

(2012) 02 DEL CK 0577

In the Delhi High Court

Case No : Regular First Appeal No. 232 of 2011

Smt. Kanak Lata Jain and Others

APPELLANT

Vs

Sh. Sudhir Kumar Jain and Others

RESPONDENT

Date of Decision : 24-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2012) 4 ILR Delhi 176

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : M. Hussain, for the Appellant; Sanjiv Kakra, Advocate with Mr. Atul Kumar, Advocate and Mr. Irfan Ahmad, Advocate for Respondent No. 2, Mr. Ravinder Singh, Advocate with Mr. Maheem Pardhan, Advocate for Respondent Nos. 3, 6, 7 and 8, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—The challenge by means of this Regular First Appeal (RFA) filed u/s 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 31.1.2011 which decreed the suit of the respondent Nos.1 and 2/plaintiffs for partition of the suit property belonging to the mother of the parties, Smt. Rajmati Jain. The trial Court passed a preliminary decree declaring all the legal heirs of Smt. Rajmati Jain including the plaintiffs to be 1/8th co-owners in the suit property. The plaintiffs/respondent Nos.1 and 2 were also held entitled to rendition of account of the rental income received by the defendant Nos.1 to 3/appellants.

2. The facts of the case are that admittedly Smt. Rajmati Jain was the owner of the property bearing plot No. 67, Mauza Shakurpur, Delhi bearing Municipal No. WZ-16 & 17, Golden Park, Rampura, Delhi admeasuring 224 sq. yds. Smt. Rajmati Jain expired on 6.4.1987 leaving behind eight legal heirs. The husband of Smt. Rajmati Jain i.e. Sh. Jagmohinder Lal Jain expired on 27.6.1987. In the plaint, it was pleaded that Smt. Rajmati Jain did not execute any Will during her

lifetime, and since she died intestate, all her eight legal heirs being the plaintiffs and the defendant Nos.2 and 4 to 8 became 1/8th co-owners of the suit property. It was pleaded in the plaint that the plaintiffs with the defendant Nos.2 and 4 had been carrying on a partnership business in the name and style of M/s. J.K. Medical Products since 1977 at 94-Darya Ganj, New Delhi and the suit property was used as a godown upto the year 1999. It was then pleaded in the plaint that when in August 2003 the plaintiffs/respondent Nos.1 and 2 approached the defendant No. 2/appellant No. 2 for partition, the matter was delayed on one pretext or the other. It was pleaded that it transpired that the defendant No. 1/appellant No. 1 claiming herself to be the owner of the suit property sold the same to defendant Nos.2 and 3 by a sale deed. Defendant No. 2 is the husband of defendant No. 1 and defendant No. 3 is the real sister of defendant No. 1. The plaintiffs were shocked and surprised to receive the certified copy of the sale deed on 25.9.2003 in which it was alleged that the defendant No. 1 had become owner of the suit property by virtue of the Will dated 10.1.1987 of the mother-late Smt. Rajmati Jain. It was pleaded that there was no valid Will of Smt. Rajmati Jain dated 10.1.1987 and consequently it was pleaded that the suit property was liable to be partitioned.

3. The suit was contested by the appellants/defendant Nos.1 to 3 while relying upon the Will dated 10.1.1987 allegedly executed by the mother Smt. Rajmati Jain. It was pleaded that by virtue of the Will dated 10.1.1987, Smt. Rajmati Jain bequeathed the suit property in favour of her daughter-in-law i.e. defendant No. 1 and thereby she became sole owner of the suit property. It was pleaded that the defendant No. 1 finally sold the property on 14.5.1998 to her husband-defendant No. 2 and her sister, defendant No. 3.

4. After completion of pleadings, the trial Court framed the following issues:-

1. Whether the will dated 10.01.1987 is a validly executed and legally enforceable document? OPD
2. Whether the suit has been properly valued for the purpose of court fees and pecuniary jurisdiction? OPP
3. Whether no cause of action has arisen against the defendants and in favour of the plaintiff for filing the present suit? OPD
4. Whether the suit is barred by limitation? OPD
5. Whether the plaintiff is entitled to the decree for partition and separate possession of suit property? OPP
6. Whether the plaintiff is entitled to the decree for rendition of accounts against defendants in respect of rent of suit property? OPP
7. Relief.

