

Pankaj Sharma & Anr vs.devender Kumar Sharma

Pankaj Sharma & Anr vs.devender Kumar Sharma

SooperKanoon Citation : sooperkanoon.com/1210594

Court : Delhi

Decided On : Nov-15-2017

Appellant : Pankaj Sharma & Anr

Respondent : Devender Kumar Sharma

Advocate for Def. : Mr. T.R. Sharma

Advocate for Pet/Ap. : Mr. D.K. Rustogi, Mr. Kapil Gulati

Judgement :

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

15. h November, 2017. CM(M) 48/2017 PANKAJ SHARMA & ANR

... Petitioner

s Through: Mr. D.K. Rustogi and Mr. Kapil Gulati, Advs. Versus DEVENDER KUMAR SHARMA Respondent Through: Mr. T.R. Sharma, Adv. with respondent in person. CORAM: HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW1 Though a petition under Article 227 of the Constitution of India is not available against an order of dismissal of an application under Order XII Rule 6 of the Code of Civil Procedure Code, 1908 (CPC) and the remedy available thereagainst in the CPC being of a Revision Petition under Section 115 of the CPC but this petition having been entertained, it is not deemed appropriate to oust the petitioners/plaintiffs on this technicality.

2. This petition under Article 227 of the Constitution of India impugns the order [dated 2nd May, 2016 in CS No.33/2016 of the Court of Additional District Judge (ADJ)-II (Central), Tis Hazari Courts, Delhi]. of dismissal of the application of the petitioners/plaintiffs under Order XII Rule 6 of the CPC. CM(M) 48/2017 Page 1 of 10 3. The petition came up before this Court first on 16th January, 2017 when notice thereof was ordered to be issued. The counsel for the respondent/defendant has been appearing.

4. The application of the petitioners/plaintiffs for early hearing came up before this Court on 10th November, 2017, when on the contention of the counsel for the petitioners/plaintiffs that the suit from which this petition arises is of 1999 vintage and prima facie finding merit in the petition, the application for early hearing was allowed and the petition posted for 13th November, 2017. On 13th November, 2017, the counsel for the petitioners/plaintiffs was partly heard and on request of the counsel for the respondent/defendant, the matter was adjourned to today. The counsel for the respondent/defendant has been heard.

5. The petitioners/plaintiffs instituted the suit from which this petition arises, in or about October, 1999 and the suit, as per the last amended plaint of April, 2011 copy of which is filed along with this petition, is for recovery of possession of portion of property No.135, Vivekanand Puri, Azad Marg, Delhi-110007 in possession of the respondent/defendant and for ancillary reliefs of recovery of mesne profits, demolition of unauthorised construction raised by the respondent/defendant and injunction restraining the respondent/defendant from parting with possession of portion of the property in his possession. It is the case of the petitioners/plaintiffs (i) that Babu Ram Sharma was a member of DCM Employees Co-operative House Building Society Ltd. and was allotted plot No.135, admeasuring 160 sq. yds. and constructed a house comprising of ground floor, first floor and barsati floor thereon; (ii) that the two petitioners/plaintiffs are the daughter and son CM(M) 48/2017 Page 2 of 10 respectively of the said Babu Ram Sharma; (iii) that the said Babu Ram Sharma died on 13th November, 1998; (iv) that the said Babu Ram Sharma, besides the petitioners/plaintiffs, also left another son namely Khayali Ram and another daughter namely Smt. Madhu Sharma; (v) that as per the validly executed last registered Will dated 31st

December, 1993 of Babu Ram Sharma, 70% undivided share in the property aforesaid has been bequeathed to the petitioner/plaintiff No.1 and 30% to the petitioner/plaintiff No.2; (vi) that the respondent/defendant was also a son of Babu Ram Sharma aforesaid but was given in adoption to Yad Ram, brother of Babu Ram Sharma; (vii) that the respondent/defendant was allowed by Babu Ram Sharma to occupy one room/store on the ground floor and the barsati floor of the house; (viii) that the petitioners/plaintiffs, after the demise of Babu Ram Sharma had called upon the respondent/defendant to vacate the portion of the property in his possession but the respondent/defendant had failed to do so; (ix) that the respondent/defendant was in unauthorised use and occupation of the portion of the property in his possession.

