

Raghunath Roy Vs. Ishwari Devi and ors

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Court : Delhi

Decided On : Mar-11-2014

Judge : Rajiv Sahai Endlaw

Appellant : Raghunath Roy

Respondent : ishwari Devi and ors

Advocate for Pet/Ap. : Mr. Sanjay Goswami, Mr. Neelam Rathore, Mr. Syed Amber Azad, Mr. S.N. Choudhri, Mr. Anjan Sinha, Ms. Shruti Choudhri, Ms. Rita Jha

Judgement :

*IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

11. h March, 2014 % + CS(OS) 1265/2011 & CC No.91/2012 RAGHUNATH ROY Through: Plaintiff Mr. Sanjay Goswami, Adv. Versus ISHWARI DEVI & ORS Through: Defendants Mr. Neelam Rathore with Mr. Syed Amber Azad, Adv. for D-1 to 3. Mr. S.N. Choudhri, Mr. Anjan Sinha & Ms. Shruti Choudhri, Adv. for D4&5. Ms. Rita Jha, Adv. for D-10 to 12. AND + CS(OS) 1300/2011 RAGHNUNATH ROY Through: Plaintiff Mr. Sanjay Goswami, Adv. versus ISHWARI DEVI & ORS Through: Defendants Mr. Neelam Rathore with Mr. Syed Amber Azad, Adv. for D-1 to 3. Mr. S.N. Choudhri, Mr. Anjan Sinha & Ms. Shruti Choudhri, Adv. for D4&5. Ms. Rita Jha, Adv. for D-10 to 12 CORAM :HONBLE MR. JUSTICE RAJIV SAHAI ENDLAW RAJIV SAHAI ENDLAW, J1

Both these suits together with Counter Claim No.91/2012 in CS(OS) No.1265/2011 are listed for framing of issues.

2. The counsel for the plaintiff in both the suit, the counsel for the defendant no.1 to 3, the counsel for the defendants no.4&5 and the counsel for the defendants no.10 to 12, in both the suits have been heard. The counsels inform that the defendants No.6 to 9 and the defendants no.13 to 22 are also represented in these suits through counsels, though their counsels are not present today.

3. CS(OS) No.1265/2011 has been filed for partition of property No.4/21, Kalkaji Extension, New Delhi.

4. CS(OS) No.1300/2011 has been filed for partition of property No.C-103, Kalkaji, New Delhi.

5. The parties to the suits are the legal heirs of one Shri Guranditta Ram and Smt. Jeevan Bai. Both , Shri Guranditta Ram and his wife Smt. Jeevan Bai are admitted by all parties to have died intestate and neither party has set-up any Will of either of them.

6. The said Shri Guranditta Ram and Smt. Jeevan Bai had six sons namely, (i) Shri Raghunath Roy ; (ii) Shri Raghubir Singh (whose legal representatives are defendants No.1-3); (iii) Shri Baldev Raj (whose legal representatives are defendants no.4&5); (iv) Shri Nand Kishore (whose legal representatives are defendants no.6&7); (v) Shri Arjun Dev (whose legal representatives are defendants no.8&9); and, (vi) Shri Dilbagh Rai (whose legal representatives are defendants no.10-12) and two daughters namely, (i) Smt. Indrawati (whose legal representatives are defendants no.13-15) ; and (ii) Smt. Vidyawati (whose legal representatives are defendants no.16-22).

7. With respect to property No.4/21, Kalkaji Extension, New Delhi the position is as under:(i) the said property was recorded in the name of Shri Raghubir Singh son of Shri Guranditta Ram; (ii) however in or about the year 1962 Shri Guranditta Ram and his sons Shri Raghunath Roy and Shri Baldev Raj instituted a suit for declaration that though the said property was recorded in the name of Shri

Raghubir Singh but they also had a share in the said property; (iii) a consent decree dated 19th December, 1992 was passed in the aforesaid suit, declaring Shri Guranditta Ram, Shri Raghunath Roy, Shri Raghubir Singh and Shri Baldev Raj each to be having 1/4th undivided share in the said property; (iv) Shri Raghubir Singh in or about the year 1976 instituted a suit impugning the aforesaid consent decree of 19th December, 1962, averring that he had been pressurized to agree thereto and the decree was obtained in a fraudulent manner and for injunction restraining Shri Guranditta Ram, Shri Raghunath Roy and Shri Baldev Raj from disturbing Shri Raghubir Singhs peaceful possession of the said property; (v) the aforesaid suit was dismissed on merits and also on the ground of being barred by Section 34 of the Specific Relief Act, 1963 for the reason of Shri Raghubir Singh having not claimed the consequential relief of possession in the said suit; (vi) the first appeal to this Court and the Special Leave Petition to the Supreme Court filed by Shri Raghubir Singh thereagainst are stated to have been dismissed, with the finality having been attained only in the year 2012; (vii) Shri Raghunath Roy has now filed CS(OS) No.1265/2011 for partition of the property No.4/21, Kalkaji Extension, New Delhi on the premise that Shri Guranditta Ram, Shri Raghunath Roy, Shri Raghubir Singh and Shri Baldev Raj each had 1/4th share therein and on the demise of Shri Guranditta Ram, his 1/4th share in the said property has devolved upon his six sons and two daughters; and, (viii) the legal heirs of Shri Raghubir Singh who are the defendants no.1 to 3 in this suit are contesting the suit, again averring that the consent decree dated 19th December, 1962 declaring Shri Guranditta Ram, Shri Raghunath Roy and Shri Baldev Raj to be having 1/4th share each in the said property is fraudulent and the property belonged to Shri Raghubir Singh only and thus the suit by Shri Raghunath Roy for partition thereof does not lie.