5. The main issue was really as to the ownership of the defendant No. 1 by virtue of the alleged Will dated 10.1.1987 of the mother Smt. Rajmati Jain. In this

regard, the trial Court in the impugned judgment in para 28 has noted that no Will of late Smt. Rajmati Jain has been placed on record, much less the original Will. Further, no attesting witness of the Will was summoned to prove the execution of the Will. It was held that since the alleged Will of Smt. Rajmati Jain was not proved consequently all the legal heirs of Smt. Rajmati Jain i.e. the plaintiffs, and defendant Nos.2 and 4 to 8 were equal co-owners to the extent of 1/8th share each in the suit property.

I completely agree with the findings and conclusions of the trial Court inasmuch as surely if no Will is filed, much less the original Will, and no attesting witness summoned, surely the alleged Will dated 10.1.1987 was not proved.

6. So far as the issue of limitation is concerned, the trial Court has noted that the suit cannot be said to be barred by limitation as the suit property was used for storing as godown of the partnership business between the parties till the year 1999 and the demand for partition was made in the year 2003 and the suit was thereafter filed on 13.4.2005 i.e. within two years. The trial Court has rightly noted that the period of limitation for filing of the suit for partition is 12 years. of course, 12 years will begin when the claim adverse to the plaintiffs/co-owners is notified to the world at large including the plaintiffs who are the concerned persons. There is no evidence which has been led on record that the alleged Will of the mother dated 10.1.1987 was ever brought to the notice of the respondent Nos.1 and 2/plaintiffs. The issue of limitation has been dealt with by the trial Court in para 34 of its judgment, with which I agree and which reads as under:-

34. Issue no.4 Whether the suit is barred by limitations? OPD

The onus to prove this issue is upon the defendants. In the written statement, defendants have simply mentioned that suit is barred by time. As per the plaintiff, the suit property was inherited by them as well as other legal heir after the death of their mother, Smt. Rajmati Jain and the plaintiffs and defendant no.2 were carrying the joint business by the name of M/s. J.K. Medical Products and the suit property was being used as a godown for storing the products till the year 1999. As per the plaintiff in the year 2003, they asked the defendant no.2 for partition which he initially avoided and subsequently stated that he is the owner of the suit property. Therefore on inquiry they came to know that defendant no.1 executed a sale deed in favour of defendant no.2 & 3 on the basis of the alleged will, thus right of the plaintiff and other legal heir was disputed by the defendant in the year 2003. The plaintiff reiterated the said fact in his examination in chief. During cross-examination he has admitted that he made enquiries with the office of Sub-Registrar regarding the will of Smt. Rajmati Jain dated 10.01.1987. He volunteered that he made the enquiry somewhere in 2003. He further stated that he came to know in the year 2003 that Smt. Kanaklata Jain was claiming her right on the suit property by virtue of will dated 10.01.87 executed by Smt. Rajmati Jain. In the entire cross-examination, PW1 has not been suggested that the suit is barred by limitation. As per the plaintiff they came to know that defendant no.1,2 & 3 were claiming

absolute right in the suit property to the exclusion of legal heir of late Smt. Rajmati Jain in the year 2003. The present suit has been filed on 13.04.2005 i.e. within 2 years. The limitation for filing the suit for partition is 2 years from the date of denial of right. The present suit has been filed within the period of limitation. Defendants have thus failed to discharge the onus of issue no.4, same is accordingly decided against the defendant.

