

HIGH COURT OF DELHI

Date of Decision: 01 February 2024

Bench: Acting Chief Justice Manmohan

Justice Manmeet Pritam Singh Arora

FAO(OS) 65/2023

Indupal Kaur Sehgal Appellant

Versus

Dr. Davinder Pal Singh Rekhi & Ors. Respondents

Legislation:

Section 10 of the Delhi High Court Act, 1966

Order VI Rule 17 of the Code of Civil Procedure, 1908 (CPC)

Article 59 of the Limitation Act, 1963

Section 6(e) of the Transfer of Property Act, 1882

Subject: Appeal in a property partition suit involving challenging a 1976 partition decree on grounds of fraud, and subsequent amendment of the suit.

Headnotes:

Appeal Against Order Dismissing Amendment Application – Appellant's amendment application under Order VI Rule 17 CPC, seeking to challenge a 1976 partition decree as fraudulent, dismissed by Single Judge [Paras 1-1.5].

Partition Suit Background – Suit filed by appellant for partition of property, claiming a 1/4th share. Respondents contended property already partitioned in 1976 [Paras 1.2-1.3].

Alleged Fraud in 1976 Decree – Appellant claimed 1976 partition decree collusive and fraudulent. Sought to declare it null and void [Para 1.4].

Single Judge's Observations – Amendment application was dismissed as it sought to change the nature of the original suit for partition [Para 1.5].

Appellant's Argument – Proposed amendment sought to challenge the 1976 decree's validity, claimed unawareness of decree and its fraudulent nature [Paras 2-2.4].

Respondents' Argument – 1976 partition decree was legitimate, and appellant had no right to challenge it. Amendment would change suit's nature [Paras 3-3.3].

Court's Analysis and Findings – Amendment would convert partition suit into a declaration suit with distinct cause of action and limitation, which is not permissible [Paras 5-11].

Appellant's Lack of Locus to Challenge 1976 Decree – Appellant had no right, title, or interest in the property in 1976. Cannot challenge ancestor's actions posthumously [Paras 16-17, 19].

Decree Accepted by Ancestor – Appellant's common ancestor accepted and acted upon the 1976 decree, hence binding on appellant [Paras 14, 18-19].

Decree Cannot Be Challenged Posthumously – Right to challenge a decree is not transferable posthumously according to Section 6(e) of the Transfer of Property Act, 1882 [Para 19].

Dismissal of Appeal – Court found no merit in the appeal and dismissed it along with pending applications [Para 21].

Referred Cases: None.

Representing Advocates:

Ajay Kumar for petitioner
Vijay Kumar for respondents

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J

1. This first appeal has been filed under Section 10 of the Delhi High Court Act, 1966, impugning the order dated 28.03.2023 passed by learned Single Judge of this Court in CS(OS) 53/2021, titled as ***Indupal Kaur Sehgal v. Dr. Davinder Pal Singh Rekhi & Ors.*** whereby an application filed by the Appellant under Order VI Rule 17 of the Code of Civil Procedure, 1908 ('CPC') for amending the plaint has been dismissed.

1.1 The Appellant herein is the plaintiff and the Respondent Nos. 1 to 3 herein are the defendants before the learned Single Judge in CS(OS) 53/2021. The present appeal has been contested by Respondent Nos. 1 and

2.

1.2 The Appellant herein has filed a suit for partition in respect of the property i.e., A-389, Defence Colony, New Delhi ('suit property') claiming here 1/4th share in the suit property of the late Sh. Prehlad Singh Rekhi i.e., the father of Appellant, who died on 04.12.2007 intestate.

Late Sh. Prehlad Singh Rekhi is the common ancestor of the parties to the suit being their father.

