

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

% Date of decision: 29th April, 2020

+ RSA No.394/2015

GOPI CHAND

..... Appellant

Through: Mr. Prem Kumar Sharma,
Adv.

Versus

GEETA DEVI & ORS.

...Respondents

Through: Mr. Basant Kumar Gupta,
Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 29th April, 2015 in RCA No. 50/2011 of the Court of Additional District Judge-01 (West)] of dismissal of First Appeal under Section 96 of the CPC preferred by the appellant against the judgment and decree [dated 21st July, 2011 in Suit No. 927/2006 of the Court of Civil Judge (West)-2] of dismissal of suit filed by the appellant for (i) declaration that the appellant is entitled to 1/4th share in property bearing no. B-532 Madipur, JJ Colony, New Delhi – 110063; (ii) partition of the aforesaid property and separation of 1/4th share of the appellant; and (iii) injunction, restraining the respondents/defendants from alienating any portion or otherwise creating third party interest in the said property.

2. This Second Appeal came up first before this Court on 17th November, 2015 and thereafter on 12th January, 2016, 8th February, 2016 and 9th February, 2016 when notice hereof was issued, but without indicating / recording the substantial question of law which arose for adjudication. The order dated 28th

September, 2016 records that the respondents had been served, and *vide* the same order, trial court record was also ordered to be requisitioned. The appeal was thereafter adjourned from time to time but the orders of none of the said dates also record the substantial question of law, which is the *sine qua non* to the maintainability of the Second Appeal, arising for consideration herein.

3. The appeal came up before the undersigned on 13th July, 2018 when the counsels were heard and the trial court and first appellate court record received perused. However the judgment intended to be dictated in open Court on the same day remained to be dictated as I was called to the Full Bench and the matter adjourned to 16th July, 2018. However while so adjourning, it was recorded '*even otherwise, it appears that the appeal is entitled to be allowed and the counsel for the respondents is granted an opportunity to by the next date, consider the possibility of settlement*'. On 16th July, 2018, the following order was passed:

"1. None appears for the respondents.

2. However, one lady gets up from the bench at the rear and states that her advocate Mr. Basant Kumar Gupta is unwell.

3. On enquiry, she states that her name is Geeta.

4. The counsel for the appellant states that he recognizes the said lady as respondent no.1.

5. The counsel for the respondent no.1, after the order dated 13th July, 2018, cannot avoid the hearing.

6. The respondent no.1 has been informed in vernacular that she should make her advocate appear

tomorrow i.e. 17th July, 2018, else, this Court will proceed to decide the appeal.

7. List tomorrow i.e. 17th July, 2018.”

On 17th July, 2018, none appeared for the respondents in spite of waiting and the file sent to the chamber for dictating the judgment which is being pronounced now.

4. The appellant/plaintiff, on 17th April, 2006 instituted the suit from which this Second Appeal arises, impleading his brother Hem Chand, sister Meera Devi and widow of a pre-deceased brother namely Geeta Devi as defendants thereto. Subsequently children of Geeta Devi namely Yogesh Kumar, Hemant Kumar and Lokesh Kumar were also impleaded as defendants to the suit. It was the case of the appellant/plaintiff in the plaint, that (a) his father Sh. Laloo Ram, vide letter dated 25th November, 1968 of the Delhi Development Authority (DDA) under the Juggi Jhopri Settlement Scheme was allotted plot of land admeasuring 25 sq. yards bearing no. B-532, Madipur, JJ Colony, New Delhi – 110063 and raised construction comprising of two rooms etc. thereon and was residing therein along with his family including the appellant/plaintiff; (b) the father of the appellant/plaintiff died intestate in 1975 leaving the appellant/plaintiff and the respondents/defendants as his only heirs; (c) the appellant/plaintiff subsequently acquired adjoining property no. B-531 and started residing therein and his brother Hem Chand and his deceased brother's wife Geeta Devi along with her children continued to reside in property no. B-532 along with their family; and, (d) the appellant/plaintiff has been requesting the respondents/defendants for partition but the respondents/defendants had avoided the same, leading to the appellant/plaintiff issuing notice dated 24th

November, 2005 to which a false and frivolous reply was got sent by the respondents/defendants.

