

(2014) 04 DEL CK 0137

In the Delhi High Court

Case No : I.A. No. 16744/2011 in CS (OS) 1544/2011

Smt. Vandana Sharma

APPELLANT

Vs

Smt. Hemlata Goswamy and Another

RESPONDENT

Date of Decision : 22-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 32 Rule 15, Order 32 Rule 4, Order 7 Rule 11, Order 7 Rule 11(a)
Evidence Act, 1872 — Section 114, 115
Succession Act, 1925 — Section 213

Citation : (2014) 5 AD 122 : (2014) 209 DLT 741 : (2014) 143 DRJ 252

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Vijay Hansaria, Sr. Advocate, Mr. Arun Sharma and Mr. Avnish Pandey, Advocate for the Appellant; Ajay Kumar Jha, Advocate for Defendant No. 1, Party-in-person and Mr. S.N. Sharma, Advocate for Defendant No. 2, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Mukta Gupta, J.—By this application the Defendant No. 1 seeks rejection of the plaint filed by the Plaintiff, the daughter of Defendant No. 1.

2. Learned counsel for the Defendant No. 1/applicant contends that the present suit, filed by the Plaintiff is not maintainable and is liable to be dismissed in view of Order VII Rule 11(a), (b) and (d) CPC inter alia being barred by limitation, as no cause of action has accrued in favour of the Plaintiff and the condition precedent for invoking provisions of Order XXXII Rule 15 CPC has not been complied with. Further the Plaintiff has not valued the property correctly for the purposes of court fee and jurisdiction and relief of partition cannot be granted to the Plaintiff. The Plaintiff having admitted the mother to be the owner of the property cannot claim herself as co-sharer of the property. The plaint is an abuse of the process of the court. The Plaintiff has no right in the property. The suit filed by the Plaintiff is mala fide and vexatious, without cause of action and

contradictory and inconsistency pleas have been taken.

3. The claim of the Defendant No. 1/applicant for the suit being barred by limitation is based upon the fact that the right to sue accrued to the Plaintiff on 15th December, 1985 when the father of the Plaintiff late Shri M.V. Goswami executed a Will in favour of the Defendant No. 1, his wife to the exclusion of both his daughters, that is, the Plaintiff and Defendant No. 2. Assuming though not admitting that the Plaintiff had no knowledge of the Will dated 15th December, 1985 she certainly had the knowledge of the Will when the property was mutated in the name of the Defendant No. 1 based on the no objection given by the Plaintiff and admitted by her in Para-8 of the suit and her affidavit along with the no objection in DDA in 2011. Thus, the suit is barred by Section 113 of Limitation Act as the same has not been filed within three years from the date of accrual of the cause of action. Even as per Article 110 of the Limitation Act, 12 years is the period for filing a suit by a person excluded from the joint family property. Further in view of the provisions of Sections 114 and 115 of the Indian Evidence Act once a certificate is issued in the name of a person presumption is that he can transfer his membership to any person and judicial notice can be taken of the contemporaneous documents which have not been denied.

4. The suit is liable to be dismissed for want of cause of action as the Plaintiff in Para-8 of the plaint has admitted that she got the mutation of the property No. C-45, Neeti Bagh, New Delhi-110049 in DDA in the name of Defendant No. 1 after the death of her father on 26th January, 1996. Once the property stood mutated in the name of the Defendant No. 1 way back in 1996, the Defendant No. 1 became the absolute owner thereof thus there is no cause of action in favour of the plaintiff and against the defendant. Assuming though not admitting, the cause of action, if any, accrued to the Plaintiff for filing the suit for partition on the date when the mutation was granted. The suit is thus also barred by limitation. Relying upon *Bharat Kumar Vs. Ashok Sahdev and Others*, it is stated that clever drafting by advocates should not stop the court from meaningful reading of pleadings, decipher the real cause of action/case and if the same is found to be barred by any law, to nip the same in the bud. Reliance is also placed on *Madan Lal Vaid Vs. Nand Kumar Walia and Another*, to contend that the suit is liable to be dismissed for want of cause of action. This Court is not powerless to deal with litigants who file frivolous and vexatious suit concealing material facts from the Court. Reference is made to *T. Arivandandam vs. T.V. Satyapal and others*, AIR 1970 SC 2421. It is stated that material facts have been suppressed from this Court only to make out a sham and flimsy cause of action. Reliance is also placed on *Amrit Kaur vs. Sarabjit Singh*, 153 (2008) DLT 392; *Bharat Bhushan Maggon Vs. Joginder Lal and Others*, ; *I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others*, , *Malvika Madan Sehgal and Another Vs. M.M. Sehgal Limited and Others*, .