1.3 The Respondent Nos. 1 and 2 filed their joint written statement to the suit and alleged that the suit property had already been partitioned between late Sh. Prehlad Singh Rekhi and the said Respondents, vide decree of partition dated 28.05.1976 passed in the suit no. 75/1976. The suit property comprises ground floor, first floor and second floor. It is stated that as per the said decree dated 28.05.1976, the ground floor came to the share of late Sh. Prehlad Singh Rekhi, first floor with Respondent No.1 and second floor with Respondent No.2.

Respondent Nos. 1 and 2 contended that rights of the Appellant in the suit property, if any, on death of late Sh. Prehlad Singh Rekhi would have been limited to the ground floor, which was in exclusive possession and ownership of late Sh. Prehlad Singh Rekhi. Lastly, it was stated that the

Appellant is left with no interest in the ground floor of the suit property, since she was given alternate immovable properties at Shadhara and Sangam Vihar in lieu of her share in ground floor of the suit property.

1.4 It is contended by the Appellant that she first learnt about the decree of partition dated 28.05.1976 upon perusing the joint written statement of Respondent Nos. 1 and 2 which has the effect of diminishing the estate of late Sh. Prehlad Singh Rekhi ; and therefore, she moved an application under Order VI Rule 17 CPC for amending the pleadings and seeking addition of prayer clauses for declaring the said decree of partition dated 28.05.1976 as being null and void on the ground of fraud practiced by the common ancestor i.e., late Sh. Prehlad Singh Rekhi in collusion with Respondent Nos. 1 and 2 in the civil court.

1.5 The said application of the Appellant has been dismissed by the learned Single Judge vide the impugned order. The learned Single Judge observed that the amendment sought by the plaintiff is misplaced since by way of the application filed under Order VI Rule 17 CPC, the applicant seeks to change the very nature of the suit, which was originally filed for partition of the estate of late Sh. Prehlad Singh Rekhi.

Arguments of the Appellant i.e. plaintiff

2. The learned counsel for the Appellant stated that by way of the proposed amendment, the Appellant seek to challenge the validity and the effect of the decree of partition dated 28.05.1976 passed in suit no. 75/1976.

2.1 He stated that the Appellant has been unable to verify the existence of the decree dated 28.05.1976; however, assuming the same to be correct, it is the stand of the Appellant that the said decree was collusive and never intended to be acted upon by late Sh. Prehlad Singh Rekhi. He stated that this is evidenced from the fact that despite the said decree, the suit property

continued to stand in the name of late Sh. Prehlad Singh Rekhi and this position has remained unchanged.

2.2 He stated that the said decree has been obtained by late Sh. Prehlad Singh Rekhi and the Respondent Nos. 1 and 2 herein collusively by playing a fraud on the civil court and therefore, can be challenged by the Appellant in the present proceedings.

2.3 He stated that the Appellant first learnt about the existence of the decree of partition dated 28.05.1976, after she was served with the written statement dated 05.02.2022, and therefore, the cause of action for seeking the additional relief of declaration is within limitation and is governed by Article 59 of the Limitation Act, 1963. He relied upon the judgment of the Supreme Court in ***Pankaja and Anr. v. Yellappa (Dead) by LRs. and Ors.***¹ to contend that amendment seeking to incorporate reliefs which are barred by limitation can also be allowed subject to the issue of limitation being left open.

2.4 He stated that the relief sought in the unamended plaint remains unchanged and in effect the Appellant is seeking to put to trial the defence of the Respondent Nos. 1 and 2 who have relied upon the decree of partition dated 28.05.1976. He stated that therefore, there is no change in the nature of the suit which continues to remain a suit for partition.

Arguments of the Respondents i.e. the defendants

3. In reply, learned counsel for Respondent Nos. 1 and 2 stated that the suit property was partitioned during the life time of late Sh. Prehlad Singh Rekhi in civil suit no. 75/1976 by decree partition dated 28.05.1976. He stated that the suit property stood partitioned by metes and bounds whereby, share of

¹ (2004) 6 SCC 415.

late Sh. Prehlad Singh Rekhi and late Smt. Mohinder Kaur was limited to the ownership and possession of the ground floor of the suit property only.

