

(1987) 02 DEL CK 0057

Delhi High Court

Case No: Letters Patent Appeal No. 14 of 1975

Chanderwati and Others

APPELLANT

Vs

Lakhmi Chand

RESPONDENT

Date of Decision: Feb. 24, 1987

Citation: AIR 1988 Delhi 13 : (1987) 13 DRJ 248

Hon'ble Judges: S.S. Chadha, J; S.N. Sapra, J

Bench: Division Bench

Advocate: S.N. Mehta and Vijay Kishan, for the Appellant;

Judgement

S.S. Chadha, J.

(1) This appeal under Clause X of the Letters Patent. against the judgment of Hon'ble Mr. Justice Yogeshwar Dayal has arisen on these facts and grounds.

(2) Shri Manna Singh and Shri Lakhmi Chand became the tenants of the Custodian of Evacuee Property, Delhi some time in the year 1948-49 after they respectively occupied the evacuee houses built on plots now numbered as 11097 and 11096, Ward No. Xiv, Doriwalan, Delhi. House No. 11097 falls on the back of house No. 11096 and as it is closed by houses built on all other sides, an access to it lies only through Plot No. 11096. Shri Manna Singh and his family members etc., Therefore, since the occupation of house No. 11097 in 1948-49 had been using a passage through plot No. 11096. The aforesaid two houses were acquired by the Central Government. In an open auction held by the Managing Officer of the Ministry of Rehabilitation, New Delhi on June 4, 1960 Shri Manna Singh and Shri Lakhmi Chand jointly made the highest bid of Rs. 32,100 and became the purchasers of the aforesaid two houses Nos. 11096 and 11097 including the lease hold rights in the plots. A sale certificate dated August 11, 1960 was issued in the joint names of Shri Manna Singh and Shri Lakhmi Chand with respect to the aforesaid house Nos. 11096 and 11097. The total area of the land underneath the aforesaid houses in mentioned therein as 338 square yards on lease hold basis with the Delhi Development

Authority/Delhi Improvement Trust. The shares of Shri Manna Singh and Shri Lakhmi Chand are mentioned as "half share each". Shri Manna Singh and Shri Lakhmi Chand consequently became the lessees in respect of the site underneath the said houses in equal shares under the Delhi Development Authority. The mutation No. 522 of 1963 was sanctioned in the joint names of Shri Manna Singh and Shri Lakhmi Chand in equal shares for the plot measuring 338 square yards. There is dispute to these facts.

(3) The successors of Shri Manna Singh who died in July 1965, brought a suit on October 27, 1966 for a perpetual and mandatory injunction" It is alleged by the plaintiffs in para 3 of the plaint that on the receipt of the sale certificate, an oral partition between the parties took place and it was mutually agreed that in consideration of his owning and occupying the front portion namely, house No. 11096. Shri Lakhmi Chand, the defendant shall concede and give up all claims to the passage 7'-6" wide and 44" long in favor of Shri Manna Singh who shall be the exclusive owner and possessor of the same and that the defendant shall have absolutely no right to or claim upon the said piece of land. It is further alleged that to perpetuate the division and to demarcate the portions it was further decided that partition walls in the shape of English letter "L" 7" wide and 44" long on the length side i.e. from North to South extending from the left pillar of the entrance gate and 7" wide into 25'-2" long on the width side i.e. from West to East shall be built on the respective lands of the parties and the expenses shall be borne equally. It was further agreed that each party shall be the exclusive owner of the portions so divided and shall be in their right to dispose off the same. These terms were incorporated "in a partition deed dated September 8, 1960," avers the plaint, and since then the plaintiffs are in exclusive possession and use of their portion including the passage. The plaintiffs claim that to perpetuate the partition and to demarcate the respective portions, the partition walls were built and the possession of the respective portions is being enjoyed by 250 the parties. The cause of action for the suit is alleged to be the reconstruction of 2 1/2 storeyed building by the defendant in the year 1964 in the absence of Shri Manna Singh and the opening of one door and three windows with sunshades on the ground floor abutting on the passage and three window's with sun-shades on the first floor overlooking the passage. The plaintiffs allege that when they came to know of the encroachment upon their land and interference with their possession and enjoyment of the property, they made strong protests to the defendant and asked him to remove and close the said windows and door and to demolish the sun-shades and also to demolish the partition wall and restore it to its original height of 4" but the defendant refused to listen. The relief claimed in the suit is for the grant of injunction restraining the defendant from interfering with the plaintiffs possession, user and enjoyment of the passage 7'-6" and 47" long and a mandatory injunction directing the defendant to demolish, to remove and close three windows and one door on the ground floor and three windows and sun-shades on the first floor

