

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment Reserved on : 26th July, 2022**
Judgment Delivered on : 17th August, 2022

+ **CS(OS) 287/2020**

KRISHAN DAS CHOUDHRY Plaintiff

Through: Mr. Rajat Aneja with Ms. Chandrika
Gupta and Ms. Aditi Shastri,
Advocates

versus

**RAJESH ALIAS RAJ
CHAUDHARY & ORS.**

..... Defendants

Through: Mr. S.N. Choudhri, Mr. Dipit Sareen
and Mr. Anil Sharma, Advocates

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

AMIT BANSAL, J.

I.A. 8633/2021 (O-XII R-6 of CPC)

1. The present application has been filed on behalf of the plaintiff under Order XII Rule 6 of the Code of Civil Procedure, 1908 (CPC) read with Order XIV Rule 1(6) of the CPC, seeking a decree on the basis of admissions made in the written statement filed by the defendants.
2. The present suit was filed by the plaintiff seeking reliefs of mandatory and permanent injunction in respect of the property bearing No. J-3, South

Extension Part-I, New Delhi (suit property), on the ground that the plaintiff is the exclusive and absolute owner of the suit property.

3. Notice in this application was issued on 10th August, 2022. Subsequently, the reply has been filed on behalf of the defendants and the rejoinder thereto has also been filed on behalf of the plaintiff.

4. The case set up by the plaintiff is that:

- (i) The plaintiff and his two brothers Late Sh. Mohinder Singh and Late Sh. Brijender Singh, were the joint owners of five plots bearing No.J-1, J-2, J-3, J-4 and J-20 situated in South Extension Part-I, New Delhi.
- (ii) Vide partition deed dated 21st June, 1965, plots bearing No. J-1 and J-3 fell to the share of Late Sh. Mohinder Singh, whereas plot bearing No.J-2 and J-4 fell to the share of Late Sh. Brijender Singh.
- (iii) Late Sh. Mohinder Singh died intestate on 27th April, 1985 leaving behind 5 Class I legal heirs, comprising his mother, first wife, Vidya Choudhary and a daughter from the first wife, Sangeeta and second wife, Anupama and a son from the second wife, Rahul Chaudhary.
- (iv) There was a dispute between the two wives of Late Sh. Mohinder Singh, Vidya Choudhary and Anupama, as a result of which, a civil suit being CS(OS) 841/2004 was filed by Vidya Choudhary in which, the plaintiff was impleaded as the defendant no.2 and the defendants no.1 to 4 in the present suit were impleaded as the defendants no.6 to 9 therein.
- (v) Vide registered Sale Deed dated 20th May, 2005, Anupama and Rahul Chaudhary transferred 2/3rd undivided share in the suit property in favour of the plaintiff. The suit property is a vacant plot of land measuring 270 sq. yards.

- (vi) The 1/3rd undivided share in the suit property that fell to the share of the mother of the plaintiff and Late Sh. Mohinder Singh, Smt. Shiv Devi, was bequeathed to the plaintiff vide registered Will dated 27th October, 2004, executed by Shiv Devi, who expired on 20th January, 2005.
 - (vii) Another civil suit CS(OS) 243/2006 was filed by the plaintiff before this Court, the subject matter of which was other properties left behind by Late Sh. Mohinder Singh.
 - (viii) Both the suits were settled amongst the family members of Late Sh. Mohinder Singh as well as the plaintiff in October, 2015. I.A. No.23503/2015 under Order XXIII Rule 3 of the CPC was filed in CS(OS) 243/2006, wherein all the legal heirs of Late Sh. Mohinder Singh agreed to surrender their rights, title and interest in all properties including the suit property, in favour of the plaintiff.
5. In the written statement filed on behalf of the defendants, it has been pleaded that:
- (i) The plaintiff is neither the owner, nor in possession of the suit property.
 - (ii) The Sale Deed dated 20th May, 2005 was executed in favour of the plaintiff by Rahul Chaudhary and Anupama, who themselves were not the owners of 2/3rd undivided share in the suit property.
 - (iii) Late Sh. Mohinder Singh never divorced his first wife, Vidya Choudhary and therefore, she continued to be his legally wedded wife. Anupama and Rahul Chaudhary have admitted in I.A. No. 23503/2015 under Order XXIII Rule 3 of the CPC that Vidya Choudhary and Sangeeta were the only legal heirs of Late Sh.