3.1. He stated that the said decree was relied upon by late Sh. Prehlad Singh Rekhi (himself) before several courts and tribunals for successfully seeking eviction of the statutory tenants in the suit property by pleading paucity of accommodation. He stated that thus, late Sh. Prehlad Singh Rekhi acted upon the said decree during his life time and the Appellant has no locus to challenge the said decree on the ground of fraud as alleged. He stated that the Appellant and Respondent No. 3 were aware of the said decree and the consequent partition.

3.2. He stated that in the proposed amended pleadings for raising a challenge to the said decree of partition, Appellant has alleged fraud by late Sh. Prehlad Singh Rekhi on the civil court. He stated that such a plea is impermissible as the Appellant is claiming as the legal heir of late Sh. Prehlad Singh Rekhi and she is bound by the acts of her predecessor and cannot be challenged.

3.3. He stated that if the Appellant is allowed to challenge the said decree dated 28.05.1976 in the present suit for partition for the estate of late Sh. Prehlad Singh Rekhi, it would change the nature of the suit. He stated that the Appellant is seeking to challenge a prior disposition by late Sh. Prehlad Singh Rekhi and the said challenge cannot be raised in the existing suit for partition.

4. No arguments were addressed on behalf of Respondent No.3.

Analysis and finding

5. This Court has considered the submissions of the learned counsel for the parties and perused the record.

6. In the unamended plaint, the Appellant has sought a $\frac{1}{4}$ th share in the undivided estate of her father i.e., late. Sh. Prehlad Singh Rekhi ('common

ancestor' or 'predecessor'). In the suit, the Appellant has pleaded that the entire suit property comprising a ground floor, first floor and second floor is the said undivided estate.

7. The Respondent Nos. 1 and 2 in their written statement have pleaded a defence that late Sh. Prehlad Singh Rekhi during his life time in 1976, partitioned the suit property by metes and bounds as between himself, his wife, late Smt. Mohinder Kaur and his two (2) sons Respondent Nos. 1 and 2. It is stated that the said partition was affected by a decree of the civil court dated 28.05.1976. And, as per the said decree, the ground floor fell exclusively to the share of late Sh. Prehlad Singh Rekhi and late Smt. Mohinder Kaur; the first floor fell to share of Respondent No. 1 and the second floor fell to the share of Respondent No. 2.

Late Sh. Prehlad Singh Rekhi passed away on 04.12.2007 and the intestate succession of his legal heirs opened on the said date. The Respondent Nos. 1 and 2 therefore dispute that first floor or second floor of the suit property forms any part of the estate of late Sh. Prehlad Singh Rekhi as on 04.12.2007. The Respondent Nos. 1 and 2 have contended that consequently the ownership rights of late Sh. Prehlad Singh Rekhi, were limited to the ground floor in the suit property as on 04.12.2007.

8. The Appellant filed an application under Order VI Rule 17 CPC seeking to challenge the decree of partition dated 28.05.1976 on the ground that the same was obtained by late Sh. Prehlad Singh Rekhi and Respondent Nos. 1 and 2 by playing fraud on the civil court. It is contended that since there was no real dispute between late Sh. Prehlad Singh Rekhi and Smt. Mohinder Kaur and Respondent Nos. 1 and 2, there was no occasion in 1976 for the filing of the civil suit and agreeing to passing of the decree of partition. The Appellant also contends that the said decree was

not acted upon by late Sh. Prehlad Singh Rekhi as the suit property continues to stand in the name of late Sh. Prehlad Singh Rekhi.

From the pleadings on record it is apparent that the Appellant has therefore pleaded fraud 'by' late Sh. Prehlad Singh Rekhi and not fraud 'on' late Sh. Prehlad Singh Rekhi.