5. The suit is also liable to be dismissed under Order VII Rule 11(d) being contrary to law as conditions precedent for invoking provisions of Order XXXII

Rule 15 have not been complied with as it has been nowhere stated in the suit or in affidavit that interest of Plaintiff is not averse to Defendant No. 1 which is a mandatory requirement under Rule 1, 3(iii) and proviso to Rule 4 of Order XXXII CPC. In view of the conduct and false facts stated before this Court, this Court dismissed I.A. No. 10032/2011 filed by the Plaintiff seeking leave to represent Defendant No. 1 as she was incapable of defending herself being mentally ill. Once the foundation of the suit gets demolished the entire suit is liable to be rejected. This Court has already held that the Defendant No. 1 is "fully possessed of mental and intellectual faculties to enable her to form a clear, rational judgment and make decisions". Moreover leave to withdraw I.A. No. 10032/2011 has been declined and I.A. No. 6974/2013 under Order XXIII Rule 1 CPC for withdrawing the suit has already been opposed.

6. The Plaintiff has not valued the property correctly for the purposes of court fee as 1/3rd share is claimed as co-owner and co-sharer and only fixed court fee of Rs. 200/- for partition and Rs. 260/- for permanent and mandatory injunction has been affixed. Thus the suit is liable to be dismissed being barred under Order VII Rule 11(b). As per the own admission of the Plaintiff there is a complete ouster of the Plaintiff from the property and thus she is required to pay ad-valorem court fee which has not been done.

7. Further, the relief of partition as claimed cannot be granted since the measurement of the property has been wrongly mentioned to be 400 sq. yards instead of 325.33 sq. yards. The suit is thus liable to be rejected. There is misjoinder of parties as by prayer (i) (b) the Plaintiff seeks partition of the ancestral property measuring 23 acres situated at village Manakwara and Chillauth/Bankheri, District Hoshangabad, Madhya Pradesh wherein the uncles and cousins are necessary parties but have not been impleaded. In the absence of proper details of the property at Neeti Bagh and other ancestral properties without any site plan or schedule of properties, the present suit cannot be maintained. The Plaintiff has not produced any document in support of her claim. The claim of the Plaintiff that the Will in question is forged, not genuine and not probated is not borne out from the record. The Plaintiff in the pleadings has nowhere shown how she became the co-owner and the co-sharer of the built up property bearing No. C-45, Neeti Bagh, New Delhi. The son of the Plaintiff performing the last rites of late Shri M.V. Goswami does not confer any right or ownership in the suit property.

8. The Plaintiff is neither the co-owner nor co-sharer of the property left behind by the father. Pleadings in this regard are contradictory and inconsistent with her own conduct and admission. The Defendant No. 1 became the exclusive owner of the properties mentioned in the suit which were devolved on her on the basis of mutation done by the DDA which was done on the basis of the Will dated 20th December, 1985 in her favour left behind by her husband. Further the pleadings in the suit have not been verified as per law. Thus the suit filed by the Plaintiff be dismissed with heavy costs being malicious, vexatious and without any legal

basis.

