving and taking is essential, though no particular form is prescribed. Their Lordships have held as under:

"10. The law may briefly stated thus: Under the Hindu Law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of corporeal giving and receiving in adoption is obviously to secure due publicity. To achieve this object, it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it. The exigencies of the situation arising out of diverse circumstances necessitated the introduction of the doctrine of delegation; and, therefore, the parents, after exercising their volition to give and take the boy in adoption, may both or either of them delegate the physical act of handing over the boy or receiving him, as the case may be, to a third party."
(emphasis supplied)

15. In view of the aforesaid settled law when applied to the facts and circumstances and evidence adduced by the parties, it can sufficiently be concluded that plaintiff has failed to discharge her onus to prove that defendant no.1 was given in adoption to his uncle and thus the said issue no.1 is decided against her and in favour of defendant no.1."

16. A bare perusal of the impugned judgment would show the learned Trial Court has taken cognizance of the documents filed by appellant wherein the name of his father is shown as Prem Singh. Admittedly, when appellant was given to DW3-Smt.Kailasho Devi, she had her elder son alive and per Section 15 of the Hindu Adoption and Maintenance Act, 1956 she, even otherwise, could not have adopted the appellant since had a surviving son. More so, neither *datta homam* ceremony nor any other ceremony was ever proved. DW3 Smt.Kailasho Devi had categorically deposed she had never taken appellant in adoption at any time. The natural mother - PW1 of the appellant has also admitted there is no document proving such adoption and all the documents of appellant show his father to be Late Prem Singh.

17. Thus, the learned Trial Court has rightly held the adoption of the appellant to the family of Kailasho Devi / DW3 was never proved.

18. In view of above, the appeal is disposed of with partial modification of the Judgment and decree dated 24.07.2018 to an extent the *Nilothi Extension* Property be also included in the joint properties left by Late Prem Singh, being available for partition, of course with a rider *the status of the properties would be in the estate of the Prem Singh and the person claiming through him and such finding shall have no effect on the third person having any independent right in the properties.* Thus, preliminary decree is also passed in respect of *Nilothi Extension* Property with share of each of the parties already determined to an extent of 1/4th each.

19. Parties to appear on 07.11.2019 before the learned Trial Court/ Successor Court for directions for further proceedings.

20. Copy of this order be sent to the learned Trial Court/Successor Court for compliance forthwith.

21. The pending application(s), if any, also stands disposed of. No order as to costs.

YOGESH KHANNA, J.

OCTOBER 16, 2019

M