9. In the proposed amendments the Appellant admits that relying upon the said decree of partition dated 28.05.1976, late Sh. Prehlad Singh Rekhi had successfully sought eviction of statutory tenants (protected by Delhi Rent Control Act, 1958) from the ground floor of the suit property before Courts and Tribunals. Therefore, the validity and binding nature of the said decree of partition was affirmed by late Sh. Prehlad Singh Rekhi during his life time. Respondent Nos. 1 and 2 as well admit the binding nature of the said decree of partition.

10. A suit for partition lies when parties have undivided share in the property and in such a suit, first a preliminary decree for partition is passed determining the shares of each of the parties, followed by a final decree of partition. The final decree is either by division of the property by metes and bounds or by sale of the property and distribution of sale proceeds (***Re: Uma Shankar & Anr. v. Anand Prakash***)². It requires no reiteration that a suit for partition cannot be filed or maintained for properties which have already been alienated by the common ancestor during his lifetime as the disposed of asset cannot form part of the deceased's estate. The Appellant herein has filed the suit for partition of the estate of the common ancestor i.e., late Sh. Prehlad Singh Rekhi on the assertion that he died intestate, which only requires declaration from the Court of her share in his undivided estate as it existed on the date of the death (which is ground floor of the suit property) i.e., 04.12.2007. The cause of action in the said suit is the factum of death, existence of estate and operation of the law of succession entitling the

plaintiff to maintain the suit. In such a suit strictly speaking all parties are plaintiffs because their shares are admitted. The suit is not strictly adversarial.

11. However, the challenge by a legal heir to a disposition made by the common ancestor to his properties during his life time is adversarial and would necessarily require an independent inquiry and adjudication. The said challenge is a distinct cause of action and would change the nature of the suit from partition; to suit for declaration. The facts constituting the cause of action and limitation for maintaining the said relief of declaration are separate and distinct from the relief of partition.

12. The Appellant herein is alleging fraud by her own common ancestor upon the civil court which passed the decree of partition dated 28.05.1976. The nature of trial for adjudication of such reliefs would undoubtedly be distinct from a trial of partition; and therefore, the learned Single Judge has rightly concluded that the proposed amendments will change the nature of the suit. The Supreme Court has recently reiterated in the case of ***Life Insurance Corporation of India v. Sanjeev Builders Private Ltd. & Ors.***³ that where the proposed amendment to the plaint, if allowed would result in changing the nature of the suit or cause of action, so as to set up entirely new case, foreign to the case setup in the plaint, the said amendment must not be

² 2018 SCC OnLine
Del 12867. ³ AIR 2022
SC 4256.

allowed. We, therefore, find merit in the contention of the Respondent Nos. 1 and 2 that by clubbing this cause of action for declaration on grounds of fraud and the trial of the suit for partition will embarrass the proceedings and delay the trial in the unamended plaint. The appeal is therefore without any merits.

13. Further, in our opinion the maintainability of relief of declaration by the Appellant 48 years later challenging the decree of partition dated

28.05.1976, to which late Sh. Prehlad Singh Rekhi acquiesced during his lifetime, appears to be highly doubtful.

14. The decree for partition was passed on 28.05.1976, which was unconditionally accepted by late Sh. Prehlad Singh Rekhi. He in fact, relied upon the said decree of partition before Courts and Tribunals to successfully seek eviction of statutory tenants from the suit property. The Appellant admits that the Courts and Tribunals before which the decree dated 28.05.1976 was filed by late Sh. Prehlad Singh Rekhi, accepted the same to be correct and relied upon the same to pass eviction orders against the statutory tenant on the ground of personal necessity in favour of late Sh. Prehlad Singh Rekhi. Therefore, the contention of the Appellant in proposed paragraphs that the decree of partition was not acted upon or relied upon by late Sh. Prehlad Singh Rekhi is incorrect.