5. The brother and the deceased brother's widow and children, of the appellant/plaintiff contested the suit by filing a joint written statement pleading that (i) the suit of the appellant/plaintiff was barred by limitation as cause of action, if any, had arisen on the death of the father in 1975, but the suit was filed after 30 years, in 2006; (ii) the father, Sh. Laloo Ram had been allotted two properties i.e. B-531 and B-532, Madipur, JJ Colony, New Delhi – 110063; (iii) that the appellant/plaintiff was in exclusive possession of property no. B-531 and the suit property was in possession of the respondents/defendants and therefore the appellant/plaintiff was not entitled to seek declaration and partition. It was denied that the property no. B-531 was the self-acquired property of the appellant/plaintiff; however it was admitted that the allotment of plot no. B-531 in possession of the appellant/plaintiff was in the name of the appellant/plaintiff; it was however pleaded that the father Sh. Laloo Ram had got the said allotment in favor of the appellant/plaintiff as he had attained the age of majority at that time.

6. Though the appellant/plaintiff filed replication to the written statement aforesaid but the need to advert thereto is not felt.

7. The defendant No.3 Meera Devi being the sister of the appellant/plaintiff did not appear before the trial court, and was proceeded against *ex parte* as recorded in the orders dated 7th August, 2006 and 16th November, 2006.

8. On the pleadings of the parties, the following issues were framed in the suit on 16th November, 2016:

- “1. Whether the suit of the plaintiff is barred by limitation ? OPP*
- 2. Whether the plaintiff is entitled for the relief of declaration, as prayed? OPP*
- 3. Whether the plaintiff is entitled for the relief of partition, as prayed? OPP*
- 4. Whether the plaintiff is entitled for the relief of permanent injunction, as prayed? OPP*
- 5. Relief”*

and the parties relegated to evidence.

9. The appellant/plaintiff besides examining himself examined a neighbour. The respondents/defendants in their evidence examined the defendant Hem Chand and the defendant Geeta Devi.

10. The Ld. Civil Judge, being the Trial Judge dismissed the suit, reasoning (i) that though the respondents/defendants had not controverted that property no. B-532 was owned by the father Sh. Laloo Ram and that on his death had devolved upon his heirs including the appellant/plaintiff and had contested the suit by pleading the property no. B-531 in possession of the appellant/plaintiff though allotted in the name of appellant/plaintiff having also been purchased out of joint family funds, but a perusal of the letter of allotment of property no. B-532 in the name of the father of the parties showed the said allotment to be on license basis; (ii) for succeeding in a partition suit, the appellant/plaintiff has to prove a right in the property; however the letter of the year 1968 of allotment of land underneath property no. B-532 showed that the father of the parties only had a license in respect thereof; (iii) a license is a personal right which does not enure to the benefit of the heirs of the licensee; (iv) the appellant/plaintiff had failed to

prove that the said license in favour of his father was heritable and that he had acquired any right therein; and, (v) the appellant/plaintiff was claiming a right / share in the property through his father Sh. Laloo Ram but who himself did not have any right which he could have passed in favour of his heirs.

11. The Ld. Additional District Judge dismissed the appeal of the appellant/plaintiff, affirming the reasoning of the Civil Judge. The contention of the counsel for the appellant/plaintiff that had the license granted to the father of the appellant/plaintiff been personal, the DDA would have taken back possession of the property after the demise of the father of the parties and would not have permitted them to continue, was negated, reasoning that merely because DDA had not taken back possession did not confer any ownership in favour of legal representatives of the licensee when the letter of allotment itself used the term 'license'. It was also reasoned, without there being any issue or finding of the father of the parties Sh. Laloo Ram being the owner of property no. B-531 also and the same also forming part of his estate, that the appellant/plaintiff as one of the four heirs of his father was already in exclusive possession of one of the said two properties and was being greedy by wanting a share in the other property also.

12. On the issue of limitation, both the Civil Judge as well as the Additional District Judge found in favour of the appellant/plaintiff and there is no challenge to the said finding.

