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IN THE HIGH COURT OF DELHI

Judgment reserved on : September 22, 2008

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Judgment delivered on : September 29, 2008

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RFA 790/2002

SHRI ARUN KUMAR MITTAL & ANR. Appellants

Through: Mr.Sanjay Poddar, Advocate

VERSUS

SHRI N.K. MITAL Respondent

through: Mr.Dinesh K. Gupta, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE J.R. MIDHA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

: PRADEEP NANDRAJOG, J.

1. Vide impugned judgment and decree dated 5.10.2000 the suit seeking recovery of possession and mesne profits filed by N.K. Mittal, the respondent, against the

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appellants has been decreed.

2. The appellants, Arun Kumar Mittal and his wife Sneh Mittal, were impleaded as defendant No.1 & defendant No.2.

3. Claim for possession was pleaded on a family settlement stated to have been arrived at on 12.11.1965 amongst the heirs of late Shri Jwala Prasad Mittal. As per the averments made in the plaint, the properties left behind by late Jwala Prasad Mittal were partitioned amongst his heirs and that property bearing No.865, Dr. Joshi Road, Karol Bagh, New Delhi fell to the share of G.D. Mittal, father of the plaintiff, Rattan Chand Mittal, a brother of the father of the plaintiff, and Prem Chand Mittal, the third brother. It was stated that on the death of Prem Chand Mittal, his share was inherited by Arun Kumar Mittal i.e. appellant No.1 and the other son of Prem Chand namely, Subhash Chand Mittal. It was pleaded that inheritors of the property No.865, Dr. Joshi Road, Karol Bagh, New Delhi drew up a record of the family settlement dated 12.11.1965 by writing a memorandum dated 14.1.1990 and submitted necessary applications and documents required by the MCD on 28.8.1992 seeking separation of their shares so that each share could be separately assessed to house tax in the hands of the different owners of the property.

It was asserted that the suit property was assigned, on partition, to the plaintiff and was trespassed upon by the appellants in the absence of the plaintiff, who was away to the United Kingdom.

4. In the written statement filed by the appellants, the factum of partition as alleged was denied. It was pleaded that the settlement dated 12.11.1965 and the written memorandum thereof drawn up on 14.1.1990 merely declared the share of the parties without any separation and that the documents submitted to the MCD were intended only to facilitate payment of property tax.

5. Needless to state the only material issue which arose for consideration between the parties was whether a partition of property No.865, Dr. Joshi Road, Karol Bagh, New Delhi had taken place and if yes whether the plaintiff was assigned the portion of the house as claimed in the plaint and whether the appellants were liable to restore possession thereof to the plaintiff and at what rate were they liable to pay damages for unauthorized use and occupation; if found to be in unauthorized possession.

6. Various documents have been proved at the trial, but the principal documents are Ex.PW-1/2, Ex.PW-1/3, Ex.PW-1/6 and Ex.PW-2/B. We note that Ex.PW-2/B is a

compendium of documents being certified copies obtained from the municipal record which include :

- (i) A letter of request dated 20.8.1992 signed by Rattan Chand Mittal, appellant No.1 Arun Kumar Mittal and his brother Subhash Chand Mittal for sub-division/mutation of separated portions of property No.865, Dr. Joshi Road, Karol Bagh, New Delhi;
- (ii) An Indemnity Bond signed by Rattan Chand Mittal, Subhash Chand Mittal and appellant No.1;
- (iii) An affidavit deposed to by Rattan Chand Mittal;
- (iv) An Indemnity Bond submitted by the plaintiff N.K. Mittal;
- (v) Minutes of sub-division of property dated 14.1.1990; and
- (vi) A Mutation order dated 24.1.1994.

7. The letter of request dated 20.8.1992 referred to in sub para (i) of para 6 above has also been proved as Ex.PW-1/4, Ex.PW-1/6 is the formal order issued communicating the order sanctioning mutation dated 24.1.1994.

8. Ex.PW-1/3 is a site plan evidencing a partition of the property in question as claimed by the plaintiff having 3 portions marked thereon as portion I, portion II and portion III.

