

(2017) 02 DEL CK 0046

In the Delhi High Court

Case No : CS(OS) 388/2016 & IAs No. 9367/2016 (u/O XXXIX R-1&2 CPC),
1750/2017 (of D-2 u/O VII R-11 CPC) & 1751/2017 (of D-2 for
condonation of 27 days delay in filing WS)

M.K. Govil

APPELLANT

Vs

Harish Chand Govil

RESPONDENT

Date of Decision : 09-02-2017

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1
Limitation Act, 1963 — Article 110, Article 65

Citation : (2017) 4 ADDelhi 406 : (2017) 238 DLT 91

Hon'ble Judges : Mr. Rajiv Sahai Endlaw, J.

Bench : Single Bench

Advocate : Mr. S.C. Singhal, Advocate, for the Plaintiff in person; Mr. Kunal Malik, Advocate, for the Defendant No. 2 with in person

Final Decision : Disposed Off

Judgement

Mr. Rajiv Sahai Endlaw, J.—The plaintiff has instituted this suit for partition of property No.319, Deepali, Pitampura, Delhi claiming (i) that the same was owned by his father late Sh. Nawal Kishore Govila who died intestate on 9th May, 2001 leaving the plaintiff and the defendants No.1 to 3 as his children and the mother of the plaintiff and defendants No.1 to 3 as his widow, and another daughter namely the predecessor of defendants No.4&5, as his only legal heirs and thus the plaintiff on the demise of his father acquired 7th undivided share in the said property; (ii) that the mother of the plaintiff and the predecessor of the defendants No.4&5 have also since died intestate; (iii) that the plaintiff, defendant No.1, defendant No.2 and defendant No.3 now have 7th share each and the defendants No.4&5 together have the remaining 7th share in the property.

2. The suit was entertained and vide ex-parte ad-interim order dated 5th August, 2016, while issuing summons, the parties including the plaintiff were restrained

from alienating, encumbering or parting with possession of the property.

3. The defendants No.1, 4 & 5 namely Mr. Harish Chand Govil, Mr. Rajneesh Gupta and Ms. Malvika Gupta in their joint written statement have admitted the facts aforesaid set out in the plaint and have pleaded that they have no objection to the property being partitioned and have additionally sought a direction to the defendant No.2 to render account of the rent realised by him from the tenant on the second floor of the property.

4. Similarly, defendant No.3 namely Smt. Jaya Gupta also in her written statement has admitted the contents aforesaid of the plaint and stated that she has no objection to the property being partitioned and has also additionally sought the relief against the defendant No.2 for rendition of accounts.

5. The defendant No.2, in his written statement, has contested the suit, pleading (a) that the plaintiff did not claim any right for 15 years since the death of the father and the suit is thus beyond the prescribed period of limitation; (b) that the plaintiff has not filed original documents; (c) that the plaintiff in para 1 of the plaint has admitted that he is not the legal heir of his father; (d) that the suit has not been properly valued for the purposes of court fees and jurisdiction and the plaintiff though not in possession of the property has not paid ad valorem court fees; (e) that the plaintiff has not resided in the property since after his marriage in the year 1975 and has been residing separately; (f) that the father of the plaintiff had disowned the plaintiff from his estate vide his Will made by him in his lifetime; (g) that the said document was not executed during the lifetime of the father due to unavoidable circumstances but has been made by him; (h) that the said Will makes the claim in the suit false; (i) that the second floor of the property was constructed out of the savings of defendant No.2, though in the lifetime of the father only; (j) that the plaintiff or the other defendants have no share in the rent of the second floor of the property. However the defendant No.2, along with the written statement did not file any document which in law could be said to be a "Will".

6. The suit came up before this Court on 7th February, 2017 for framing of issues when in view of the aforesaid pleas in the written statement of the defendant No.2, being the only defendant contesting the suit, it was enquired from the counsel for the defendant No.2, as to how the said pleas constitute a material plea within the meaning of Order 14, Rule 1 of the Code of Civil Procedure, 1908 (CPC) to invite the framing of issues.

7. I may in this regard notice that Order 15 of CPC empowers the Court to, on the date when the suit is listed for framing of issues, if from a perusal of the pleadings finds that no material question of law or fact arises for adjudication, pass a decree forthwith.

8. Though the counsel for the defendant No.2 on 7th February, 2017 sought to argue that the suit claim was barred by time but could not cite any Article of the Schedule to the Limitation Act, 1963 governing the claim for partition of property

or for rendition of accounts. On his request, the matter was adjourned to today.

9. Today, the counsel for the defendant No.2 refers to Article 65 of the Schedule to the Limitation Act which provides limitation period of 12 years commencing from the date when the possession of the defendants become adverse to the plaintiff, for a suit for possession of immovable property or any interest therein based on title.