6. The respondent/defendant contested the suit by filing a written statement, pleading (a) that the suit was bad for non-joinder of Khayali Ram and Smt. Madhu Sharma, the son and daughter of late Babu Ram Sharma, according to the petitioners/plaintiffs also; (b) that the respondent/defendant was the son of Babu Ram Sharma and was shown as the son of Babu Ram Sharma in various records; (c) that the document dated 31st December, 1993 claimed by the petitioners/plaintiffs to be the validly executed last Will of Babu Ram Sharma had been forged and fabricated by the petitioners/plaintiffs; (d) that the respondent/defendant, after the demise of Babu Ram Sharma was a co-owner of the property and the suit for recovery CM(M) 48/2017 Page 3 of 10 of possession of the portion of the property in possession of the respondent/defendant was not maintainable; (e) that the respondent/defendant had also contributed to the cost of construction of the house and particularly the barsati floor thereof.

7. Unfortunately, the suit aforesaid has remained pending for the last 18 years and issues are informed to have been framed in the suit only on 14th September, 2016. Both, the counsel for the petitioners/plaintiffs and the counsel for the respondent/defendant, blame each other for the delay. However, for the present purposes, the same is not relevant.

8. The counsel for the petitioners/plaintiffs, on enquiry, informs (I) that no probate had been obtained of the document claimed by the petitioners/plaintiffs to be the

validly executed last Will of Babu Ram Sharma bequeathing the property aforesaid to the two petitioners/plaintiffs; (II) however, the petitioners/plaintiffs on the basis of the said Will had also instituted a suit for recovery of possession of the portion of the property in possession of Khayali Ram, another son of Babu Ram Sharma and who also had contested the Will aforesaid; the said suit was however decreed in favour of the petitioners/plaintiffs and the said decree had been upheld till the Supreme Court and the petitioners/plaintiffs have recovered possession of the said portion from Khayali Ram; (III) that Smt. Madhu Sharma, the other daughter of Babu Ram Sharma was neither in possession of any portion of the property nor had any claim or any share in the property and was not disputing the document aforesaid claimed to be the validly executed last Will of Babu Ram Sharma. CM(M) 48/2017 Page 4 of 10 9. The counsel for the petitioners/plaintiffs argued that the petitioners/plaintiffs filed the application under Order XII Rule 6 of the CPC contending (A) that it was not disputed by the respondent/defendant that Babu Ram Sharma was the owner of the property aforesaid; (B) that though the respondent/defendant in his written statement had disputed the document claimed by the petitioners/plaintiffs to be the validly executed last Will of Babu Ram Sharma but the respondent/defendant had no locus to challenge the said Will as having been given in adoption to Yad Ram, was not the natural heir of Babu Ram Sharma, to receive a share in the property aforesaid of Babu Ram Sharma in the event of the said Will being not proved; (C) that thus, there was no need for the petitioners/plaintiffs to, in the suit from which this petition arises, prove the said Will and the suit was entitled to be decreed on admissions.

10. The learned ADJ, vide the impugned order, has dismissed the application under Order XII Rule 6 of the CPC filed by the petitioners/plaintiffs merely reasoning that admission has to be unequivocal and unambiguous and which is not so in the present case and there was a very serious contest by the respondent/defendant to the claims of the petitioners/plaintiffs to the extent that the respondent/defendant had been adopted by late Yad Ram and thus triable issues arose in the suit.

11. In view of the reasoning aforesaid given in the impugned order, it was enquired from the counsel for the petitioners/plaintiffs that, where was the admission of the

respondent/defendant of having been adopted by Yad Ram.

12. The counsel for the petitioners/plaintiffs, on 13th November, 2017, drew attention to the reply filed by the respondent/defendant to the CM(M) 48/2017 Page 5 of 10 application of the petitioners/plaintiffs under Order XII Rule 6 of the CPC and where the respondent/defendant had admitted the plea of the petitioners/plaintiffs of Yad Ram having left a Will. Attention was next drawn to the said Will of Yad Ram in favour of the respondent/defendant and where the respondent/defendant was described as the adopted son of Yad Ram.

13. It was enquired from the counsel for the petitioners/plaintiffs, as to how the description by Yad Ram, in his Will, of the respondent/defendant as adopted son of Yad Ram could be construed as an admission of the respondent/defendant.

14. The counsel for the petitioners/plaintiffs then drew attention to a Sale Deed executed by the respondent/defendant of the property of Yad Ram bequeathed to him under the Will aforesaid and in which Sale Deed, the respondent/defendant had described himself as the adopted son of Yad Ram.

15. Finding so, the personal presence of respondent/defendant for today was directed. The respondent/defendant is stated to be present in person.

16. The counsel for the respondent/defendant has today at the outset contended that it is also the plea of the respondent/defendant that the respondent/defendant had contributed to the cost of acquisition of the plot underneath the property and the cost of construction on the property, particularly the barsati floor of the property.