9. It is not in dispute that late Jwala Prasad Mittal was survived by his widow, five sons and one daughter. His sons D.D. Mittal, P.C. Mittal, R.C. Mittal, S.K. Mittal and G.D. Mittal had met on 12.11.1965 and had agreed to partition the estate

of their father. It is also not in dispute that Ex. PW-1/2 was drawn up on 14.1.1990 and was signed by N.K. Mittal, Shashi Prabha Mittal, the daughter-in-law of D.D. Mittal, Subhash Chand Mittal, appellant No.1 Arun Kumar Mittal and Sharan Kumar Mittal. The document Exhibit PW-1/2 records as under:-

“MINUTES

Subject : Division of Property

A meeting was held on Sunday the 12th November 1965 at 8, South Patel Nagar. The following were present:-

Shri D.D. Mital
Shri P.C. Mital
Shri R.C. Mital
Shri S.K. Mital
Shri V.K. Mital (representing Narendra Kumar Mital)

The above meeting took place in order to decide the question of the partition of the property left by Shri Jwala Prasad Mital, at the time of his death.

Following values were agreed upon.

Delhi Property Rs. 75,000/-
Multani Dhanda.....Rs. 5,000/-
Palwal.....Rs.10,000/-
Alwar Rs.30,000/-
Jaipur Rs.25,000/-

Rs.1,45,000/-

+ Total value Rs.50,000/-. Shri J.P. Mital's contribution 3/5 i.e. Rs.30,000/-

In addition, it was pointed out that Rs.29,000/- (including Rs.3,000/- taken by Shri S.K. Mital for his Motor Cycle) in cash is deposited with Shri R.C.

Mital. Rs.7,000/- is in fixed deposit of late Shri J.P. Mital and Rs.6,000/- were taken by late Shri G.D. Mital, thus making a total of Rs.42,000/-. It was agreed the money taken by late Shri G.D. Mital for his daughter's marriage and Shri P.C. Mital for his daughter's marriage will not be taken into account.

Total value of the property and cash therefore was agreed upon as Rs.1,87,000/-. This was decided to be divided amongst 5 brothers equally. Accordingly each person gets Rs.37,000/- which was agreed upon to be distributed as follows:

	Property	Cash
Shri D.D. Mital	Rs.30,000/- (Alwar) +	Rs.7,400/-
Shri P.C. Mital	Rs.30,000/- (Dlshare)+	Rs.7,400/-
Shri R.C. Mital	Rs.30,000/- (.....)+	Rs.7,400/-
Shri S.K. Mital	Rs.25,000/- (Jaipur) +	Rs.12,400/-
Shri N.K. Mital	Rs.30,000/- (Dlshare)+	Rs.7,400/-

It was also decided that fixed deposit of Rs.7000/- may be taken by Shri D.D. Mital as his share of cash and in addition he will get Rs.400/-. Shri N.K. Mital may be given Rs.1400/- since Rs.6000/- was already taken by his father late Shri G.D. Mittal. Shri S.K. Mital may be given Rs.9400/- since Rs.3000/- has already been taken by him for his Scooter Loan. The balance of Rs.14,800/- each to Shri P.C. Mital and R.C. Mital.

Shri V.K. Mital was authorized to go ahead with the partition formalities in consultation with the lawyer. Mr. P.C. Mital was asked to procure the blue print of Delhi house and fees etc of the lawyer and the court will be equally shared by all the parties.

The decision was communicated to Ammaji and it was agreed by all concerned that, she will be paid a monthly sum of Rs.20/- by each of the person sharing the property. This payment will start from the time the decision become effective.

We the undersigned admit that a family settlement typed as above was arrived at between the then surviving members of the family in Nov., 1965 and the aforesaid portion of the various houses and cash were allotted to the

share of those noted against their names.

It is well known that we have been acting upon this family settlement ever since. It was arrived at. We are however signing it as a token of our admission to avoid all complications and future litigation.

(A) I, Narender Kumar Mital son of Shri late G.D. Mital, grand son of Shri late J.P. Mital, agree with my own will.