13. The undersigned, after the hearing of this Second Appeal on 13th July, 2018 had observed that the appeal was entitled to be allowed, being of the view that once the land had been allotted to the father of the parties as far back as in the

year 1968 and the father of the parties had raised construction of a permanent nature thereon and continued in occupation thereof till his demise in 1975 and that further since after his demise his heirs had been allowed to continue in occupation for 30 years, at least till the institution of the suit and even thereafter, without any disturbance from the grantor i.e. the DDA, the allotment even if any by way of a license, was of a right and the license was not of such a nature which was determinable by demise of the licensee. Even a license with respect to immovable property, once allowed to continue after the demise of the licensee, is valuable property even if not immovable property and is partible among the legal heirs of the licensee. In this context, I have in ***Shyam Behari Vs. Ram Kishan*** (2013 SCC OnLine Del 4110) and ***Surjit Singh Vs. Ekta Gulati*** (2012 SCC OnLine Del 4233, appeal whereagainst was dismissed by the Supreme Court in its order dated 3rd March, 2016 in Civil Appeal No. 7332/2013 titled “ ***Inderjit Kaur Vs. Ekta Gulati***”) held that the law of inheritance / succession covers all assets of the deceased including possessory rights of the deceased to any movable and immovable property. Parity was also drawn with tenancy / leasehold rights, which also are determinable by nature and with respect whereto also it is settled law [***Iresh Duggal Vs. Virender Kumar Seth*** 2015 (221) DLT 216, ***Dalip Kumar Vs. Om Prakash*** 2015 SCC OnLine Del 11768 ***Ram Lal Sachdev Vs. Sneh Sinha*** 1999 SCC OnLine Del 917, ***UOI Vs. Mohinder Pratap Soni*** 2016 SCC OnLine Del 2600, ***Madan Lal Vs. Kuldeep Kumar*** 2013 SCC OnLine Del 4008, ***Pragun Buildtech (P) Ltd. Vs. Sarla Aggarwal*** 190 (2012) DLT 164, ***Surendra Pal Singh Vs. Ravindra Pal Singh*** 2014 SCC OnLine Del 2959, ***Satish Kumar Chojar Vs. Subhasini Chopra*** 2014 SCC OnLine Del 3403] that the said rights are partible. It was also felt that the Trial Court as well as the First Appellate Court had fallen in

error in dismissing the claim of the appellant/plaintiff for partition for the reason which was not pleaded by the respondents/defendants in the written statement and on which no issue had been framed.

14. In this context I may notice that a perusal of the file of the First Appellate Court shows that the counsel for the appellant/plaintiff had been seeking adjournments to place a notification before the First Appellate Court, entitling occupants of jhuggi jhopri colonies developed by the DDA to rights of permanent nature in the property in their occupation, though did not place such notification before the First Appellate Court till the pronouncement of the judgment. Even after the First Appellate Court pronounced the judgment, the record shows the counsel to have protested in this regard. Though the counsel for the appellant/plaintiff here also has not placed any notification in this respect but it is found that the Department of Urban Development of Government of NCT of Delhi vide Order No. F.234(7)/UD/BSUP/2012/17270-17281 dated 20th June, 2013 has activated the earlier order dated 9th September, 1998 of conversion of rights of eligible occupants of 45 Jhuggi Jhopri Resettlement Colonies developed from 1950 onwards by the DDA, in favour of allottees thereof. The same also is indicative of the rights of allotment of the plot in favour of father of the parties constituting a valuable right capable of being partitioned between the heirs. It is thus evident that both the Courts below have terribly misdirected themselves.

15. The following substantial questions of law arise for consideration in this Second Appeal:

- (i) Whether the Courts below could have dismissed the suit of the appellant/plaintiff for partition, on a ground not pleaded by the respondents/defendants and or on which no issue was struck.
- (ii) Whether possession of an immovable property by the common predecessor of the parties, as an allottee / licensee of a governmental authority is partible?

16. I now proceed to answer the aforesaid substantial questions of law, the law in which regard as aforesaid is unambiguous.