Mohinder Singh and had rights in the properties of Late Sh. Mohinder Singh.

- (iv) No Will was ever executed by Late Smt. Shiv Devi in favour of the plaintiff. In any case Late Smt. Shiv Devi did not have any right, title and interest in the suit property and therefore, she could not have willed any portion of the suit property in favour of the plaintiff.
- (v) Late Sh. Mohinder Singh, the owner of the suit property, out of love and affection, gifted the suit property to the defendant no.2 in November, 1981. By virtue of the said gift, the defendant no.2 has remained in possession of the suit property since November, 1981.
- (vi) The defendants constructed two rooms in the suit property, where a servant of the defendants, Ram Pratap Singh, used to reside for a long time, and the defendants have also been parking their vehicles in the vacant space since 1983. Reliance is placed on the ration card in the name of the servant showing the suit property as his address.
- (vii) The entrance to the suit property has been under the lock and key of the defendant no.2 since November, 1981. Since the partition in 1965, the only entrance and exit to the properties bearing No. J-1 to J-4 was through the suit property bearing No. J-3.
- (viii) After execution of the Sale Deed in 2005, the plaintiff has claimed rights, title and interest in the suit property for the first time in the present suit.

6. On the basis of the aforesaid pleadings, the counsel for the plaintiff has contended that i) the compromise dated 6th November, 2015 duly recorded in CS(OS) 243/2006 before this Court resulted in the Sale Deed dated 20th May, 2005 executed in favour of the plaintiff attaining finality.

Since the plaintiff already acquired title in respect of 1/3rd undivided share on the basis of his mother's Will, the plaintiff became the absolute owner of the suit property; ii) The aforesaid settlement was recorded in the presence of the defendants, who never objected to the same. Nor have they filed any subsequent application or legal proceedings questioning the said settlement; iii) The defendants demolished a small portion of the intervening wall between plots bearing No. J-2 and J-3 and have made a passage to gain illegal access to the suit property. The defendants have locked the gate of the suit property illegally from inside, thereby denying access to the plaintiff.

7. Counsel for the plaintiff submits that the gift claimed in favour of the defendant no.2 has no sanctity in law. He relies upon Section 123 of the Transfer of Property Act, 1882 (TPA) to submit that the registration of a gift deed in respect of an immovable property is mandatory. Reliance is placed on the judgment of the Supreme Court in **Gomitibai (Dead) through Lrs. And Ors. v. Mattulal (Dead) through LRs**, (1996) 11 SCC 681.

8. Reliance is placed on the judgment of the Supreme Court in **Anathula Sudhakar v. P. Buchi Reddy (Dead) By LRs and Others**, (2008) 4 SCC 594, and the judgment of Gujarat High Court in **Navalram Laxmidas Devmurari v. Vijayaben Jayvantbhai Chavda**, 1997 SCC Online Guj 83, to contend that where the property is a vacant plot of land, the principle to be followed is that the possession follows the title. If two persons claim to be in possession of vacant plot of land, the one who is able to establish title thereto will be considered to be in possession, as against the person, who is not able to establish title.

9. On behalf of the defendants, it has been contended that i) the compromise between the plaintiff and the legal heirs of Late Sh. Mohinder

Singh was recorded in CS(OS)243/2006, in which the defendants were not the parties. The two suits were not consolidated; ii) Anupama and Rahul Chaudhary did not have 2/3rd share in the suit property and therefore, could not have conveyed the said share in the suit property in favour of the plaintiff; iii) The Sale Deed dated 20th May, 2005 has been disclosed for the first time in the present suit and the same was not disclosed in the written statement filed on behalf of the plaintiff in CS(OS) 841/2004. Before filing the present suit, the plaintiff never claimed any right, title and interest in the suit property.

10. In rebuttal, the counsel for the plaintiff submits that in the written statement filed on behalf of the defendants in CS(OS) 841/2004, they never claimed ownership in respect of the suit property. Therefore, they cannot dispute the title of the plaintiff. It is further submitted that the defendants were throughout aware of the settlement in CS(OS) 243/2006 and therefore, never challenged the withdrawal of CS(OS) 841/2004. Since the defendants were parties in CS(OS) 841/2004, they cannot claim that they were not aware of the said suit being withdrawn.