7. There is no issue which is framed with respect to the plea of ownership by adverse possession of the appellants/defendant Nos.1 to 3 and even if such issue was framed it was necessary that this issue should have been proved by leading clinching evidence showing the claim of ownership of the defendant No. 1 for a consistent period of 12 years before filing of the suit i.e. nec vi, nec clam, nec precario i.e. open, peaceful and continuous. Mere long possession is not adverse possession. The plea of adverse possession is not looked upon with favour especially when the parties are closely related to each other inasmuch as possession of one co-owner is treated to be possession for and on behalf of the other co-owner unless ouster is categorically proved. Nothing has been pointed out to me on behalf of the appellants/defendant Nos.1 to 3 that ouster was specifically ever made known to the plaintiffs/respondent Nos.1 and 2. The Supreme Court in its recent judgment reported as Chatti Konati Rao and Others Vs. Palle Venkata Subba Rao, has reiterated the law with respect to adverse possession in paras 12 to 15 of the said judgment, and which paras read as under:-

12. We have bestowed our thoughtful consideration to the submission advanced and we do not find any substance in the submission of Mr. Bhattacharya. What is adverse possession, on whom the burden of proof lie, the approach of the court towards such plea etc. have been the subject matter of decision in a large number of cases. In the case of T. Anjanappa and Others Vs. Somalingappa and Another, , it has been held that mere possession however long does not necessarily mean that it is adverse to the true owner and the classical requirement of acquisition of title by adverse possession is that such possessions are in denial of the true owner's title. Relevant passage of the aforesaid judgment reads as follows:

20. It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the

former's hostile action.

13. What facts are required to prove adverse possession have succinctly been enunciated by this Court in the case of *Karnataka Board of Wakf Vs. Government of India and Others*, . It has also been observed that a person pleading adverse possession has no equities in his favour and since such a person is trying to defeat the rights of the true owner, it is for him to clearly plead and establish necessary facts to establish his adverse possession. Paragraph 11 of the judgment which is relevant for the purpose reads as follows:

11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See *S.M. Karim Vs. Mst. Bibi Sakina*, , *Parsinni (Dead) by Lrs. and Others Vs. Sukhi and Others*, and *D.N. Venkatarayappa and another Vs. State of Karnataka and others*,) Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. *Dr. Mahesh Chand Sharma Vs. Smt. Raj Kumar Sharma and others*, .

14. In view of the several authorities of this Court, few whereof have been referred above, what can safely be said that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The Plaintiff is bound to prove his title as also possession within 12 years and once the Plaintiff proves his title, the burden shifts on the Defendant to establish that he has perfected his title by adverse

possession. Claim by adverse possession has two basic elements i.e. the possession of the Defendant should be adverse to the Plaintiff and the Defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known a requisite ingredient of adverse possession. Mere possession does not ripen into possessory title until possessor holds property adverse to the title of the true owner for the said purpose. The person who claims adverse possession is required to establish the date on which he came in possession, nature of possession, the factum of possession, knowledge to the true owner, duration of possession and possession was open and undisturbed. A person pleading adverse possession has no equities in his favour as he is trying to defeat the rights of the true owner and, hence, it is for him to clearly plead and establish all facts necessary to establish adverse possession. The courts always take unkind view towards statutes of limitation overriding property rights. Plea of adverse possession is not a pure question of law but a blended one of fact and law.

(underlining added)

A reference to para 14 of this judgment shows that if the possession before the plea of adverse possession is accepted, the same must be open and hostile enough so that it is known by the parties interested in the property. The Supreme Court has reiterated this on the basis of similar observations made by the Supreme Court in its judgment reported as T. Anjanappa and Others Vs. Somalingappa and Another, and para 20 of which judgment has been referred to in para 12 of the judgment in the case of Chatti Konati Rao (supra).

8. A civil case is decided on balance of probabilities. Once the appellants failed to prove that there was any Will of the mother-Smt. Rajmati Jain and also failed to prove the plea of adverse possession, which in any case is looked at with disfavour by the Courts, the trial Court was justified in arriving at a finding decreeing the suit for partition. An appellate Court does not interfere with the findings and conclusions of the trial Court unless such findings are wholly perverse or illegal. I do not find any perversity or illegality in the impugned judgment which calls for interference by the Court in the appeal.

9. In view of the above, there is no merit in the appeal, which is accordingly dismissed, leaving the parties to bear their own costs.