8. In view of the aforesaid, it has been enquired from the counsel for the legal heirs of Shri Raghubir Singh i.e. defendants no.1 to 3 as to how the said defence and the counterclaim made for declaration that Shri Raghubir Singh alone was the owner of the said property is maintainable. I may note, that in the counterclaim, in alternative to the relief of declaration, relief for recovery of Rs.40,000/- incurred by Sh. Raghubir Singh / his heirs in construction of the said property and of Rs.2,82,649/being amount spent by Raghubir Singh / his heirs towards property

tax, electricity / water charges of the said property, has also been made.

9. The counsel for the defendants no.1 to 3 has argued that since the suit filed by Shri Raghbir Singh challenging the consent decree dated 19th December, 1962 was dismissed, also on the ground of the same being barred by Section 34 of the Specific Relief Act, the findings on merits therein, of the consent decree dated 19th December, 1962 being not fraudulent, would not bind the defendants no.1 to 3. It is further argued that the defendants no.1 to 3 have in the alternative, also taken the plea, of having become owners by adverse possession of the said property, since they are in occupation of 2/3rd portion of property No.4/21, Kalkaji Extension, New Delhi.

10. No merit is found in the aforesaid contention. The principle invoked by the counsel for the defendants no.1 to 3 and as reiterated in *Fida Hussain Vs. Moradabad Development Authority* (2011) 12 SCC615 & *Nirmal Jeet Singh Hoon Vs. Irtiza Hussain* (2010) 14 SCC564 applies when the suit, besides on merits, is also dismissed on the ground of the Court not having jurisdiction to entertain the suit. In such an eventuality it has been held that the findings even if returned on merits will not constitute *res judicata*. The dismissal of the suit filed in the year 1976 by the predecessor of defendants No.1 to 3 is however not stated to be on the ground of the Court, in which the said suit was filed, lacking in jurisdiction but on the ground of being barred by Section 34 of the Specific Relief Act. The said ground, is not a ground of the Court lacking in jurisdiction. The principle invoked thus, does not apply. Moreover, the defendants no.1 to 3 and their predecessor having litigated right up to the Supreme Court on the same matter, cannot now be permitted to re-agitate the matter. The said defence of the defendants No.1 to 3 is thus not required to be put to trial.

11. As far as the only other defence of the defendants no.1 to 3, of having become owners by adverse possession is concerned, reference can be made to the dicta of the Supreme Court in *Mohan Lal Vs. Mirza Abdul Gaffar* (1996) 1 SCC639 *Karnataka Board of Wakf Vs. Government of India* (2004) 10 SCC779 *Annasaheb Bapusaheb Patil Vs. Balwant @ Balasaheb Babushaheb Patil* (1995) 2 SCC543 & *L.N. Aswathama Vs. P. Prakash* (2009) 13 SCC229 laying down that the claim of

adverse possession is mutually inconsistent with the plea of lawful title. The defendants no.1 to 3 till as recently as 2012, were agitating to be the lawful owners of the said property by virtue of the consent decree dated 19th December, 1962 creating rights in the said property in favour of Shri Guranditta Ram, Shri Raghunath Roy and Shri Baldev Raj being fraudulent. The defendants no.1 to 3, after having failed in their plea of being the lawful owners of the property to the exclusion of others, cannot adopt a plea of adverse possession. It may also be mentioned that the possession of a co-owner of a joint property is not only for himself but on behalf of other co-owners also and it has been held in Md. Mohammad Ali Vs. Sri Jagdish Kalita (2004) 1 SCC271& Darshan Singh Vs. Gojjar Singh (2002) 2 SCC62 that plea of adverse possession amongst the co-owners is not maintainable. No case of ouster is even otherwise made out in the pleadings.

12. The counsels inform that in the written statements of other defendants, no other controversy has been raised with respect to property No.4/21, Kalkaji Extension, New Delhi.

