

+ **CS(OS) 1156/2006**

SMT. KUNNI MIGLANI Plaintiff

Versus

Through: Mr. Rajesh Kumar, Advocate

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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 the judgment should be reported in the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1. This suit is with respect to single storied property No.R-653, New Rajinder Nagar, New Delhi admeasuring about 200 sq. yds.
2. It is not in dispute that the said property belonged to Smt. Motia Devi who died on 27th February, 1993. The plaintiff is the daughter in law of Smt. Motia Devi. The defendants are the widow and children of Shri Raj Kumar Muglani, another son of Smt. Motia Devi.
3. It is also not in dispute that Smt. Motia Devi executed as registered Will dated 7th November, 1986. The said Will dated 7th November, 1986 of Smt. Motia Devi was duly probated. The portions of the property bequeathed to the plaintiff and to the

predecessors of the defendants are described in the said Will as under:-

2. That after my death, the aforesaid house/property shall devolve upon my son Shri Raj Kumar Miglani and Mrs. Kunni Miglani @ Ravinder Madan wife of my younger son Shri Devendra Miglani in unequal shares as follows:-

Shri Raj Kumar Miglani Shall become the owner of two rooms each measuring 12'.4.1/2" x 9'.9", kitchen store, bath, W.C. a part of Rear Court Yard, a part of Front Court Yard and a part of verandaha between kitchen and one room; the portion adjoining House No.R-654 on the Southern side.

And Mrs. Kunni Miglani shall become the owner of one room measuring 10'.3" x 14'.6" , one room measuring 9'.9" x 12' , a part of rear court yard, a part of front court yard, stair case leading to the roof, and a part of verandaha between kitchen and one room; the portion adjoining House No.R.652 on the Northern side.

That the aforesaid house property shall be divided by Mrs. Kunni Miglani and Shri Raj Kumar Miglani by erecting a wall at a distance of 12' – 4.1/2" from House No.R-654 on the Southern side, and thus extending the wall of the two rooms falling in the share of Shri Raj Kumar Miglani.

3. That the wall dividing the aforesaid house shall be constructed at the expenses of Mrs. Kunni Miglani and Shri Raj Kumar Miglani in equal shares.

5. That Mrs. Kunni Miglani shall construct kitchen, laterine and bath room in her portion at her own expense. However, unless and until Mrs. Kunni Miglani is able to construct her kitchen, bath-room and latrine in her portion, she would be free and at liberty to use the existing kitchen, bath and laterine. Mrs. Kunni Miglani would construct kitchen, bath room and laterine in her own portion within a maximum period of six months from the date of my death. Similarly Shri Raj Kumar Miglani would construct the stair-case in his portion leading to the roof of the portion of the house to be owned by him after my death within six months from the date of my death at his own expense."

The site plan of the house is also annexed to the Will, though it does not delineate the two portions aforesaid.

4. The plaintiff instituted the present suit for declaration that she is the exclusive owner of the entire house/property No.R-653, New

Rajinder Nagar, New Delhi adjoining house No.R-652, New Rajinder, Nagar, New Delhi excluding portion measuring 82.5 sq. yds. adjoining house No.R-654, New Rajinder Nagar, New Delhi and for permanent injunction restraining the defendants from transferring, alienating or in any way parting with possession of the property in suit and/or from dispossessing the plaintiff from the peaceful possession of her portion of the property. A site plan of the house was annexed to the plaint. It is the copy of the site plan annexed to the Will, save that the portion which the plaintiff claimed as her's is coloured red in the site plan and the portion of defendant is coloured blue. The suit was valued for the purposes of declaration at Rs.23,50,000/- on which court fee of only Rs.20 was affixed. The suit was valued for the relief of injunction, for the purposes of court fees and jurisdiction at Rs.200 only.