11. I have heard the counsels for the parties and examined the record.

12. The plaintiff claims that 2/3rd undivided share in the suit property was transferred in his name by virtue of a Sale Deed dated 20th May, 2005 by Anupama and her son Rahul Chaudhary. A reference may be made to one of the recitals to the said Sale Deed. The same is set out below:

“AND WHEREAS unfortunately Sh. Mohinder Singh expired on 27.04.1985 and consequently after his death, the property bearing No.J-3, South Extension Part-I, New Delhi devolved upon Smt. Shiv Devi, Smt. Anupama & Sh. Rahul Choudhry as his only

legal heirs (being his mother, wife and son respectively) having 1/3rd undivided equal share.”

13. In view of the fact that there was a first wife of Late Sh. Mohinder Singh, Vidya Choudhary and their daughter, Sangeeta, the facts stated in the aforesaid recital do not appear to be factually correct. It appears that the first wife, Vidya Choudhary was never divorced by Late Sh. Mohinder Singh. If that be so, Anupama and Rahul Chaudhary did not have 2/3rd undivided share in the suit property at the time of execution of the said Sale Deed and the whole basis of the said Sale Deed is incorrect.

14. The plaintiff has claimed 1/3rd undivided share in the suit property by virtue of the Will dated 27th October, 2004 executed by Late Smt. Shiv Devi, the mother of the plaintiff. However, the defendants have claimed that the said Will is forged and fabricated. This aspect can only be examined in trial.

15. CS(OS) 841/2004 was filed on behalf of Vidya Choudhary, claiming partition of the properties left behind by Late Sh. Chandi Ram, being the father of the plaintiff and Late Sh. Mohinder Singh. In the aforesaid suit, all the family members including the plaintiff herein, Anupama and Rahul Chaudhary were parties.

16. The plaintiff also filed CS(OS) 243/2006 seeking partition of some other properties, in which Vidya Choudhary, Sangeeta, Anupama and Rahul Chaudhary were made parties. However, the defendants herein were not parties in the said suit. In CS(OS) 243/2006, a joint application under Order XXIII Rule 3 of the CPC was filed. The plaintiff relies upon paragraphs 6, 8(vi) and 8(ix) of the said application. The same are set out below:

“6. That in CS(OS) No.379 of 2005, a Settlement was reached between the Defendants No.1 and 2 on the one hand and the

Defendants No.3 and 4 on the other hand when the Defendants No.1 and 2 had accepted the Defendants No.3 and 4 to be the legal heirs of late Shri Mohinder Singh and of late Shri Chandi Ram and also admitted that consequently, Defendants No.3 and 4 were/are entitled to inherit the share/property of late Shri Mohinder singh and late Shri Chandi Ram including the aforesaid land.”

....

“8(vi) That it has also been agreed and undertaken by the parties hereto that the other Suit bearing C.S.(OS) No.841/2000 titled “Vidya Chaudhary and another Vs. Smt. Shiv Dei and others” filed by the Defendants No.3 and 4 here shall be unconditionally withdrawn by them from this Hon’ble Court for which none of the other Defendants, i.e. Defendant Nos.1 and 2 herein who are Defendants No.10 and 11 to the said suit, shall have an objection thereto, including the present Plaintiff who is the Defendant No.2 therein. It is also made clear that in the event of any of the other parties (other than the parties hereto) in C.S.(OS) No.841/2004 objecting to the withdrawal of the said suit, in that event also, the present settlement shall continue to remain binding on all the parties hereto.

.....

(ix) It is further agreed that Defendants No.1 to 4 have conveyed/ surrendered all their rights, title or interest that they had or claimed to have had and hereafter, shall not claim any right, title or interest in any of the property Nos.J-3, J-17 and J-18, South Extension Part-I, New Delhi, which belong to the Plaintiff, his family members as well as any entity of whom they are a part and their successors-in-interest. Furthermore, the parties to the present suit would not make any challenge to the sale of property Nos.J-19 and J-20, South Extension, Part-I, New Delhi, be it a sale by the Plaintiff or subsequent sales.”

17. CS(OS) 243/2006 was decreed by this Court in terms of the aforesaid compromise vide order dated 6th November, 2015. On the same date, CS(OS) 841/2004 was listed before another judge of this Court, who permitted the plaintiff to withdraw the said suit. It was a withdrawal simpliciter. It is significant to note that though the withdrawal was on the same date i.e. 6th November, 2015, the said withdrawal was before another Judge of this Court. Therefore, contention of the plaintiff that the two suits were consolidated, is completely misconceived.