abutting and emerging on the said passage belonging to the plaintiffs and also to pull down and to demolish so much portion of the partition wall 7" wide and 47" long on the land of the plaintiffs as was tempered with from a height of 9" to its original height of 4" long and to restore a status quo ante.

(4) The defendant resisted the suit. It is admitted that late Shri Manna Singh, now the plaintiffs, are the exclusive owners of plot No. 11097 with lease hold right in the house built upon this plot and the defendant is the exclusive owner of house built on plot No. 11096. It is also admitted that the defendant and late Shri Manna Singh gave effect to the purchase of the property made by them by executing an agreement whereby Shri Manna Singh agreed to retain the possession of the house No. 11097 and the defendant agreed to retain possession of 11096 as exclusive owners with one-half share each in the site of the said property and Shri Manna Singh was allowed passage over the site of the defendant for going into his house bearing No. 11097 but the land underneath the passage belongs to the defendant and the plaintiffs have only got a right of passage over it as allowed by the defendant. This is alleged to be as a result of the execution of an agreement between the parties. It is admitted that the left side wall of the passage from the main road was built by the defendant while the right side wall was built by the defendant and late Shri Manna Singh jointly. It is however, denied that the plaintiffs are in possession of the site of the passage or they have any right of possession over it as it does not admit of their possession. The plea further is that the defendant constructed 2" storeyed building and opened door and windows thereon towards the passage for light and air which are necessary for the sanitation of the house and late Shri Manna Singh had no right or title in the land under the passage. The trial court framed the following four issues. (1) Whether plaintiff is the exclusive owner of the Wall (7" in thickness)shown red in the plan attached with the plaint running parallel to the passage in dispute ? If so, is the plaintiff entitled to dismantle the same ? (2) Whether plaintiff is the exclusive owner of the disputed site shown as passage in the plan attached with the plaint? If so, to what effect ? (3) Whether plaintiff is entitled to the relief of injunction claimed ? (4) Relief ?"

(5) The plaintiffs produced document marked "A" alleging that it only records the terms of the earlier oral partition. On a consideration of the terms of the document in the light of the provisions of Sections 17 and 49 of the Registration Act, 1908 and Section 91 of the Indian Evidence Act, 1872 the trial court found that the document itself created the partition and the partition deed requires registration and as it is unregistered it is inadmissible in evidence, and that oral evidence as to the terms of such document is shut out by Section 91 of the Evidence Act. Document marked "A" was looked into for the proof of factum of partition and nature of possession. On facts it was found that the plaintiffs are the owners in possession of the passage in dispute. It was found that the plaintiffs are the exclusive owners of one of the walls separating the two houses out of two separate walls each 7" thick. It was further held that Shri Manna Singh was present at the time when the construction of 2"

storeyed building was made by the defendant and for this reason the plaintiffs cannot be heard to say that the windows with sun-shades and the door of the defendant should be directed to be removed. The trial court granted the plaintiffs the prohibitory injunction restraining the defendant from interfering with the plaintiffs' possession, user and enjoyment of the passage in dispute, but dismissed the suit for mandatory injunction prayed for by the plaintiffs.