9. Learned counsel for the Plaintiff on the other hand contends that undoubtedly in the plaint the Plaintiff could not have claimed that the Defendant No. 1 was suffering from old age mental infirmities/unsound mind and is not capable to protect her claims, rights and interest and also not in a position to move out freely since 1996. For this reason application of the Plaintiff being I.A. No. 10032/2011 seeking leave to defend on behalf of the Defendant No. 1 has already been declined. For these averments, the suit cannot be rejected under Order VII Rule 11 CPC. It is contended that there is no admission of the plaintiff that the Defendant No. 1 is the owner of the property nor does the Plaintiff in the suit admit execution of a valid Will by the deceased, bestowing complete ownership of the suit property in Defendant No. 1. The mutation in respect of the suit property, that is, C-45, Neeti Bagh, New Delhi does not confer a title on the Defendant No. 1 as held by the Hon"ble Supreme Court in a number of decisions. The legal position for rejection of a suit under Order VII Rule 11 CPC is very clear as laid down in Bhau Ram Vs. Janak Singh and Others, . At this stage only the plaint and the documents filed by the Plaintiff can be looked into and not the written statement or the defence of the Defendant. Reliance is also placed on Sankalchan Jaychandbhai Patel and Others Vs. Vithalbhai Jaychandbhai Patel and Others, ; Suman Verma Vs. Union of India (UOI) and Others, ; State of Himachal Pradesh Vs. Keshav Ram and others, ; Balwant Singh and another etc. Vs. Daulat Singh (dead) by L.Rs. and others, ; Mahila Bajrangi (dead) through Lrs. and Others Vs. Badribai and Another, ; Rajinder Singh Vs. State of Jammu and Kashmir and Others, and Durga Das Vs. The Collector and others, .

10. The Plaintiff has nowhere admitted that the deceased father executed a Will and in the absence of the Will, the Plaintiff is entitled to 1/3rd share in the suit properties being the class-1 legal heir of the deceased. Even assuming the case of the Defendants that there is a Will in favour of Defendant No. 1, the Will has not been probated and in the absence of probate, the properties of the deceased do not vest in the Defendant No. 1. Reliance is placed on Mrs. Hem Nolini Judah (since deceased) and after her Legal Representative Mr. Marlean Wilkinson Vs. Isolyne Sarojbashini Bose and Others, . The objection with regard to the Court fee is liable to be rejected as admittedly the Plaintiff is in possession of the suit property and is thus not required to pay ad-valorem court fee. The suit is not barred by Limitation Act. The right of the Plaintiff to the suit property had never been threatened and she has been in continuous possession thereof. Only on 23rd May 2011 when the Defendant No. 1 intended to sell the property, the right to sue accrued and immediately thereafter the Plaintiff filed the present suit.

11. As per the documents filed by the Plaintiff she has only given a no objection to the mutation in favour of Defendant No. 1 in respect of the property C-45, Neeti Bagh, New Delhi and the same can at best be an admission for mutation which does not deprive the Plaintiff of her right in the property. In a suit for partition there is a continuing cause of action and thus it is never barred by

limitation. Relying upon Krishna Pillai Rajasekharan Nair (D) by Lrs. Vs. Padmanabha Pillai (D) by Lrs. and Others, it is stated that in a suit for partition a cause of action only arises when the right is denied. Reliance is place on Nanak Chand and Others Vs. Chander Kishore and Others, and S. Jaswant Singh (deceased by L. Rs.) Vs. S. Darshan Singh (deceased by L. R.) and others, .

12. I have heard learned counsel for the parties.

13. As regards the objection of the learned counsel for the Defendants with regard to the court fee being inadequate, I find no merit therein as admittedly the plaintiff is in possession of one floor in the suit property, that is, C-45, Neeti Bagh, New Delhi and in view thereof she would not require to pay ad-valorem court fee and thus the suit cannot be dismissed on this count. Also I do not find any merit in the contention of the learned counsel for the Defendants stating that the suit is barred by limitation. Admittedly the Plaintiff is in possession of part of the suit property and the cause of action arose to her only when her ownership/possession in the suit property was threatened after the Defendant No. 1 sought to sell the property and called the prospective buyers on 27th May, 2011 whereafter immediately the Plaintiff filed the present suit.

