

SB-2

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Order delivered on: 22.09.2011

+ RFA 462/2010.

SHIV SHANKAR Appellant
Through: Mr. A. K. Mishra, Advs. along with appellant
versus

HARI SHANKAR @ NANU Respondent
Through: Mr. Lalit Gupta, Adv. for respondent
along with respondent in person

**CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI**

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

G.S.SISTANI, J. (ORAL)

I.A.NO.7242/2011.

1. Exemption allowed, subject to all just exceptions.

I.A.NO.19068/2010.

2. Present application has been filed by the respondent seeking recall/modification of the order dated 24.9.2010.
3. Parties are brothers. Appellant has filed the present appeal assailing the judgment and decree passed by Additional District Judge, Delhi, on 31.5.2010. Subject matter of the appeal is a property bearing No.6178-6180, Gali Shiv Mandir, Fatehpuri, Delhi measuring 108 sq. yds. Operative portion of the order dated 31.5.2010 passed by trial court reads as under:

“5. Thus in view of the arguments submitted by the defendant himself, the defendant is entitled for one floor of the suit property. He has also stated

that his sons have already occupied major portion at the first floor of the suit property. In view of the submissions made by the parties, the final decree is passed to the effect that the defendant is entitled for 1/5th share in terms of preliminary decree passed by this Court on 08.12.2005 in the suit property bearing no.6178-6180, Gali Shiv Mandir, Fatehpuri, Delhi-110006 at the first floor of this property. The plaintiff shall have no right, title or interest in the first floor of property bearing no.6178-6180, Gali Shiv Mandir, Fatehpuri, Delhi-110006. Rest of the floors of this property are fallen in the share of the plaintiff. The plaintiff is the owner of property bearing no.6178-6180, Gali Shiv Mandir, Fatehpuri, Delhi-110006 except first floor. The defendants shall have no right, title or interest at the property except first floor. The plaintiff shall supply requisite deficit court fees within one month. The Reader of the court is directed to prepare the final decree after receipt of deficit court fee. Parties shall bear their own costs. File be consigned to record room after compliance of necessary formalities."

4. As per the judgment and decree dated 31.5.2010 passed by learned trial court, on the basis of submissions made by the defendant (appellant herein), defendant was entitled to one floor in the suit property. On 31.5.2010 defendant had further stated that he was already in occupation of major portion at the first floor of the suit property and in view thereof a final decree was passed on 31.5.2010 to the effect that defendant would be entitled to 1/5th share in terms of the preliminary decree passed on 8.12.2005 in the suit property bearing no.6178-6180, Gali Shiv Mandir, Fatehpuri, Delhi – 110006. The trial court further held that plaintiff (respondent herein) would have no right, title or interest in the first floor of the suit property and the rest of the floor of this property shall fall to the share of the plaintiff (respondent herein). Aggrieved by the aforesaid judgment, present appeal was filed.
5. The prime contention of learned counsel for the appellant before this court was that he is not getting along well with his sons, in fact he has disowned his sons and he wants to live in peace and, thus,

he should be given possession and ownership of the second floor of the suit property where he is already residing having no concern with his sons, who have illegally occupied the first floor of the suit property. Various options were suggested by counsel for the parties, however, on 24.9.2010 an offer was made by the respondent that in case appellant pays him Rs.40.00 lakhs, he would hand over 80% i.e. the balance in the property to the appellant. The offer was recorded in the order sheet. Parties were directed to append their signatures on the order sheet in token of their acceptance. Although the appellant signed the order sheet, the respondent did not sign the order sheet. It is submitted by counsel for the respondent that soon after passing of the order respondent realized that he had accepted an offer, which was far less than the market price and he had accepted the offer on the spur of the moment without really applying his mind. As per the terms detailed in the order dated 24.9.2010, the appellant arranged a sum of Rs.40.00 lakhs but the respondent refused to accept the same. As directed by this Court, Rs.40.00 lakhs was deposited by the appellant with the Registrar General of this Court and the same is kept in a fixed deposit to earn interest. In these circumstances respondent seeks recall of the order dated 24.9.2010.