17. I have enquired from the counsel for the respondent/defendant that even if the said plea of the respondent/defendant were to be believed, how does the same vest a right in the property in the respondent/defendant. It has been enquired, whether not when a son contributes to the cost of acquisition CM(M) 48/2017 Page 6 of 10 or construction of a house by the father, the only claim of the son or any other person can be to recover the said amount with interest.

18. The counsel for the respondent/defendant agrees and admits that the lawful title of the property aforesaid was of Babu Ram Sharma.

19. I have enquired from the counsel for the respondent/defendant, whether Yad Ram had any other child.

20. The answer is in the negative.

21. I have next enquired from the counsel for the respondent/defendant that if Yad Ram in his Will, which is admitted by the respondent/defendant also, had not described the respondent/defendant as the adopted son of Yad Ram and if the petitioners/plaintiffs were not treating the respondent/defendant as adopted son of Yad Ram, whether not the petitioners/plaintiffs would be entitled to challenge the Will of Yad Ram and claim share along with respondent/defendant in the estate of Yad Ram. It has further been enquired, as to how the respondent/defendant can be permitted to abuse the process of law and of the Courts by, where it suits him to describe himself as adopted son of Yad Ram, describe himself so and where it does not suit him, to contest so and whether not it amounts to blowing hot and cold at the same time.

22. No answer has been forthcoming.

23. At this stage, the counsel for the respondent/defendant sought a passover to enable him to talk with his client.

24. After passover, the counsel for the respondent/defendant states that the respondent/defendant is willing to suffer on admissions, a decree for CM(M) 48/2017 Page 7 of 10 recovery of possession and for permanent injunction, if the petitioners/plaintiffs do not press the claim for mesne profits.

25. The counsel for the petitioners/plaintiffs, on taking instructions from the petitioners/plaintiffs, is agreeable thereto.

26. The compromise aforesaid between the parties is found to be lawful and is allowed.

27. The learned ADJ, in the impugned order, is found to have taken a superficial view of the pleadings and the documents instead of reading the pleadings and the documents meaningfully, as is required to be done. As would be obvious from the above, on the basis of the material on record, a case for passing a decree, at least for recovery of possession and injunction, on admissions is made out. On the contrary, the learned ADJ is found to have mechanically proceeded to frame the issues in the suit and to have put the suit to trial and which would result in keeping the suit pending, which has already been pending for last 18 years, at least for another few years and would have also given rise to unnecessary appeals.

28. Accordingly, the impugned order dismissing the application under Order XII Rule 6 of the CPC of the petitioners/plaintiffs is set aside and the application of the petitioners/plaintiffs is allowed.

29. Accordingly, a decree is passed in favour of the petitioners/plaintiffs and against the respondent/defendant, of recovery of possession of the portion of property No.135, Vivekanand Puri, Azad Marg, Delhi as described in the plaint and as shown in red colour in the site plan filed along with the plaint and copy of which is filed at page 28 of this paper book and on which for identification Ex. C-1 is put in today's date. A decree is also CM(M) 48/2017 Page 8 of 10 passed in favour of the petitioners/plaintiffs and against the respondents/defendants of permanent injunction restraining the respondent/defendant from transferring, alienating or parting with possession of the portion of the property aforesaid or any part thereof in favour of any other person and from carrying on any addition, alteration or construction in the said portion of the property.

30. However, in view of the compromise aforesaid arrived at between the parties and the undertaking of the respondent/defendant to hand over vacant peaceful physical possession of the entire portion of the property aforesaid in his possession to the petitioners/plaintiffs on or before 15th January, 2018 and to, before vacating the said portion, pay electricity and water charges with respect thereto and not to induct any other person into the property and not to cause any damage to the property and which undertaking is accepted and the respondent/defendant is informed of the consequence thereof, the claim of the

petitioners/plaintiffs in the suit for recovery of mesne profits from the respondent/defendant is dismissed.

31. It is however made clear that in the event of the respondent/defendant being in breach of his undertaking aforesaid or any part thereof, the respondent/defendant, besides being liable for being proceeded against for contempt of this Court, shall also be liable for costs of the suit which may be then assessed and for mesne profits qua which an enquiry will then be held and the petitioners/plaintiffs shall then be entitled to execute the decree passed today forthwith. CM(M) 48/2017 Page 9 of 10 32. A copy of this judgment be forwarded to the learned ADJ who is requested to, on receipt of the same, have the decree sheet prepared.

33. The petition is disposed of. RAJIV SAHAI ENDLAW, J.

NOVEMBER15 2017 bs (corrected & released on 29th December, 2017) CM(M) 48/2017 Page 10 of 10

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com