14. The plea of the learned counsel for the plaintiff that in the absence of a probate the Will cannot be acted upon is liable to be rejected in view of the legal position laid down in by this court in Sambhav Gupta Vs. State and Others, and Shri Shivraj Krishan Gupta, Smt. Neena Jain and Smt. Neera Goel Vs. Sh. Chander Krishan Gupta, Sh. Avtar Krishan Gupta, Shri Balraj Krishan Gupta and Ms. Anjali Gupta, which holds that Section 213 of the Indian Succession Act is not applicable in Delhi and it is not necessary to obtain probate before any claim is based on the Will. A person has a right to set up a Will even in collateral proceedings and there is no need for obtaining probate thereof. Further there can be no dispute to the proposition that while deciding an application under Order VII Rule 11 CPC only the averments in the plaint are required to be seen.

15. However the moot question in the present case is whether the present suit is liable to be rejected on the ground that the Plaintiff has concealed material facts and made mala fide, vexatious and contradictory averments to maintain the suit.

16. A brief factual matrix is that the Plaintiff is the daughter of the Defendant No. 1 and sister of Defendant No. 2. The father of the Plaintiff and Defendant No. 2 and the husband of Defendant No. 1 Shri M.V. Goswami expired on 26th January, 1996 leaving behind the Plaintiff and the Defendants as the only legal heirs as his son Mukesh Goswami died in an accident on 24th October, 1982. After the death of her father, the Plaintiff with her family shifted to C-45, Neeti Bagh, New Delhi to look after the mother as the Defendant No. 2 is settled in U.K. since her marriage. In the plaint it is stated that the Defendant No. 1 is suffering from old age mental infirmity/unsound mind and is unable to protect her claims, rights and interest and is not in a position to move out freely since 1996. Based on this claim the Plaintiff filed I.A. No. 10032/2011 under Order XXXII Rule 15 CPC

seeking leave to defend on behalf of the Defendant No. 1. This court called the Defendant No. 1 on 10th October, 2012 and interacted with her. This Court found that the Defendant No. 1 was absolutely lucid, did not suffer from any mental infirmity and was quite capable of protecting her interest. Thereafter the Plaintiff was summoned and despite opportunities she failed to appear before this Court and thus costs of Rs. 5,000/- was imposed on the Plaintiff. On 1st March, 2013 the Plaintiff was present in Court and offered her unqualified apology to Defendant No. 1/her mother for hurting her feelings by stating on record that she is of unsound mind. However the Defendant No. 1 stated that the Plaintiff's apology was hollow and did not inspire any confidence. Thus this Court dismissed I.A. No. 10032/2011 filed by the Plaintiff being devoid of merits, vexatious and deliberate attempt on her part to portray her mother as a person of unsound mind with costs of Rs. 50,000/- on the Plaintiff to be paid to the Defendant No. 1 in two weeks from the said date and dismissed the application on 20th May, 2013.

17. Few facts admitted by the Plaintiff in the plaint and the documents are that on 1st August, 1972 the perpetual lease deed was executed by the Supreme Court Advocates Group Housing Society (in short "SCBCHBS Ltd.) in favour of Shri M.V. Goswami, the father of the Plaintiff and the Defendant No. 2 and the husband of Defendant No. 1 whereby Plot C-45, Neeti Bagh, New Delhi measuring 325.33 sq. yards was allotted to him for Rs. 6,886/- on the terms mentioned therein. On 8th December, 1976 the occupancy certificate was issued by DDA in favour of Shri M.V. Goswami. On 26th January, 1996 Shri M.V. Goswami passed away whereafter on 30th March, 1996 the Plaintiff shifted to C-45, Neeti Bagh, New Delhi and in the same year the Plaintiff got mutated the property C-45, Neeti Bagh in the name of her mother, Defendant No. 1. The Plaintiff has filed copies of the Sale Deed of agricultural land at Manakwara and Chillauth, District Hoshangabad, Madhya Pradesh entered into between the Defendant No. 1 and one Rajesh Kumar. On 24th May, 2011 the Plaintiff also filed objections with DDA for conversion of lease hold property to free hold as applied by the Defendant No. 1 in respect of C-45, Neeti Bagh and requested to cancel the no objection given by her earlier for the said property.