5. The defendants filed a written statement contending
That the suit was without cause of action; that the plaintiff had not correctly valued the suit for the purposes of court fees and jurisdiction and not paid the requisite court fees; that the plaintiff was in possession of her portion of the property and the defendants were in possession of their portion of the property under the Will.
6. The plaintiff filed a replication to the aforesaid written statement. Nothing further was stated in the replication.
7. Vide ex-parte order dated 26th May, 2006, the defendants were restrained from interfering with the peaceful possession of the

plaintiff's portion of the party and from transferring that portion or creating any third party interest therein.

8. On 27th March, 2008 when the suit was listed before this court for framing of issues, it was noted that it is not disputed that the property has to be apportioned in accordance with the Will aforesaid and the only dispute was whether the portion in occupation of the parties are in accordance with the Will or not. I may notice that I do not find any averments whatsoever in the plaint to the effect that the parties were not in possession of portions of the property in accordance with the Will and no relief of apportionment or partition of the property in accordance with the Will were claimed. It was not the case of the plaintiff that the defendants are in possession of a portion of the property in excess of their share. The plaintiff did not claim the relief of possession of any excess portion of the property from the defendants. This court appears to have recorded the oral submissions of the parties to the aforesaid effect.

9. Be that as it may, this court on 27th March, 2008 appointed a court commissioner to take the measurement of the entire property and to give a report as to how the Will is to be given effect to. Mr. Rohit Nagpal, Advocate was appointed as the court commissioner with a direction to go through the Will carefully and after going through Will to take measurement of the entire property and draw a rough site plan, not to scale, suggesting which portion has to go to whom and where the wall is to be erected. He was also directed to make permanent marks in the property itself as to where the wall is to be erected.

10. The court commissioner has filed his report. He has reported that he along with an architect inspected the premises and took measurement and the architect engaged by him also drew rough sketch plan which has been annexed to the report. The report inter-alia states:

“Mrs. Kunni Miglani the plaintiff submitted that walls should be erected according to the marks which I had put as per the Will.

“Mrs. Leela Miglani and Mr. Vijay Pal Singh the defendants have objected to the marks which has been put by me according to the Will.”

11. The Report of the court commissioner save as aforesaid does not state as to how the Will is to be given effect to, as he was directed on 27th March, 2008. However, the site plan annexed to the Report, and which is the same as the site plan annexed to the Will and that annexed to the plaint has proposed a partition wall dividing the two portions. The proposed wall is shown at a distance of 12'.4 ½" from the outer boundary wall of the property, abutting property No.R-654. The proposed wall thus falls short of the existing wall separating the rooms bequeathed to the plaintiff from those bequeathed to predecessor of defendants.

12. The defendants filed IA No.13115/2008 objecting to the report of the court commissioner. In this application it is stated for the first time that the plaintiff, without informing the defendants had raised the wall dividing the front and the rear courtyards also in accordance with the Will during the lifetime of her husband only i.e. much prior to the institution of this suit. The defendants along with this application also filed a site plan showing the wall dividing the front and rear courtyard constructed by plaintiff prior to institution of suit, as well as photographs of the wall. It was further stated that

the dividing wall proposed by the court commissioner was 1'.6" inside the portion of defendants from the wall dividing the constructed area existing since life time of Smt. Motia Devi and the wall dividing the open areas of front and rear courtyard constructed subsequently and in the same straight line as dividing wall in constructed area.

13. The plaintiff in reply to the objections admitted the construction of the wall dividing the front and the rear courtyards but stated that it was constructed by predecessor of defendants. It was however admitted that expense thereof was shared equally. It was however averred that the predecessor of the defendants had at the time of construction of wall misrepresented that it was being constructed as per the Will, the said wall is infact not in accordance with the Will; the wall as per the Will has to be constructed at a distance of 12'. 4 ½" from house No.R-654 as measured by the court commissioner.

14. The counsel for parties during arguments today also argued that the only dispute between the parties is as to whether the portions of parties under the Will are as per dividing wall already constructed or as proposed by the court commissioner.