10. On enquiry, as to where is the plea in the written statement of the defendant No.2 of, possession of the defendant No.2 being adverse to the plaintiff, the counsel for the defendant No.2 draws attention to Article 110 of the Schedule to the Limitation Act which provides limitation of 12 years commencing from the date when the exclusion becomes known to the plaintiff, for a person excluded from a joint family property to enforce a right to share therein.

11. On enquiry, whether exclusion of the plaintiff has been pleaded, the counsel states that since the plaintiff has not resided in the property since 1975, the plaintiff has been excluded.

12. In view of the ambiguity aforesaid in the written statement and stand of the defendant No.2, on 7th February, 2017 the defendant No.2 was directed to appear in person today before this Court and has appeared and his statement on oath has been recorded.

13. No merit is found in the contention of the counsel for the defendant No.2 qua limitation and the same is not found to be a material plea to be put to trial. The Courts in *Neelavathi v. N. Natarajan* (1980) 2 SCC 247, *Jagannath Amin v. Seetharama* (2007) 1 SCC 694, *Md. Mohammad Ali v. Jagdish Kalita* (2004) 1 SCC 721 and followed by this Court in *Saroj Salkan v. Capt. Sanjeev Singh* (2008) 155 DLT 300 (DB) have held that in case of co-owners, possession of one is in law possession of all, unless ouster or exclusion is proved. It was further held that to be in joint possession in law, it is not necessary that plaintiff should be in actual possession of whole or part of property. Equally it was held to be not necessary that the plaintiff should be getting a share or some income from the property. So long as the right to a share and the nature of the property as joint is not disputed, the law presumes that he is in joint possession unless he is excluded from such possession. Mere long and continuous possession by itself is not enough, plea of ouster and adverse possession has to be raised in the written statement. Else, a co-sharer becomes a constructive trustee of the other co-sharer and the rights would be protected by the trust. Even mutation in the revenue record in the name of one co-sharer has been held to be not amounting to ouster unless there is a clear declaration that title of other co-sharer is denied and disputed. Not only is there no such plea in the written statement of the defendant No.2 but the defendant No.2 in his statement recorded today has deposed that after the demise of the father, the property has not been mutated in the name of any person and that till the life time of mother i.e. till the year 2011, it was she who was receiving rent from the tenant on the second floor of

the property. It is thus quite evident that the defendant No.2 has not only not pleaded the ouster / exclusion of the plaintiff but no case of ouster / exclusion also is made out.

14. Paras 20 to 27 of *Vidya Devi v. Prem Prakash* (1995) 4 SCC 496, though part of the concurring opinion, sets out the law correctly and is not affected by the majority view. It has been held:

"20. The legislature has not prescribed any period of limitation for filing a suit for partition because partition is an incident attached to the property and there is always a running cause of action for seeking partition by one of the co-sharers if and when he decides not to keep his share joint with other co-sharers. Since the filing of the suit is wholly dependent upon the will of the co-sharer, the period of limitation, specially the date or time from which such period would commence, could not have been possibly provided for by the legislature and, therefore, in this Act also a period of limitation, so far as suits for partition are concerned, has not been prescribed. This, however, does not mean that a co-sharer who is arrayed as a defendant in the suit cannot raise the plea of adverse possession against the co-sharer who has come before the court as a plaintiff seeking partition of his share in the joint property.

21. Normally, where the property is joint, co-sharers are the representatives of each other. The co-sharer who might be in possession of the joint property shall be deemed to be in possession on behalf of all the co-sharers. As such, it would be difficult to raise the plea of adverse possession by one co-sharer against the other. But if the co-sharer or the joint owner had been professing hostile title as against other co-sharers openly and to the knowledge of other joint owners, he can, provided the hostile title or possession has continued uninterruptedly for the whole period prescribed for recovery of possession, legitimately acquire title by adverse possession and can plead such title in defence to the claim for partition.

22. "Adverse possession" means hostile possession, that is, a possession which is expressly in denial of the title of the true owner. (See: *Gaya Parshad Dikshit v. (Dr) Nirmal Chander* [(1984) 2 SCC 286 : AIR 1984 SC 930] The denial of title of the true owner is a sign of adverse possession. In *Ejas Ali Qidwai v. Special Manager, Court of Wards* [AIR 1935 PC 53 : 1935 All LJ 744] it was observed:

"The principle of law is firmly established that a person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

23. Dr. Markby in his treatise *Elements of Law* (2nd Edn.) has observed that possession "to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. (See also: *Munnalal v. Kashibai*. [AIR 1947 PC 15 : 1946 All LJ 472 : 49 Bom LR 231])

24. It is a matter of fundamental principle of law that where possession can be

referred to a lawful title, it will not be considered to be adverse. It is on the basis of this principle that it has been laid down that since the possession of one co-owner can be referred to his status as co-owner, it cannot be considered adverse to other co-owners. (See: Maharajadhiraj of Burdwan, Udaychand Mahatab Chand v. Subodh Gopal [(1970) 3 SCC 681 : AIR 1971 SC 376] ; P. Lakshmi Reddy v. L. Lakshmi Reddy [AIR 1957 SC 314 : 1957 SCR 195] ; Mohd. Baqar v. Naim-un-Nisa Bibi [AIR 1956 SC 548] .)

