

(2012) 08 DEL CK 0457

In the Delhi High Court

Case No : Regular First Appeal 166 of 2012 and CM No. 6147 of 2012

Surjit Singh and Others

APPELLANT

Vs

Ekta Gulati and Others

RESPONDENT

Date of Decision : 16-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2012) 08 DEL CK 0457

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Sanjay Gupta, for the Appellant; Amarjeet Rai, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J

1. This first appeal u/s 96 of the Code of Civil Procedure, 1908 impugns the judgment and decree dated 31.01.2012 in a suit for partition of immovable property being Shop No. 66, Bhagat Singh Lane, Gole Market, near Connaught Place, New Delhi filed in the year 2009 by the respondent No. 1 namely Mrs. Ekta Gulati. The learned Addl. District Judge has held that the said shop belonged to Shri Purushottam Singh who died intestate in March, 1984 leaving a widow, two sons (the appellants herein) and three daughters (respondents herein); that the widow of Shri Purushottam Singh also died intestate in October, 1991. Accordingly, a preliminary decree for partition has been passed holding the two sons and three daughters of Shri Purushottam Singh to be having 1/5th undivided share each in the said shop. The appellants have also been enjoined from parting with possession, selling, encumbering the said shop.

2. The counsel for the appellants contends that:-

(i) the respondent no.1 had filed the suit pleading that Shri Purushottam Singh was the owner of the shop and was carrying on business in the name and style of Punjabi Bhaiya Di Hatti of selling books and stationery therefrom and after the

demise of Shri Purushottam Singh, the two sons of Shri Purushottam Singh continued the same business from the said shop;

(ii) the two sons of Shri Purushottam Singh had contested the suit inter alia pleading that the said shop was not in the name of Shri Purushottam Singh but was in the name of Shri Harbhajan Singh, the elder brother of Shri Purushottam Singh and the daughters of Shri Purushottam Singh thus had no claim to any share in the said shop;

(iii).that the respondent no.1/plaintiff in the affidavit by way of examination in chief took a stand that Shri Purushottam Singh and his brother Shri Harbhajan Singh were joint owners of the shop but in a compromise in the year 1970-71 Shri Purushottam Singh paid Rs.40,000/- or Rs.45,000/- to Shri Harbhajan Singh in lieu of Shri Harbhajan Singh's share in the shop and whereafter Shri Purushottam Singh became exclusive owner of the shop;

(iv).however in cross examination of one of the witnesses of appellants, the respondent no.1/plaintiff gave a suggestion that the said sum of Rs.45,000/- was paid after the death of Shri Harbhajan Singh in 1971, to his widow, in the year 1980;

(v).that the witness from the House Tax Department examined by the appellants also deposed that the shop was leased out to Shri Harbhajan Singh vide perpetual lease deed dated 10th September, 1959 and no transfer/mutation had been recorded;

(vi).that the stand of the respondent no.1/plaintiff qua ownership of the shop has been changing from time to time and could not have been believed by the learned Addl. District Judge;

(vii).On the contrary it abundantly stood proved that Shri Purushottam Singh through whom the respondent no. 1/plaintiff claimed share, was not the owner of the shop of which the partition was claimed and it was Shri. Harbhajan Singh who was/is the owner of the shop;

(viii) that in the aforesaid scenario, no decree for partition of the shop between the appellants and the respondents could have been passed when a third party namely Shri Harbhajan Singh was the owner of the shop

3. However, I am unable to find any merit in the aforesaid argument. The respondent No. 1/plaintiff approached the court with the case of the shop belonging to the father of the parties. Upon the appellants setting up the defence that it was in the name of Shri Harbhajan Singh, it was explained that Shri Harbhajan Singh had been paid his share. There was thus no inconsistency. Of course, there is inconsistency in the stand of the respondent no.1/plaintiff as to when Shri Harbhajan Singh was paid his share. Also, there is no proof of Shri Purushottam Singh and Shri Harbhajan Singh being joint owners or of Shri Harbhajan Singh releasing his share in the shop in favour of Shri Purushottam Singh. What is however undisputed is that Shri Purushottam Singh was in

occupation and possession of the said shop for tens of years prior to his demise, to the exclusion of Shri Harbhajan Singh and after demise of Shri Purushottam Singh, the appellants through him are so continuing in possession of the shop. Even today, it is informed that no claim has been made by the legal heirs of Shri Harbhajan Singh qua the said shop.