15. I have noted above that that is not the case with which the plaintiff approached the court. Technically, the dispute argued during hearing has neither been pleaded nor court fees paid thereon. However, the matter has been fully thrashed during the hearing. No pleadings or evidence is required for adjudicating the said dispute. It involves interpretation of the Will. The construction

much prior to institution of suit of wall dividing courtyard is admitted. What has to be seen is whether it is as per the Will, as contended by defendants or not. Only if I find that it is not as per the Will, questions of effect of plaintiff acquiescing in construction thereof, and requiring evidence will arise. During hearing I observed the plaintiff and defendant No.1 are ladies of advance age, both widows. They ought not to be returned to have their dispute aforesaid decided in a properly instituted suit, if it can be adjudicated here. Thus I proceeded to examine the matter.

16. The construction of property is old. The walls thereof must be load bearing and thick i.e. thicker than single brick, partition wall now the norm in a R.C.C. structure. The difference aforesaid between the parties emanates from whether the distance of 12'.4 ½" (mentioned in latter part of clause 2 of the Will reproduced in para 3 above) from house No.R-654, is to be measured from the outer end (i.e. abutting R-654) of partition wall between suit property and house No.R-654 or from the inner side of the said wall. If the said distance is to be measured from outer end, it ends before the existing wall, i.e. as measured by the court commissioner. Per contra if it is to be measured from inner side, it ends at the existing wall.

17. On interpretation of the Will I find that the existing wall is in terms thereof.

18. Firstly, if the interpretation now propounded by plaintiff is to be upheld, it will necessarily result in requiring demolition of existing wall partitioning the two rooms bequeathed to predecessor

of defendants from that bequeathed to plaintiff. The Will does not provide so. It only provides of "extending the wall of the two rooms falling to the share of Shri Raj Kumar Miglani". The said extension has to be in the straight line and has admittedly been done so.

19. Secondly, the Will bequeaths the rooms described by measurement. The two rooms bequeathed to Shri Raj Kumar Miglani i.e. predecessor of defendants are described as measuring 12'. 4 ½" x 9'.9" each. The measurement 12'. 4 ½" is from side of house No.R-654 to the wall dividing the said rooms from room bequeathed to plaintiff. The site plan annexed to the Will also shows same measurement. The site plan annexed to report of court commissioner also does not dispute the said measurements. If the interpretation of plaintiff is to be accepted, it will also interfere with the measurements of the room and the area of rooms of defendants will be reduced and that of room of plaintiff shall be increased.

20. Thirdly, the testatrix appears to have in latter part of Clause 2 (Supra) given the distance of 12'. 4 ½" from house No.R-654 for construction of partition wall because as per site plan annexed to the Will, that was the distance shown of existing partition wall from house No.R-654. I have tried to put myself in the armchair of the testatrix to fathom her intent. I am unable to conclude that she had intended virtual remodeling of the house after her, as would be inevitable if the interpretation of plaintiff is to be upheld. She has attempted to divide the existing construction only into two portions. Whatever essential facilities/amenities were lacking on either portion, she allowed use of thereof in other portion for six months after her death to enable construction thereof. It could never have

been her intention in providing distance of 12'. 4 ½" from house No.R-645 for construction of partition wall to require demolition of existing wall or that the said distance was to be measured inclusive of the width of the wall separating R-654 and R-653, as plaintiff would contend.

21. I, therefore, declare that the existing wall dividing the constructed portions only is to be the dividing the two portions and that wall only is to be extended in a straight line to divide the front and rear courtyard, as has already been done. The counsel for the plaintiff contends that the same will result in defendants getting about 14 sq. yds. more than 82.5 sq. yds. being the area if 12'. 4 ½" area from outer wall is to be taken. The area of 82.5 sq. yds. does not find any mention in the Will. A single line in the Will cannot be pulled out. On reading of all the clauses in the Will, pertaining to the house, the conclusion is inescapable that 12'. 4 ½" is to be counted from inner wall.

22. With the aforesaid declaration, suit is decreed. However, in facts, parties are left to bear their own costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**February 16, 2008
PP**