25. In Karbalai Begum v. Mohd. Sayeed [(1980) 4 SCC 396 : AIR 1981 SC 77] it was held that a co-sharer in possession of the property would be a constructive trustee on behalf of other co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustee co-sharer.

26. Certain observations of the Privy Council in Charles Edward Victor Seneviratne Corea v. Mahatantrigey Iseris Appuhamy [AIR 1914 PC 243] may be quoted below:

"Entering into possession on, and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His title must have enured for the benefit of his co-proprietors. The principle recognised by Wood, V.C. in Thomas v. Thomas [(1855) 2 K&J 79 : 25 LJ Ch 159 (161) : 110 RR 107] holds good: "Possession is never considered adverse if it can be referred to a lawful title."

* * *

His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."

(emphasis supplied)

27. From the underlined portion extracted above, it will be seen that in order that the possession of co-owner may be adverse to others, it is necessary that there should be ouster or something equivalent to it."

15. For the same reason, the plea in the written statement of the defendant No.2, of the plaintiff having not paid the appropriate court fees on the plaint is meritless. A Division Bench of this Court in judgment dated 2nd February, 2012 in FAO(OS) No.183/2006 titled Sonu Jain v. Rohit Garg has held that unless from pleadings of the plaintiff, it is found that a co-owner has been denied the right to the property, no ad valorem court fees is required to be paid and payment of fixed court fees as has been paid in the present case suffices.

16. Though the defendant No.2 in the written statement made out a semblance of a plea of the father leaving a Will but the defendant No.2 in his statement today has denied any Will.

17. I may notice that the defendant No.2 along with his documents has filed a handwritten document purported to be in the hand of the father Sh. Nawal

Kishore Govila but the same is neither signed by the father nor by any of the witnesses. The said document cannot constitute a Will of the father. Reference in this regard may also be made to the recent dicta of a Division Bench of this Court in *Preeti Satija v. Raj Kumari* (2014) 207 DLT 78 holding that there can be no dis-inheritance of any of the heirs by publication in newspaper or by any writing, save by way of a validly executed Will.

18. The other pleas in the written statement and as recorded in para 5 herein above also do not constitute a material plea. The plaintiff nowhere in para 1 of the plaint or otherwise has admitted that he is not a legal heir of his father. Though no particulars of the cost of construction of the second floor claimed to have been borne by defendant No.2 have been pleaded but even if it were to be believed that the defendant No.2 has indeed contributed to or borne the cost of construction of the second floor, the same would still not vest any additional right in the defendant No.2 to deny partition to other co-owners. The said amount would at best constitute a loan by the defendant No.2 to his father and the defendant No.2 could have recovered the same. Reference in this regard may be made to *Kirpal Kaur v. Ram Singh* (2012) SCC OnLine Del 5560 (DB) (set aside on another point in *Kirpal Kaur v. Jitender Pal Singh* (2015) 9 SCC 356). The plaintiff in his statement recorded today has stated that second floor was constructed in the year 1989. The claim if any of plaintiff for recovering of loan amount would not only be now barred by time but has also not been made.

19. Thus, none of the pleas in the written statement of the defendant No.2 merit the framing of an issue.

20. The defendant No.2 in his statement recorded today has stated that after the demise of mother Smt. Shakuntala Goyal he has exclusively being realising rent of Rs.8,000/- per month from the tenant on second floor of the property. The defendant No.2 is entitled as aforesaid to only ?th share of the said amount and is liable to pay the shares of the others.

21. A case for passing of a preliminary decree for partition is made out.

22. A preliminary decree of partition of property No.319, Deepali, Pitampura, Delhi is accordingly passed, declaring plaintiff, defendant No.1, defendant No.2, defendant No.3 to be having ?th share each in the said property and defendants No.4&5 together having remaining ?th share therein.

23. The defendant No.2 is also held liable to pay ?th share out of the total rent of second floor of the property realised by him for last three years i.e. 57,600/- to each of the plaintiff, defendant No.1, defendant No.3 and defendants No.4&5 together. A decree for recovery of the said amount in favour of the plaintiff, defendant No.1, defendant No.3 and defendants No.4&5 together is thus passed against defendant No.2.

24. Decree sheet be drawn up.

25. The question of consideration of costs as well as costs imposed on the

defendant No.2 day before yesterday shall be considered at the stage of final decree.

26. It is deemed appropriate to grant an opportunity to the parties to consider amicable settlement before passing a final decree.

27. List on 22nd February, 2017.