(6) The lower appellate court in the two first appeals filed by the parties confirmed the finding of the trial court that the document marked "A" is inadmissible. It also confirmed the findings on issues 1 and 2. Findings on issue No. 3 was modified and it was held that the windows with sun-shades and door were built in the absence of Shri Manna Singh, his family members and thus there was no acquiescence in the constructions made by the defendant. The appeal filed by the defendant was dismissed, the lower appellate court further granted mandatory injunction directing the defendant to close the windows and door existing in the wall of the plaintiffs on the ground floor and to remove the sun-shades existing over the windows. So far as the windows of the first floor are concerned the plaintiffs were given liberty to close them by increasing the height of their own wall.

(7) The defendant filed two regular second appeals in this court. The learned Single Judge observed that the finding as to at what time the house was constructed and the windows were opened and whether they were built in the absence of the plaintiffs are all questions of facts and again the finding whether the windows were constructed on the wall built by the plaintiffs on the passage in dispute is a pure question of fact. His lordship felt that as there was enough evidence to show that the windows were built by the defendant on one of the two parallel walls built by the plaintiffs, it is not a case where the finding can be said to be vitiated being based on one evidence. The main challenge before the learned Single Judge was to the finding that the plaintiffs were the exclusive owners of the passage. It was argued that it was based on no legal evidence, as no evidence could at all be led to prove that the passage in dispute fell to the share of the plaintiffs' predecessor-in-interest. The legal effect of the document marked "A" as inadmissible in evidence was reconsidered by the learned Single Judge. It was found that it was nowhere mentioned in the plaint that the document marked "A" was merely a recital of the past transaction namely, the oral partition by metes and bounds. It was held that the over-all reading of the entire document shows that this document was simultaneously executed with the oral agreement of the terms of partition and the same terms were sought to be put in black and white in the document and the passage in dispute is one of the specific items of the property in dispute which is exclusively sought to be given to the plaintiffs by virtue of clause (1) of the document. The document itself shows vide clause (2) and (3) how the passage was to fall in the share of the plaintiffs' predecessor-in-interest by construction of parallel walls by both the parties. On a consideration of various authorities cited at the Bar, a conclusion was drawn that the document marked "A" allots specific

immovable property by metes and bounds, that it is a case of creating or declaring right, title and interest in the specific property within the meaning of Section 17(b) of the Registration Act and as the document is not registered. Clause (c) of Section 49 of the Registration Act prohibits its reception as evidence of that transaction. It is further held that Section 91 of the Evidence Act impose a prohibition to the reception of any oral evidence to prove that the plaintiffs became the exclusive owners of the passage. Thus the finding of the courts below on issue No. 2 was reversed. In the result the suit of the plaintiffs was dismissed.

(8) A half hearted argument is addressed by Mr. S.N. Mehta, the learned counsel for the appellant that the document marked "A" is merely a recital of the past transaction/oral partition by metes and bounds. In our view, the plaintiffs did not make out a case in the plaint that first oral partition had taken place and possession was taken by metes and bounds including the passage before the execution of the document marked "A". The document in the recital itself says that "the same has now been mutually divided by the parties between themselves in equal shares, in the manner hereinafter stated". No oral evidence was led and no finding of any of the courts below is recorded that any earlier oral partition had taken place of the plaintiffs were given possession of the passage prior to the execution Of the document marked "A". The allotment of the passage in dispute to the share of the plaintiffs" predecessor-in-interest was by virtue of a written document and that document is inadmissible in evidence for want of registration. A partition of immovable property between coparceners or co-owners may be made orally and is not required to be in writing. A document which merely acknowledges or makes an admission, as to a prior partition, is not compulsorily registerable. But if there is an instrument effecting a partition of immovable property, as in the present case, it falls u/s 17(1)(b) of the Registration Act and is compulsorily registered under that clause. An unregistered document of partition is not admissible in evidence to prove any of the terms contained in the document. An unregistered partition deed is not admissible to show the respective shares of the parties as declared by the document. There is no doubt in our mind that the document marked "A" was itself a deed of partition and not a record of earlier oral partition by metes and bounds. It is clear that document marked "A" was intended to be a document which was binding on them as a partition deed and which was to be the sole evidence of the terms of such partition. Document marked "A" being unregistered cannot be used for establishing as is claimed that the passage on the right side of the left pillar of the outer gate shall form part of the share of the plaintiffs and the same being 7'-4" in width shall run into 44" in length where it will from the shape of English letter "L" up to its joining the last wall.