Sd/-
14.1.90 (X-3)

(B) I, Mrs. Shashi Prabha Mital, daughter of Shri K.N. Bhargava wife of Dr. V.K. Mital and daughter-in-law of Shri late D.D. Mital, agree with my own will.

Sd/-
14.1.90

(C) I, Sharan Kumar Mital S/o late Shri Jwala pershad agree with my own will.

Sd/-
14.1.90

(D) I have read the above draft agreement and sign it in conformation of the said agreement.

Sd/-
14.1.90 (X)

(E) I, Subhash Chand Mittal S/o late Shri P.C. Mittal aware of the above family settlement and sign on my own free will in confirmation of the same.

Sd/-
14.1.90(X-1)

(F) I, Arun Kumar Mittal S/o late Shri P.C. Mittal aware of the above family settlement and sign on my own free will in confirmation of the agreement.

Sd/-
14.1.90(X-2)"

10. The compendium of documents obtained from the municipal record and exhibited as Ex.PW-2/B contains a letter
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dated 20.8.1992 also proved as Ex.PW-4/1 addressed to the Assistant Assessor and Collector, MCD. It has been signed by Rattan Chand Mittal, appellant No.1 Arun Kumar Mittal and his brother Subhash Chand Mittal. It reads as under:-

“The Assistant Assessor and collector,
Karol Bagh Zone,
MCD, Delhi.

Sub:- Request for transfer and individual assessment/
sub-division of the property No.865/III Dr. Joshi Road,
Karol Bagh, New Delhi-5.

Sir,

The above noted property is entered in your record name of Late Sh. Jwala Prasad Mital who has expired on 16th of Nov. 1955.

That the legal representative of Late Sh. Jwala Prasad Mital inherited and divided the above said property among themselves are in physical possession of the same which is more specifically shown in the plan since long and using the same as owner to the extent of their respective portion. The requisite documents are being enclosed herewith for your kind perusal.

It is, therefore, requested that necessary orders as required in view of the facts as detailed may kindly be ordered accordingly directions to the record keeper may be given.

Yours faithfully,

Sd/-

1. Ratan Chand Mital

Sd/-

2. Subhash Chand Mital &
Arun Kumar Mital

3. Narender Kumar Mital”

Delhi

Dated:- 20th August 1992

11. The order sanctioning mutation by the Corporation, formal copy whereof as was communicated to the parties being Ex. PW-1/6, reads as under:-

“MUNICIPAL CORPORATION OF DELHI
(ASSESSMENT AND COLLECTION DEPARTMENT)

(not legible) X/KBZ/93-9414724
DATED : 29-1-1994

New Zonal Office Building,
(Basement), Anand Parbat,
D.T.C. Bus Terminal, Dev Nagar,
New Delhi-110005

SHRI Subhash Chand Mittal and Arun Kumar Mittal,
Sons of late shri Jawala Prasad Mittal, P.No.865 (Part-II)
Joshi Road, Delhi.

SUBJECT: MUTATION/SUB-DIVISION OF PROPERTY
No. 865, Joshi Road, Karol Bagh, New Delhi.

Sir/Madam,

Kindly refer to your application dated 11-1-1993 for mutation/sub-division of the above mentioned property/portion thereof in your name. In this connection, it is to inform you that the property referred to above has been mutated/sub-divided in the name(s) of SHRI Subhash Chand Mittal and Arun Kumar Mittal sons of late Sh. Jawala Pd. Mittal (Mutation File No.23/1993) vide orders of the Dy. Assessor & Collector dated 29-1-94 on the basis of the documents furnished by you.

It may also be informed that the mutation/sub-division has been done in your favour only for the purposes of levy/collection of property taxes and it does not devolve a legal title and is subject to the condition that the property will go automatically in the name of the previous owner without prior notice in case there is a claimant to it or a dispute in ownership arises at any time in future.