18. Defendant No. 1 has placed on record the affidavit of the Petitioner dated 25th November, 1997 which was filed before the DDA in relation to the mutation of Plot No. C-45, Neeti Bagh in the name of Defendant No. 1. The said affidavit of the plaintiff states that the Plaintiff is one of the legal heirs of Shri M.V. Goswami deceased being his daughter, accepts the contents of Will dated 20th December, 1985 left behind by the deceased allottee/Lessee/Sub-Lessee of plot No. C-45, Neeti Bagh and has no objection if the said plot is mutated in favour of Smt. Hemlata Goswami, Wife of late Shri M.V. Goswami and the legatee as per the said Will.

19. A perusal of the plaint shows that there is no reference to the Will dated 25th November, 1997. In the replication to the written statement of Defendant No. 1, the Plaintiff has not denied the Will but has stated that the Will is forged having

not seen the light of the day, and the same cannot be acted upon as there is no probate of the said Will. The Plaintiff has nowhere denied the filing of the affidavit. Undoubtedly, no objection for mutation in the revenue records neither extinguishes the title nor has any presumptive value on title, as held in Smt. Sawarni Vs. Smt. Inder Kaur and Others, but it clear that there has been suppression of material fact in the plaint. Though the Plaintiff states that the Will is forged but she does not claim that the affidavit filed by the Plaintiff before the DDA acknowledging the Will was a forged document. The Plaintiff does not deny the copy of the affidavit dated 25th November, 1997 of the plaintiff filed by the Defendant No. 1 on 1st October, 2011, in the affidavit of the Plaintiff for admission/denial of documents filed by Defendant No. 1 on 31st August, 2013.

20. In T. Arivandandam (supra) while dealing with the suit pending before the First Munsif's Court, Bangalore the Supreme Court held that on a meaningful, not formal reading of the plaint, the suit was manifestly vexatious and meritless, in the sense of not disclosing a clear right to sue, thus the Court should exercise its power under Order VII Rule 11 CPC, taking care to see that the ground mentioned therein is fulfilled. It was held that if clever drafting has created the illusion of a cause of action, it should be nipped in the bud, at the first hearing by examining the party searchingly under Chapter X CPC. The Trial Court should insist imperatively on examining the party at the first hearing so that bogus litigation can be shot-down at the earliest stage.

21. The prayers in the present suit are for a decree of partition in favour of the Plaintiff, seeking a declaration of 1/3rd share in property No. C-45, Neeti Bagh and ancestral property measuring 23 acres situated at Village Manakwara and Chillauth/Bankheri District. As noted above, though the Plaintiff denies that the Will is a forged document, however the Plaintiff does not deny the affidavit executed by the Plaintiff before the DDA pursuant to which mutation of property No. C-45, Neeti Bagh has been done in the name of Defendant No. 1. Hence, non-denial of the affidavit clearly shows that there has been suppression of material facts as regards prayer No. 1 is concerned. There is yet another fact which persuades this Court to reject the plaint. With regard to ancestral property neither complete family tree has been filed nor have the other legal heirs been made parties. In the absence of necessary parties the present suit is liable to be rejected. Nor the details of the properties have been mentioned. As regards prayer No. 2 the Plaintiff can only claim of use and enjoyment of physical possession of the house at C-45, Neeti Bagh, New Delhi in case she has a right in the property. The Plaintiff has not been able to show the same and in the absence of the same the prayer No. 2 cannot be allowed. As regards prayer No. 3 seeking a mandatory injunction in favour of the Plaintiff and against the Defendant No. 2 and her family members seeking handing over of all the original documents as the Defendant No. 1 is of unsound mind/incapable of taking independent decision, this Court after examining the Defendant No. 1 has already held that the Defendant No. 1 is of sound mind and capable of looking after her affairs vide its order dated 10th October, 2012 which order has not

been challenged till date. Thus, there is no merit in this prayer as well.

22. Hence the plaint is liable to be rejected. Ordered accordingly.

23. Application is disposed of.