13. Thus there is no material issue which arises for trial in CS(OS) No.1265/2011 for partition of property No.4/21, Kalkaji Extension, New Delhi. On the admitted position as emerging from the consent decree dated 19th December, 1962, of Sh. Guranditta Ram, Shri Raghunath Roy, Shri Raghubir Singh and Shri Baldev Raj having 1/4th share each in the said property, the counsels agree that the shares of the parties to the suit SHARE OF EACH PARTY IN PROPERTY NO.4/21, KALKAJI EXTENSION, NEW DELHI S.No.PARTY SHARE1Plaintiff 9/32 2 Defendant No.1 3/32 3 Defendant No.2 3/32 4 Defendant No.3 3/32 5 Defendant No.4 9/64 6 Defendant No.5 9/64 7 Defendant No.6 1/64 8 Defendant No.7 1/64 9 Defendant No.8 1/64 10 Defendant No.9 1/64 11 Defendant No.10 1/96 12 Defendant No.11 1/96 13 Defendant No.12 1/96 14 Defendant No.13 1/96 15 Defendant No.14 1/96 16 Defendant No.15 1/96 17 Defendant No.16 1/224 18 Defendant No.17 1/224 19 Defendant No.18 1/224 14. 20 Defendant No.19 1/224 21 Defendant No.20 1/224 22 Defendant No.21 1/224 23 Defendant No.22 1/224 As far as the CC No.91/2012 in CS(OS) No.1265/2011 is concerned, the claim therein for declaration stands dismissed in terms of above. As far as monetary

claim therein is concerned, upon the counsel for the defendants no.1 to 3 / counter claimants being informed that the said defendants no.1 to 3, if seek account of monies spent on the property, would also have to account for mesne profits of the area in excess of their share occupied in the property, has fairly stated that subject to the decree of partition in both the suits being passed simultaneously and neither party claiming any amount / mesne profits from the other for occupation of portion in excess of entitlement / share, she does not press the monetary part of the counterclaim.

15. The appearing counsels are agreeable to the aforesaid.

16. In view of the aforesaid, the counterclaim, in so far as relating to the monetary part, is dismissed as withdrawn.

17. With respect to property no.C-103, Kalkaji, New Delhi, subject matter of CS(OS) No.1300 of 2011, it is not in dispute that the said property was in the name of Shri Guranditta Ram. It is however the case of Shri Raghunath Roy that he had a half share in the said property on account of adjustment of his claim against properties left in Pakistan, towards 50% of the entire purchase cost of the said property.

18. Needless to state that the said claim of the plaintiff is controverted by the defendants.

19. Upon it being put to the counsel for the plaintiff as to how the said claim is maintainable in the face of the Benami Transactions (Prohibition) Act, 1988, he has fairly stated that in the light of what is recorded hereinabove, the plaintiff does no press the said claim and is agreeable to the said property being divided amongst the six sons and two daughters of Shri Guranditta Ram / their legal heirs.

20. There is thus no triable issue in CS(OS) No.1300/2011 also.

21. All counsels agree that the shares of the plaintiff and the defendants in property No.C-103, Kalkaji, New Delhi would be as under:

SHARE OF EACH PARTY IN PROPERTY No.C-103, KALKAJI, NEW DELHI	
S.No.	PARTY
1	Plaintiff
2	Defendant No.1
3	Defendant No.2
4	Defendant

No.3 1/24 5 Defendant No.4 1/16 6 Defendant No.5 1/16 7 Defendant No.6 1/16 8 Defendant No.7 1/16 9 Defendant No.8 1/16 10 Defendant No.9 1/16 11 Defendant No.10 1/24 12 Defendant No.11 1/24 13 Defendant No.12 1/24 14 Defendant No.13 1/24 15 Defendant No.14 1/24 16 Defendant No.15 1/24 17 Defendant No.16 1/56 18 Defendant No.17 1/56 19 Defendant No.18 1/56 20 Defendant No.19 1/56 21 Defendant No.20 1/56 22 Defendant No.21 1/56 23 Defendant No.22 1/56 22. Accordingly, a preliminary decree for partition is passed of both the properties, declaring the parties to be having shares as mentioned in paras 13 & 20 above therein.

23. The consent of the parties, that neither party shall have any claim against the other on account of having incurred any expenses on maintenance, construction, taxes or otherwise with respect to the properties or for occupation by any of them of portion (s) of the property in excess of entitlement / share, is also recorded.

24. The counsels, on enquiry, inform that except for the family members, no outsider is in possession or control of either of the property.

25. Since all the parties are not appearing, no purpose would be served in appointing a Court Commissioner to suggest the modalities for partitioning of the properties or to refer the parties to mediation.

26. The parties are cautioned, that if they, within three months as sought, do not arrive at a mutually acceptable division of the properties by metes and bounds and/or by of payment of owelty, this Court would have no option but to pass a final decree for partition by sale of the properties and distribution of sale proceeds amongst the parties as per their share in terms of the preliminary decree.

27. Till further orders, all parties are also directed to maintain status quo qua title, possession and construction of both the properties.

28. The date of 21st March, 2014 is cancelled.

29. No costs.

30. Preliminary decree of partition of both the properties be drawn up.

31. List on 23rd July, 2014. RAJIV SAHAI ENDLAW, J MARCH11 2014 pp..

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