6. Learned counsel for the appellant submits that the order dated 24.9.2010 cannot be reviewed as the appellant had taken Rs.40.00 lakhs on loan from a third party and certain rights would flow in favour of the third party.
7. Mr. Lalit Gupta, learned counsel for the respondent, however, submits that respondent would be put to great hardship and since the respondent had consented to the offer without any application of mind which fact he fairly concedes, no mala fides can be attributed towards him and to meet the ends of justice respondent is willing for any amicable solution and is willing to agree even to the preliminary request of the appellant that he should be granted exclusive rights of the entire second floor where he is already residing. Counsel for the respondent further submits that respondent is willing to permit the appellant to continue to reside on the second floor of the suit property and also agrees that original decree and judgment passed by the trial court on 31.5.2010 be modified holding that the share of the appellant would be transferred into the entire second floor of the suit property.
8. Heard counsel for the parties and also perused the application. Aggrieved by the judgment and decree passed by the learned trial court, the appellant had preferred the present appeal. At the time of hearing on 24.9.2010, the appellant had made an offer to the

respondent that he was willing to buy the 80% share of the respondent for a sum of Rs.40.00 lakhs. Admittedly, the respondent accepted the offer. It has been submitted by learned counsel for the respondent/review applicant that respondent had taken a decision on the spur of the moment and soon after accepting the offer he realized that he had made a mistake as the value of the property was much above Rs.40.00 lakhs and the respondent did not sign the order sheet and moved the present application for review of the order. Learned counsel for the appellant has opposed this review application primarily on the ground that appellant has taken a loan of Rs.40.00 lakhs from a third party and some rights have been created in favour of the third party. It is not in dispute that respondent at the earliest opportunity available withdrew the acceptance, which was made in Court, a practice which is not to be encouraged. The appellant at the initial stage of this matter had prayed that he be permitted to occupy the second floor of the suit premises where he is already residing. Since this was the initial prayer and request of the appellant, the appellant cannot have any objection to the same except the counsel submits that he cannot concede to this in view of the change in circumstances, as the appellant has already taken a loan of Rs.40.00 lakhs from a third party and the third party has also filed an application, being CM No.7241/2011, in this Court. Any arrangement between the

appellant and the third party can really not bind this Court and the Court is well within its right to review an order for justifiable reasons. At the time of deposit of the amount to avoid any loss of interest this Court had directed the Registrar General of this Court to keep the amount in a fixed deposit to be renewed periodically till further orders of this Court. At the first opportunity available, the respondent brought it to the notice of the Court that he did accept the offer on the spur of the moment and he sought leave to withdraw from the statement given in Court. Parties are brothers and they belong to the weaker section of the society and in case this property is lost the respondent would never be in a position to have a roof over his head. The appellant, who is present in Court today, is not averse to the idea of his being permitted to stay on the second floor. The appellant had already at the initial hearing of the matter in fact canvassed that he should be permitted to stay on the second floor and in fact he had made an offer that in case he is allowed to stay on the second floor he would not claim any share in the suit property as he has extremely strained relationship with his own sons. Unfortunately, at that point of time, respondent was not agreeable.

9. Be that as it may, I am of the view that since the order sheet was not signed by the respondent on 24.9.2010 when the order was passed, the respondent did not accept any money from the

appellant and thereafter the respondent filed present application for review of the order dated 24.9.2010 and the third party is not present either to press the application filed by them or to agitate their claim, it would be open to the appellant to return the money to the third party with interest. The order dated 24.9.2010 is set aside and the judgment and decree passed by Additional District Judge, Delhi, on 31.5.2010 is modified to the extent that appellant would be entitled to exclusive right over the second floor of the suit property and the remaining property shall fall exclusively to the share of the respondent. It would also be open for the respondent to execute the decree and take vacant peaceful possession of the property falling to his share from the occupants to which the appellant will have no objection. Appellant would be entitled to seek refund of Rs.40.00 lakhs deposited with the Registrar General of this Court in a fixed deposit together with interest accrued thereon without any further notice to the respondent. Application stands disposed of.

I.A.NOS.23230/2010 (Direction), 7241/2011 (Impleadment)

10. Applications stand dismissed in view of the order passed above.

SEPTEMBER 22, 2011
msr

G.S.SISTANI,J