(9) The learned Single Judge held that the partition of immovable property between the coparceners as understood by Mitakshara law or co-owner is not required by any law to be in writing at all, that partition is a mixture of surrender and conveyance of rights in property ; it partly extinguishes right of joint property and

partly creates rights to it and that in numerous authorities of the Supreme Court it has been held that partition as such is not a transfer within the meaning of the Transfer of Property Act and for the purpose of Income Tax.

(10) The submission of the counsel for the appellant, next is that where immovable property has been partitioned amongst co-sharers by metes and bounds, there is a transfer within the meaning of Section 5 of the Transfer of Property Act, 1882 to which the doctrine of part performance as contained in Section 53A of the Transfer of Property Act is applicable. Reliance is placed on *Sadhuram v. Pirthi Singh and Co.*, Air 1936 Lah 220 [Soniram Raghushet and Others Vs. Dwarkabai Shridharshet and Another](#), and [Raman Pillai Gopala Pillai and Others Vs. Madhavan Pillai Aiyappan Pillai and Others](#). He further submits that the predecessor-in-interest of the plaintiffs was a party to the document dated September 8, 1960, marked "A" under which the passage on the right side of the left pillar of the outer gate of T-4" in width and 44" in length came to their share, that they were already in physical possession of the passage as is admitted by the defendant and that physical possession was not even necessary because they were already in possession and continued to be so in part performance of the contract. The submission is that it is certainly a case falling well within the scope of Section 53A of the Transfer of Property Act and the possession of the appellant cannot be disturbed. It is further contended that Section 53A does not either indicate that the rights conferred on the transferee there under can only be invoked as a defendant and not as a plaintiff. Reference is also made to a decision of the Privy Council in AIR 1940 1 (Privy Council) and of the Supreme Court in *Ranchhoddas Chhanganlal v. Devaji Supdu Dorik and Ors.*, Air 1977 Sc 1515. As the conditions laid down in Section 53A has been complied with says the counsel, it enables the predecessor-in-interest and the appellants to protect their possession if the defendant seeks to enforce his right against the property. Reliance is placed on [Yenugu Achayya and Another Vs. Ernaki Venkata Subba Rao and Others](#) and [Hussain Banu Vs. Shivnarayan and Others](#), wherein it was so held.

(11) The objection of Mr. Vijay Kishan, the learned counsel for the respondent is that in an appeal under the Letters Patent, an appellant is not entitled to be heard on a point which had not been raised before the Judge from whose judgment he is appealing. Reliance is placed on AIR 1955 302 (Nagpur) [Union of India \(UOI\) Vs. Sh. Jagdishwar Lal](#), [The State of Punjab and Another Vs. Bijay Singh and Others](#), and [Delhi Chemical and Pharmaceutical Works and Another Vs. Union of India and Others](#). The counsel is right that a new question cannot be allowed to be urged at the stage of Letter Patent Appeal, but we are not inclined to reject the contention on that ground alone.

(12) It is unnecessary to deal in detail the decided cases cited at the Bar for one of us (S.S. Chadha, J.) has considered the question whether partition of joint family property amounts to transfer within the meaning of Sections 5 and 53 of the Transfer of Property Act in *Shri Kishan Dass Talwar and Anr. v. Shri Adeshwar Lal Jain*