4. In the circumstances, what stands admitted/proved is that the father of the parties, namely Shri Purushottam Singh was having rights in the said shop, whether they be ownership rights or rights by way of adverse possession or merely possessory rights. The said rights, on the demise of Shri Purushottam Singh, are being enjoyed by the appellants only who are but two out of five legal heirs of Shri Purushottam Singh. The appellants, while continuing to enjoy the said rights, cannot deny the share of the daughters of Shri Purushottam Singh therein on the specious plea of Shri Harbhajan Singh being the recorded owner of the shop.

5. It is significant to note that the appellant do not claim the possessory rights of the shop from Shri Harbhajan Singh and the appellant no 1 in his cross examination recorded on 30th April 2011 expressly admitted, "I am in possession of this property through my father". On specific query today also as to whether the appellants claim to be occupying the shop under any authority from the legal heirs of Shri Harbhajan Singh, the counsel replies in negative.

6. Once it stands proved that the possession of the appellants of the shop is by inheritance from the father, I am of the view that possessory rights i.e. the right to control property including the right to exclude others are a facet of different kinds of rights over immoveable property and can be subject matter of partition and such possessory rights by a person who is not necessarily the owner cannot be appropriated by few only of the legal heirs to the exclusion of others and all the legal heirs are entitled to a share in the said possessory rights with respect to the property.

7. To call the bluff of the appellants, it was suggested to their counsel that a Receiver be appointed to take possession of the shop and the said possession be offered to the heirs of Shri Harbhajan Singh and if they refuse to take the same, the shop be auctioned and the proceeds distributed equally between the appellants and the respondents. Counsel for the appellants however, after taking instructions from the appellants, states that the appellants are not agreeable to such a course of action and seek a decision of this appeal in merits. The same shows that the plea of the appellants of Shri Harbhajan Singh being the recorded owner of the shop is directed only to defeat the claim of the respondents and the appellants themselves even do not want to act on the said plea.

8. It is further significant that the appellants in spite of the suit having been filed in the year 2009 did not inform the legal heirs of Shri Harbhajan Singh thereof. No application also was filed for impleadment of the legal heirs of Shri Harbhajan Singh as parties to the suit though today it is stated that notice be issued to

them. However, the said statement, at this stage, is found to be an afterthought and a merely to derail the hearing.

9. The only other argument raised by the counsel of appellants is that the suit for partition filed in the year 2009 claiming share inherited from the father on his demise in the year 1984 was barred by time. The trial court in this respect has held that the appellants, after the demise of the father, were holding the shop in trust for the respondents and the respondents being the co-owners, the question of limitation did not arise. The counsel for the appellants though has pressed the said issue but is neither able to tell the Article of Schedule to the Limitation Act, 1963 which would apply to such a case nor is able to cite any judgment in this regard though claims that this court has taken a view that a suit for partition has to be filed within three years of the date when the right accrues. On further query as to when the right accrues, he states that the right accrued in the year 1984, when the father died.

10. I have perused the written statement of the appellants/defendants in this regard; except for taking a bald plea of the suit being hit by delay and laches, it is not the case that the respondents at any time prior to the filing of the suit claimed any share in the shop or that the said share was at any time denied by the appellants. That being the position, once Shri Purushottam Singh is found to have rights with respect to the shop, the possession/occupation thereof by the appellants after the demise of Shri Purushottam Singh would be on behalf of all the persons on whom the right, title and interest of Shri Purushottam Singh would devolve. The appellants have not set up any plea of exclusion. Moreover, as aforesaid, it is the case of the appellants themselves that the shop belonged to Shri Harbhajan Singh and not to them. For this reason also, the question of the appellants excluding the respondents at any stage did not arise. In the circumstances, the plea of the appellants of the claim for partition being barred by time is meritless.

11. Counsel for the respondents also invited attention to the statement recorded on 15.03.2010 by the trial court of the appellant No. 1 under Order 10 of the CPC, wherein he has stated that he had no objection to the sisters being given a share in the shop in question. After recording the said statement, the suit was adjourned for settlement but it appears that no settlement could be arrived at and the written statement was filed thereafter. It is also the contention of the respondents that the appellants are in possession of documents to show that Shri Harbhajan Singh had transferred title in shop to Shri Purushottam Singh and are only taking advantage of the shop being recorded in the name of Shri Harbhajan Singh and otherwise do not admit that the legal heirs of Shri Harbhajan Singh are owners of the shop. No merit is thus found in this appeal, which is dismissed.

No order as to costs.