It is also added here that if any tax liability arises on this property after the mutation/sub-division for the period prior to the date of this mutation/sub-division, due to creation of any additional demand, disposal of pending proposal under Section 126 of the DMC Act, 1957 or due to any calculation mistake, the same shall be payable by you as agreed to by you in the Indemnity-Bond enclosed with your mutation/sub-division application.

This mutation/sub-division shall not be treated as valid if it has been found that the property has been constructed on a land belonging to the Govt./D.D.A./M.C.D. of which you are not the lessee/licensee accordingly to Law.

Yours faithfully,

Sd/-
ASSTT. ASSESSOR AND COLLECTOR/K.B.ZONE.

The bifurcation of Rateable Value is done as under:

<u>S.NO.</u>	<u>PROPERTY NO. AND LOCALITY NAME</u>	<u>RV (PA)</u>
1.	<u>865 (Part-I), Joshi Road, K. Bagh, N.Delhi.</u> Portion of Shri Rattan Chand Mittal	Rs.2050/- P.A.
2.	<u>865 (Part-II), Joshi Road, K. Bagh, N.Delhi.</u> Portion of S/Shri Subhash Chand Mittal and Arun Kumar Mittal	Rs.3460/- P.A.
3.	<u>865 (Part-III), Joshi Road, K. Bagh, N.Delhi.</u> Portion of Shri Narinder Kumar Mittal	Rs.1620/- P.A.”

12. We eschew reference to other documents being the various house tax receipts produced by the parties evidencing payment of house tax for different portions of the house inasmuch as the appellants’ case is that the parties had agreed to pay house tax separately for purposes of convenience and not on account of a formal partition of the house.

13. Shri Sanjay Poddar, learned counsel for the appellants urged that there is no document to establish that the appellants ever signed any Site Plan showing the property to be partitioned into three portions. Admitting that on 12.11.1965 a separation had taken place and that the minutes Ex. PW-1/2 recording the settlement were correct, explaining the letter submitted to the Corporation for separation and mutation; counsel urged that the same show that the parties

had divided their rights and not the property and hence became tenants in common of the undivided property.

14. It is true that the Site Plan submitted to the Corporation under cover of various documents and especially the letter of request seeking separate assessment of property tax being the letter dated 20.8.1992 does not bear the signatures of the appellants.

15. But, the weight of the evidence shows that a physical partition of the property had taken place.

16. The letter of request submitted to the Corporation on 20.8.1992, contents whereof have been noted in para 10 above shows that the executants of the letter have used the expression *“divided the property”, “are in physical possession”* and *“as owner to the extent of their respective portion”*.

17. A bare reading of the letter shows that the executants have referred to themselves as owners to the extent of their respective portions; have referred to the property being divided and they being in physical possession of different portions.

18. Without considering any further document, the letter in question which admittedly bears the signatures of appellant No.2 concludes the controversy. The parties clearly

understood that the partition affected was not a division of rights, but of the property, with each getting a separate and an identified share.

19. It is also important to note that the said letter refers to the different portions of the house in physical possession of the parties with reference to a Site Plan.

20. Learned counsel for the appellant conceded that the only Site Plan available in the Municipal record was a copy of Ex.PW-1/3.

21. The same shows that the suit property i.e. the house, is a single storeyed construction. 3 portions have been identified and clearly marked in the Site Plan and assigned Nos. Portion 1, Portion 2 and Portion 3.

22. The mutation order dated 29.1.1994 and the formal order issued thereon, Ex. PW-1/6, clearly records that for purpose of bifurcation of the existing ratable value separate numbers have been assigned to the property and ratable value apportioned as under:-

<u>S.No.</u>	<u>Property No. and Locality Name</u>	<u>RV (PA)</u>
1.	<u>865 (Part-I), Joshi Road, K. Bagh, N.Delhi.</u> Portion of Shri Rattan Chand Mittal	Rs.2050/- P.A.
2.	<u>865 (Part-II), Joshi Road, K. Bagh, N.Delhi.</u> Portion of S/Shri Subhash Chand Mittal and Arun Kumar Mittal	Rs.3460/- P.A.
3.	<u>865 (Part-III), Joshi Road, K. Bagh, N.Delhi.</u> Portion of Shri Narinder Kumar Mittal	Rs.1620/- P.A.