18. Since the defendants were not the parties in CS(OS) 243/2006, the compromise entered between the parties to the said suit i.e. the plaintiff and Vidya Choudhary, Sangeeta, Anupama and Rahul Chaudhary, cannot be said to be binding on the defendants. Nor can the defendants be deemed to be aware of the terms of the compromise entered therein. There was no occasion for the defendants to object to the said compromise, as there is nothing to show that the defendants were aware of the terms of the compromise. Yet, another issue would also arise that whether such a compromise would rectify/ratify the defect in the original Sale Deed dated 20th May, 2005 executed in favour of the plaintiff by Anupama and Rahul Chaudhary. Clearly, Anupama and Rahul Chaudhary did not have 2/3rd undivided share in the suit property, when the Sale Deed dated 20th May, 2005 was executed in favour of the plaintiff. In my view, the subsequent compromise between the plaintiff and Vidya Choudhary, Sangeeta, Anupama and Rahul Chaudhary, cannot amount to ratification/confirmation of the aforesaid Sale Deed.

19. Counsel for the plaintiff has placed reliance on the judgment of the Supreme Court in *Anathula Sudhakar* (supra). The relevant observations of the said judgment are set out below:

“16. But what if the property is a vacant site, which is not physically possessed, used or enjoyed? In such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs.

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21. To summarise, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

- (a) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful

possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

- (b) *As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.*
- (c) *But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in *Annaimuthu Thevar* [*Annaimuthu Thevar v. Alagammal*, (2005) 6 SCC 202]). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.*
- (d) *Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of*

title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. **The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.**”

20. Applying the dicta of the aforesaid judgment to the facts of the present case, the present case is not a simpliciter case of possession based on undisputed title of the plaintiff over the suit property. The present case involves complex questions relating to title, yet the plaintiff has not sought declaration of title in his favour. Without determining title, the issue of possession cannot be decided.

21. Further, the judgment of Gujarat High Court in ***Navalram Laxmidas*** (supra) may not be applicable to the facts of the present case, as from the photographs placed on record by the defendants, it appears that the suit property is not a vacant plot of land and some structures have been constructed on it, which have been in possession of the defendants.

22. Counsel for the plaintiff has correctly placed reliance on the judgment in ***Gomtibai*** (supra) to submit that the gift of an immovable property can only be affected through a registered document and therefore, the defendants cannot claim title in the suit property by virtue of the Gift Deed as claimed by them. This does create a doubt over the title of the defendants, however, the fact of the matter is that the plaintiff has also failed to establish clear title in his favour.

23. The Division Bench of Supreme Court in ***Himani Alloys Limited v. Tata Steel Limited***, (2011) 15 SCC 273, has observed that the Order XII Rule 6 of the CPC is an enabling provision, it is neither mandatory nor peremptory, but discretionary. Unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of the defendant to contest the claim. The discretion should be used only when there is a clear admission, which can be acted upon.

24. The Supreme Court in ***S.M. Asif v. Virender Kumar Bajaj***, (2015) 9 SCC 287, held that where the defendants have raised objections, which go to the root of the case, it would not be appropriate to exercise discretion under Order XII Rule 6 of the CPC. The said provision is enabling in nature, which confers discretion on the court to deliver quick judgment on admissions and to the extent of the claim admitted by one of the parties to his opponent's claim.

25. Applying the ratio of the aforesaid judgments to the facts of the present case, serious objections have been raised by the defendants in their written statement with regard to title and possession of the plaintiff to the suit property, that go to the root of the matter. A trial would be required to determine these issues. There are no clear, unambiguous and unconditional admissions in the written statement. The parameters prescribed under Order XII Rule 6 of CPC are not fulfilled in the present case, so as to pass a decree in favour of the plaintiff.

26. I find no merit in the application.

27. Dismissed with costs of Rs.50,000/-.

28. It is clarified that the aforesaid findings and observations made by this court are confined only for the purpose of the present application under Order XII Rule 6 of the CPC. All contentions of the parties are left open and it is for this court to record findings on various issues, which fall for consideration in the present suit, on its own merits.

CS(OS) 287/2020

List before the Joint Registrar on 20th September, 2022.

AUGUST 17, 2022
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AMIT BANSAL, J.