17. The judgment in a Civil Suit is to be returned on findings on issues framed in a suit and which issues in turn arise from the pleadings of the parties. The finding of the Trial Court as well as the First Appellate Court, that the rights of which partition was sought were impartible, is *de hors* any plea or issue and could not have been permitted to defeat the claim of the appellant/plaintiff to partition and which claim was not really opposed by the respondents/defendants, as noted in the two judgments of the Courts below also. It was not the plea of the respondents/defendants in their written statement that property no.B-532 of which partition was sought was impartible or that no rights with respect thereto had devolved to any of the heirs of the common predecessor. Significantly it was the DDA alone which could have taken the said plea and which was not a party. No issue in this respect was struck in the suit. No finding with respect to the same could have been returned in the absence of DDA. The Courts below have failed to notice that their reasoning, of no rights in property no.B-532 having devolved in favour of heirs of Laloo Ram, has resulted in the

respondents/defendants only being entitled to enjoy the property and the appellant/plaintiff inspite of being one of the heirs of Laloo Ram having been deprived of the same. The judgments impugned in this appeal are liable to be set aside on this short ground alone.

18. The proceedings in a civil suit are governed by the procedure laid down in the CPC and which provides for pleadings by the adversarial parties, framing of issues on the substantial questions of law and facts arising thereon, evidence being confined to the issues and findings in the judgment and decree in the suit being confined to the issues framed. A suit is not entitled to succeed or liable to be dismissed on a reasoning which has no foundation in pleadings and/or on which no issue has been struck. In *Maria Margarida Sequeira Fernandes Vs. Erasmo Jack De Sequeira* (2012) 5 SCC 370 it was held that if pleadings do not give sufficient details, they will not raise an issue and the Court can reject the claim or pass a decree on admission. It was further held that on vague pleadings, no issue arises. I have also dealt with this aspect in *Modicare Limited Vs. Gautam Bali* 2019 SCC OnLine Del 10511.

19. As far as the second substantial question of law as aforesaid is concerned, I have already hereinabove noticed the position in law and the judgments of the Courts below are in ignorance thereof and without adverting thereto. The Courts below also erred in not noticing that the respondents/defendants who were admittedly not the only heirs, for more than 30 years since the demise of the common predecessor were in exclusive use and enjoyment of the property admittedly allotted to the common ancestor and which fact alone was enough to forthwith grant a decree for partition. Even if DDA as the grantor of the license with respect to the land in favour of the common ancestor were to repossess the

said land, till it was so repossessed, none of the heirs could be deprived of benefit thereof as part of the estate of the common ancestor.

20. As far as the additional reasoning by the First Appellate Court, of the appellant/plaintiff being greedy, is concerned, the same is again without regard to law or procedure prescribed by law. Howsoever well off one of the heirs of a common ancestor may be, the same does not defeat the right of that heir to a share in the estate of the common ancestor. Significantly the First Appellate Court has not returned any finding, as indeed it could not have in the absence of any issue, of the property no. B-531 in occupation of the appellant/plaintiff being part of the estate of the common ancestor. Without any such finding, the appellant/plaintiff could not in law have been denied of his rights by calling him greedy. Again no issue with respect to property no.B-531 was even struck.

21. Resultantly the appeal succeeds.

22. The judgment of the Trial Court as well as the First Appellate Court of dismissal of the suit are set aside.

23. The appellant/plaintiff is held entitled to a preliminary decree of partition of property no. B-532 Madipur, JJ Colony, New Delhi – 110063. A preliminary decree for partition of property no.B-532 Madipur, JJ Colony, New Delhi – 110063 is passed, declaring (i) the appellant/plaintiff Gopi Chand, (ii) the Defendant No. 1 Hem Chand, (iii) the respondents/defendants Geeta Devi, Yogesh Kumar, Hemant Kumar together and (iv) the respondent/defendant No.3 Meera Devi, to be having 1/4th undivided share each in the property. A decree for permanent injunction is also passed, restraining all parties from alienating encumbering or parting with possession of property no. B-532 Madipur, JJ

Colony, New Delhi – 110063 till the final decree for partition is passed by the Trial Court.

24. Preliminary decree for partition be drawn up.

25. List the suit before the Civil Judge (West-2) or other appropriate Court, on 16th June, 2020 for further proceedings. The Trial Court files be returned forthwith.

26. No costs.

Decree Sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

APRIL 29, 2020

‘pp’