23. The Assessment order separating the property tax clearly records that in support of the application the family members had submitted that they had divided the property with portion 1 being assigned to Rattan Chand Mittal, portion 2 assigned to Subhash Chand Mittal and Arun Kumar Mittal and portion 3 assigned to Narender Kumar Mittal.

24. In the accompanying Indemnity Bond and affidavit submitted by the parties, each one of them had clearly stated that the house was partitioned into three portions and parties desire a separate assessment for purposes of house tax lest in future, there be any disputes.

25. It is not in dispute that the portion occupied by the appellants is the one shown as portion 3 assigned to Narender Kumar Mittal as per the Mutation Order Ex. PW-1/6.

26. Thus, the Site Plan filed before the Corporation showing three parts of the house being not signed by appellant No.1 is inconsequential as the plan in question is the only plan available. It appears that inadvertently appellant No.1 did not sign the same when it was submitted to the Corporation.

27. Shri Sanjay Poddar, learned counsel for the appellant could give no satisfactory explanation when we

repeatedly quizzed counsel as to what did his client understand when Mutation Order Ex. PW-1/6 was written by the Corporation clearly indicating that the separation of the house for purposes of house tax was with reference to 3 portions of the house referred to as Portion I, Portion II and Portion III. Further, learned counsel had no answer when questioned as to how did his client understand, reference in the Assessment/Mutation Order, the fact that the parties had desired a separation of the property for purposes of levy of house tax as they had physically partitioned the property. Further, learned counsel had no answer to the letter dated 20.8.1992 submitted by the parties for separate house tax assessment to be made by clearly recording that the parties, on inheritance, had divided the property in question and were in physical possession of different portions as shown in a plan enclosed with the letter.

28. Looked at from any angle the view taken by the learned Trial Judge is correct.

29. The memorandum of the family settlement Ex. PW-1/2 clearly shows a separation amongst the children of late Jwala Prasad Mittal with further separation of the properties on partition.

30. It is not in dispute that if it is held that pursuant to

the family settlement a partition was effected the same has to be as per Ex.PW-1/3 with portion I falling to the share of Ratan Chand Mittal, portion II falling to the share of Appellant No.1 and his brother Subhash Chand Mittal and portion III falling to the share of N.K. Mittal the respondent. Further, it would not be in dispute that the appellants are occupying portion III belonging to Narender Kumar Mittal.

31. Mr. Sanjay Poddar, learned counsel for the appellants had urged that Ex.PW-1/2 as also the compendium of documents exhibited as Ex.PW-2/B and the letter dated 20.8.1992, Ex.PW-1/4 do not evidence a partition of the terrace above the existing ground floor. Learned counsel urged that it would be, at best, a case of partial partition.

32. We are afraid, the said submission is without any basis for 2 reasons. Firstly, the appellants never took an alternative plea of the partition being a partial partition. The second reason is that, admittedly, the house is a single storeyed house. The site plan Ex.PW-1/3 shows that the property has been partitioned into 3 parts marked as portion I, portion II and portion III. The 3 portions are separate and independent units as is revealed from the site plan in question. It is settled law that the terrace of a property goes along with the property unless there are negative covenants

stipulating to the contrary in the document of title. Ex.PW-1/2 nor any other document records a negative covenant qua the terrace of the existing constructions. Thus, the respective owners of the 3 portions of the property have to be treated as owners of the respective terrace with a right to use the terrace as per law.

33. We note that no submissions were urged with respect to the quantification of the mesne profits. We note that if it is held that house No.865, Dr. Joshi Road, Karol Bagh, New Delhi was partitioned as per Site Plan Ex.D-1, the appellants are in possession of the share of Narender Kumar Mittal.

34. We find no infirmity with the view taken by the learned Trial Judge.

35. The appeal is dismissed.

36. Costs shall follow.

PRADEEP NANDRAJOG, J.

J.R. MIDHA, J.

September 29, 2008
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