15. The Appellant herein is admittedly not seeking to petition the rent tribunal for a recall of the eviction orders passed against the statutory tenants and pray for their restitution. The Appellant therefore, is willing and content to accept the eviction orders passed against the statutory tenants by rent tribunal relying upon the decree of partition dated 28.05.1976; but she is selectively seeking to challenge the same decree of partition to allege that

first floor and second floor continue to form part of the estate of late Sh. Prehlad Singh Rekhi. In the opinion of this Court, administration of justice requires that parties approach the Courts with clean hands and they cannot be permitted to take contrary stands in different forums to suit their convenience.

16. In the facts of this case, the Appellant even otherwise, can have no locus or cause of action to challenge the decree of partition dated 28.05.1976 on the grounds of fraud as alleged as she had no right, title or

interest in the suit property in the year 1976. The Appellant is claiming rights in the suit property as a Class-I legal heir of late Sh. Prehlad Singh Rekhi. The Appellant contends that the suit property was the absolute property of late Sh. Prehlad Singh Rekhi. Thus, the said right of inheritance in the suit property accrued to the Appellant first time on 04.12.2007 upon the death of late Sh. Prehlad Singh Rekhi, the said right to inherit was only limited to the estate of late Sh. Prehlad Singh Rekhi existing as on the said date i.e., ground floor of the suit property.

17. The Appellant admittedly could not have maintained a suit for declaration against the decree of partition dated 28.05.1976 during the lifetime of her father as she had no right in the suit property during his lifetime. Consequently, no right to challenge the said decree of partition dated 28.05.1976 would accrue to her upon his death.

18. This Court also finds no merit in submission of the learned counsel for the Appellant that the said decree of partition dated 28.05.1976 was a fraud played on the civil court by late Sh. Prehlad Singh Rekhi. Firstly, the Appellant admits that late Sh. Prehlad Singh Rekhi accepted the decree of partition and relied upon the same in eviction proceedings against the statutory tenant. Secondly, there is no bar in law for the owner of the property to consent to a partition of the suit property during his life time. Late Sh. Prehlad Singh Rekhi was the admitted owner of the suit property and his decision to accept the decree of partition of the suit property cannot be challenged by the Appellant herein who had no right, title or interest in the suit property in the year 1976. A legal heir is bound by the actions of the common ancestor whose property he/she seeks to inherit and the legal heir cannot be permitted to challenge the actions of the common ancestor by

alleging that he acted fraudulently because the legal heir has no locus to challenge the same. (**Sat Narain v. Sri Krishen Das**)²

19. This Court is also of the opinion that the decree of partition dated 28.05.1976 passed against late Sh. Prehlad Singh Rekhi cannot be challenged by the Appellant on the allegation that it is a sham document, as it was accepted by late Sh. Prehlad Singh Rekhi and acted upon by him for seeking eviction of statutory tenants.

Nevertheless, the right, if any, to challenge the decree of partition dated 28.05.1976 would have been available to late Sh. Prehlad Singh Lekhi alone during his lifetime. The said right to challenge the decree dated 28.05.1976 known in law as 'right to sue' cannot survive to the Appellant in view of Section 6(e) of the Transfer of Property Act, 1882.

However, the said decree of partition as noted above was accepted by late Sh. Prehlad Singh Rekhi and acted upon the same during his life time. He had no grievance as regards the binding nature of the partition effected by the decree as he had acted upon the same. The Appellant as his legal heir is bound by the said decree and its legal consequences. The Appellant cannot seek a declaration that the said decree is a sham document in the absence of any such assertion by late Sh. Prehlad Singh Rekhi during his life time.

20. The contention of the Appellant that she does not admit the existence of the decree of partition dated 28.05.1976, is untenable; as in the proposed amended paragraphs there is no such pleading and in fact the proposed paragraphs challenge the said decree on the presumption of its existence.

² 1936 SCC OnLine PC 42.

21. In view of the findings recorded hereinabove, this Court, therefore, finds no merits in the present appeal and the same along with pending applications is dismissed.

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