and Ors., Ilt 1976(2) Del 364 The 254 difference of opinion amongst various High Courts was noticed as also the case law cited. It was held that partition is really a process in and by which a joint enjoyment is transformed into an enjoyment in severally. Each one of the co-sharers had an antecedent title and Therefore, no conveyance is involved in the process as a conferment of a new title is not necessary. The reasoning of SubhaRaoJ., in [Gutta Radhakristnayya minor, by mother and guardian Nagarattamma Vs. Gutta Sarasamma,](#) as upheld by the Supreme Court in [Commissioner of Income Tax, Gujarat Vs. Keshavlal Lallubhai Patel,](#) was quoted with approval. An unregistered document will not be admissible as evidence of the part performance of the contract within the meaning of Section 53A of the Transfer of Property Act. In Smt. Zaveri v. Jitu, Air 1954 Sur 46 it was held that a partition is not a transfer within the meaning of Section 5 and Therefore the doctrine of part performance does not apply to an unregistered deed of partition. We reiterate this view of the law.

(13) Assuming that the document dated September 8, 1960 marked "A" is not admissible in evidence as a partition deed, the counsel for the appellants then submits that the unregistered partition deed can be given in evidence for a collateral purpose, namely, to prove bare fact of partition or division in the status of the parties as also the factum of taking possession of the shares allotted under the partition deed. Reliance is placed on proviso to Section 49 of the Registration Act. It provides, inter alia, that an unregistered document affecting immovable property and required to be registered may be received as evidence. Of any collateral transaction not required to be affected by instrument. Reliance is placed on [Mt. Ugni and Another Vs. Chowa Mahto and Others,](#) and [Sikhari Lakshmaiah and Others Vs. Sikhari Peddamallaiah \(Died\) and Others,](#) . It was held there that though an unregistered partition deed cannot be admitted in evidence to prove the terms of the partition, it may certainly be admitted in evidence for proving the division in status and the fact of partition as pointed out by several decisions based on the judgment of the Privy Council in Rajangam Ayyar v. Rajangam Ayyar, Air 1922 Pc 266 "Similarly, taking possession of the shares allotted to each one of the parties at the partition will be purpose collateral to the purpose of partition and such taking possession not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property, will not require registration," Reference is also made to the decision of the Supreme Court in [Ram Charan Das Vs. Girjanandini Devi and Others,](#) and [Kale and Others Vs. Deputy Director of Consolidation and Others,](#) .

(14) The two later authorities deal with family arrangements/settlements between the various members of the family under the Hindu law. In fact their Lordships in Kale's case (supra) held that the family arrangements are governed by principles which are not applicable to dealings between strangers. Admittedly the parties to the suit are not members of a family and are strangers and Therefore those principles would not be applicable in this case. The provisions of Section 49 of the

Registration Act do not bar the proving of an unregistered instrument of partition for the purpose of ascertaining the bare fact of partition. There is no dispute to this proposition of law as the fact of partition can be proved by oral evidence. The question is whether the nature of possession of the appellants and their predecessor-in-interest in the disputed passage could be proved by the oral and other documentary evidence. In our view, the combined effect of Section 91 of the Evidence Act and Section 49 of the Registration Act is to shut out all evidence to prove the terms of unregistered partition deed. Section 49 prohibits the use of 255 unregistered document in any legal proceedings in which such a document is sought to be relied upon in support of a claim to enforce or maintain any right, title or interest to or in an immovable property. Section 91 of the Evidence Act excludes oral evidence in proof of the terms of contract. It says when the terms of a contract or of any other disposition of property have been reduced to the form of a document, no evidence shall be given in proof of the terms of such contract or other disposition of the property or such matter except the document itself. The unregistered partition deed is not admissible to prove as to which property fell to the share of a particular person in partition. The plaintiffs' own case is that the partition between the parties took place and it was mutually agreed that in consideration of the defendant owning and occupying the front portion namely house No. 11096, the defendant shall concede and give up all claims to the passage 7'-6" wide and 44" long in favor of Sh. Manna Singh who shall be the exclusive owner and possessor of the same and that the defendant shall have absolutely no right to or claim upon the said piece of land. This is also one of the terms of the unregistered partition deed. The main issue in the suit is whether the plaintiff is the exclusive owner of the disputed site shown as passage in the plan attached to the plaint and if so to what effect? This is claimed as a result of partition and not by exclusive adverse possession for more than 12 years. The unregistered partition deed can be looked into for the collateral purpose but it cannot be looked into for the purpose of returning a finding that the possession is that of an owner. The factum of possession may be there but the possession can be of a licensee or an easement of necessity or as a tenant or as an owner or even a trespasser.

