

13.03.2020

Present: Plaintiff with counsel Sh. Naveen Singla.
Counsels Sh. Rahul, Sh. Prabal and Sh. Praveen Thukral for
the defendants.
D1 Sumit in person.

1. Clarifications obtained from plaintiff's counsel. Plaintiff's counsel states that Ms. Shakuntala has already passed away.
2. Arguments on maintainability of the present suit were heard on 06.03.2020.
3. Plaintiff filed the suit for declaration of ownership, possession and permanent injunction in respect of property no. 21/98, Kalyan Puri, Delhi. He also seeks declaration that WILL dt. 11.09.2014 executed by Smt. Shanti Devi in faovur of one Smt. Shakuntla be declared to be null and void.
4. Plaintiff avers that his mother Smt. Shanti Devi was the absolute owner/allottee of the suit property. He claims ownership on the averment that his mother Smt. Shanti Devi bequeathed the first floor of the suit property to him on 22.01.1982 through an affidavit. Besides this, he claims to be co-owner of ground floor and second floor. Plaintiff avers that the two defendants, who are his relatives, have been living on first and second floor of the suit property as his licencees. Plaintiff by way of his legal notice dt. 19.04.2018 terminated the licence. On these averments he file the present suit.
5. Plaintiff in his statement under section 165 of Evidence Act recorded on 06.03.2020 stated as under:-

Late Pyarelal was the father of both defendants. Late Pyarelal happened to be my step brother. My father had married twice. Late Pyarelal was the son of my father out of his first marriage with Smt. Budhiya. Out of the first marriage of my father there was only one son namely Pyarelal. There were four children including me, out of the second marriage of my father with Smt. Shanti Devi and they are Bhudev, Ram Chander, Suitra and myself. Ms. Kamla who was my sister borne out of the second marriage of my father is no more as she passed away about 8-9 years ago. Ms. Kamla left behind eight children.

6. Plaintiff asserts his right over the first floor on the basis of an affidavit of his late mother Smt. Shanti Devi. However, such an affidavit does not suffice to vest any right in the plaintiff. Such an affidavit, without any witnesses, cannot be said to be a testament.

7. Nonetheless, the plaintiff as per averment in the plaint would be a co-owner of first floor, *de hors* the affidavit of his late mother. The plaintiff avers that his mother Smt. Shanti Devi was the absolute owner/allottee of the suit property. In his statement under section 165 Evidence Act, he stated that Pyare Lal (father of the two defendants) was his step brother and that Pyare Lal was born out of the first marriage of his father with Smt. Budhiya. Whether or not this assertion of the plaintiff about his relationship with the two defendants is correct cannot be determined at this stage. However, going by this assertion, if the two defendants are not the own biological descendants of late Smt. Shanti Devi then they can assert no right in the suit property of which Smt. Shanti Devi was, as per the plaint, absolute owner/allottee.

8. In **Mohinder Prasad Jain vs. Manohar Lal Jain**, AIR 2006 SC 1471 Apex Court held that a co-owner can very well maintain an action for

recovery of possession of a property and it is not necessary for him to show before initiating the proceedings that he has taken the consent or option of other co-owners and further that however, where a co-owner objects, the same may be a relevant factor. In **India Umbrella Manufacturing Co & Ors. Vs. Bhagabandei Agarwalla & Ors.**, AIR 2004 SC 1321, the suit house was jointly owned by two co-owners and leased out to two tenants. The co-owners jointly filed suit for eviction but midway, one of the co-owners transferred her interest to the partner of one of the tenant firm and then the transferee expressed his intention to withdraw the suit but this plea was not accepted. Apex Court observed that consent of other co-owner is assumed to be taken unless it is shown that the other co-owners were not agreeable and the suit was filed in spite of their disagreement. Apex Court further observed that one of the co-owners cannot withdraw his consent so as to prejudice the other co-owners and the suit once filed, the rights of the parties stand crystallised on the date of the suit and the entitlement of the co-owners to seek ejectment must be adjusted by reference to the date of institution of the suit, the only exception being when by virtue of a subsequent event the entitlement of the body of co-owners to eject the tenant comes to an end by act of parties or by operation of law.

9. It is held that the present suit is maintainable. List on **27.05.2020** for further proceedings as per law.

(MURARI PRASAD SINGH)
Addl. District Judge-03(East)
Karkardooma Courts-13.03.2020