(15) In [Nalam Ramayya and Others Vs. Nalam Achamma](#), it was held that where a deed of partition is inadmissible by reason of the fact that it has not been registered, a co-sharer who happened to be in sole enjoyment of a particular property cannot sue to eject another co-sharer who had disturbed his possession when he based his title on the partition deed. In [Vedangi Veera Raghava Rao Vs. Vedangi Gopalarao](#), Patanjali Sastri, J., held that the finding that the partition deed was inadmissible to show what property fell to each co-sharer must result in the conclusion that each co-sharer enjoyed an undivided share in each item of the properties, in such circumstances, even if one co-sharer happened to be in sole enjoyment of a particular piece of property, he could not sue in ejectment if another co-owner disturbed such enjoyment. In *Subbu Naidu and Ors. v. Varadarajulu Naidu*

and Ors., Air 1948 Mad. 26 the same view was taken. In [Ratan Lal and Others Vs. Hari Shanker and Others](#), it was held that an unregistered partition deed could certainly be looked into for a collateral purpose and this proposition is correct that if a document is compulsorily registerable and has not been registered, it will be admissible in evidence only for a collateral purpose, but the collateral purpose has a limited scope and meaning. It cannot be used for the purpose of saying that the deed created or declared or assigned or limited or extinguished a right to the immovable property. We are. Therefore, in respectful agreement with the learned Single Judge that the item of passage is expressly dealt with in the document marked "A" and no amount of evidence could have been led or considered for the purpose of giving a finding of ownership of the passage,

(16) The last submission of the counsel for the appellants is that the partition having been acted upon and the passage has been separated by construction of boundary walls and possession delivered to the predecessor-in-interest of the appellants, there is an estoppel against the defendant. Reference is made to the subsequent conduct of the parties disclosing a state of affairs consistent with the existence of the agreement mutually recognised and acted upon as if the instrument of partition was binding on them. The submission is that even if the document marked "A" is defective as a deed of partition such defects may be supplied by the action and conduct of the parties. The courts of equity have always intervened and protected possession. Reliance is placed on *Mahomed Musa v. AghoreKumar Ganguli*, 2nd 1942 Cal 801 wherein it was held :

"THE matter has advanced beyond the stage of contract and the equities which arise out of the stage which it was reached cannot be administered unless the contract is regarded." Many authorities are cited in support of these propositions from English and Scotch law, and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. From these authorities one dictum quoted by Lord Selborne from Sir John Strange in *Potter v. Potter* (1) may be here repeated : "If confessed, or in part carried into execution, it will be binding on the parties, and carried into further execution as such in equity". Their Lordships do not think that the law of India is inconsistent with these principles. On the contrary it follows them."

Reliance is also placed on *Nand Lal Mahton and Ors. v. Dhanukdhari Mahton and Ors.*, Air 1924 244 wherein it was held :

"IN my opinion, we are entitled to give the defendant relief upon the equities that arise out of the acting of the parties though it is quite impossible to give him any relief upon the document itself. I have come to the conclusion that the learned Judge is right, although I do not agree with some of the views which he has expressed in his judgment."

The appellant before us are not the defendants in the suit claiming adverse possession in the passage conveyed to them under invalid document. They seek ownership of the passage in their suit which can only be granted if legal and admissible evidence is adduced.

(17) Before parting with the case we may notice that the defendant was willing to give title to the disputed passage to the appellants provided the defendant had an easement of light and air through the windows but the appellants did not agree.

(18) The result of the above discussion is that the appeal fails and is dismissed with costs.