

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

+ **RFA No.20/2011**

% **18th March, 2011**

SMT. KANTA RANI & ANOTHER Appellants
Through: Mr. Roop Chand, Advocate.

VERSUS

SMT. SUSHMA ARORA & OTHERS Respondents
Through:

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. Trial Court record has been received. I have heard the learned counsel for the appellants and perused the trial Court record.
2. The challenge by means of this Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment and decree dated 6.10.2010 whereby the suit of the plaintiff/respondent No.1 was decreed by passing a preliminary decree of partition with respect to the share of the plaintiff in the suit properties being D-36, Moti Nagar, New Delhi and 18/6, Moti Nagar, New Delhi.

3. The facts of the case are that the respondent No.1 filed a suit for declaration, partition, possession and permanent injunction with respect to the aforesaid two suit properties. It was contended that the properties were purchased and owned by the father Sh. Om Prakash Budhiraja and on his death in 1990, properties devolved upon his children, who are the plaintiff and defendants in the suit. Accordingly, the relief of partition etc. was prayed.

4. The appellants/defendant Nos.2 and 3 contested the case and it was pleaded that with respect to property No.D-36, Moti Nagar, New Delhi, the deceased had left behind the Will dated 4.2.1981 as per which the defendant No.1/respondent No.2 was the sole owner of the property. So far as the property bearing No.18/6, Moti Nagar, New Delhi was concerned, it was the case of the defendants that the property was not purchased by the father Sh. Om Prakash Budhiraja but the same was purchased by defendant No.1/respondent No.2 and his brother.

5. After pleadings were complete, the trial Court, framed the following issues:-

“1.Whether the property No.D-36, Moti Nagar, New Delhi was bequeathed to defendant no.1 by way of Will of Sh. Om Prakash?
OPD-1

2. Whether the premises no.18/6, Moti Nagar, New Delhi was owned by the deceased Sh. Om Prakash? OPP

3. Whether the suit has been properly valued for the purpose of court fees and jurisdiction? OPP

4. Whether the plaintiff is entitled to any share in either or both of the suit properties? If so, to what extent? OPP

5. Whether the plaintiff is entitled to the relief of declaration and partition as sought? OPP

6. Whether the plaintiff is entitled to relief of Injunction as sought? OPP

7. Relief.”

6. With regard to issue No.1 pertaining to property No.D-36, Moti Nagar, New Delhi, the trial Court held the same against the appellants/defendants inasmuch the Will dated 4.2.1981 was not proved. On the record, only a photocopy of the Will was filed and even that photocopy was not proved in accordance with law. In fact, so far as the Will is concerned, it is necessary to file on record and prove the original of the same inasmuch as one of the ways for revoking the Will is by tearing the original Will. I do not find any illegality or perversity in the impugned judgment and decree which has therefore held issue No.1 against the appellants as the original Will dated 4.2.1981 was neither filed nor proved. No argument could be raised by the counsel for the appellants except contending that he had moved an application for summoning of the records of the Registrar, however, this argument is without substance because even a registered Will has to be proved in accordance with law either by summoning the attesting witness(s) or by any other method, and by filing of the original Will, and which admittedly was not done. The findings with regard to issue No.1 are therefore upheld.

7. So far as the property No.18/6, Moti Nagar, New Delhi is concerned, trial Court has dealt with the same in issue No.2. Under this issue, the trial Court has referred to the fact that an order was passed on 29.8.2007 asking the defendants to produce the title deeds of the property. The title deeds of the property were however not filed in spite of repeated opportunities granted and costs imposed. Accordingly, the trial Court drew a presumption against the defendants/appellants that the property No.18/6, Moti Nagar, New Delhi would not be in the name of respondent No.2/defendant No.1 and his brother because if that was so the title document would have been filed.

8. The relevant findings with regard to issue Nos.1 and 2 are contained in paras 13 to 17 and which read as under:-

“13. Issue No.1.

Whether the property No.D-36, Moti Nagar, New Delhi was bequeathed to defendant no.1 by way of Will of Sh. Om Prakash? OPD-1

The onus to prove this issue was upon defendant no.1. DW1 who is son of defendant no.1, stated in para 6 of Ex.DW1/A i.e. evidence of affidavit that property bearing No.D-36, Moti Nagar, New Delhi was already given by Late Sh. Om Prakash to defendant no.1 by executing a registered Will. However, the said registered Will has not brought on the record or proved in accordance with law. On the record, there is a photocopy of Will dated 04.02.1981. However, neither the defendant nor any attesting witness has appeared as witness to prove the Will. Even the original Will has also not been filed before the Court. Thus, defendant no.1 is not able to discharge the onus to prove this issue and accordingly this issue is decided against defendant no.1.

14. Issue No.2.

Whether the premises no.18/6, Moti Nagar, New Delhi was owned by the deceased Sh. Om Prakash? OPP

The onus to prove this issue was upon the plaintiff. Plaintiff in her evidence by way of Ex.PW1/A stated in Para 1 that both the suit properties including property bearing No.18/6, Moti Nagar, New Delhi and D-36, Moti Nagar, New Delhi-15 were purchased by her father out of his own earnings and funds. During cross-examination, it is stated by PW1 that his property was allotted to her father after the partition by the Government. A suggestion was given by counsel for the defendants that defendant no.1 and Late Sh. Jeet Kumar had purchased this property. This suggestion is denied by the plaintiff.

15. My Ld. Predecessor by order dated 29.08.2007 has observed as:-

".....In the written statements, defendants have pleaded that premises no.18/6 had not been purchased by the deceased. As per defendants, premises no.18/6 had been purchased by defendant no.1 and his brother. So far as premises no.D-36 is concerned, as per the defendants the same had been bequeathed by the deceased in favour of defendant no.1. The specific pleadings in para 6 of the plaint to the effect that original title deeds of both the premises are in possession of defendants no.1-3 have not been denied in the written statements. Even today, it is not denied that the original title deeds are in possession of the defendants no.1-3. I have also perused annexure A to the Written Statement on the basis of which defendants alleged that the plaintiff has been extorting money.

Merely, because burden of proof of some of issues is on plaintiff does not mean that the other side which is in possession of the best possible evidence has a right to refuse to produce the documents. Failure to produce the best possible evidence, in whichever party's possession the same is, attracts adverse inference against that party. In view of the defence taken in the written statements, I am of the opinion that the suit cannot be fairly disposed of without perusing the original title deeds of both the premises which constitute the suit property. Under these circumstances, the application dated 18.04.2007 of plaintiff is allowed and defendants no.1-3 are directed to place on record the original title deeds of both the premises mentioned above....."

16. Various dates were obtained by the defendants to produce title deeds of the property. On 21.11.2007, my Ld. Predecessor granted the opportunity to the defendant to comply with the directions of order dated 29.08.2007. On 19.03.2008, my Ld. Predecessor again observed that the said order was not complied and cost of Rs.1000/- was imposed upon the defendants. On 29.05.2008, it was submitted by Ld. Counsel for the defendant that whatever documents they had filed on the record, were available on record. Thus, despite various opportunities, defendants did not comply with the order to produce title deeds for this property.

Section 106 Evidence Act says:

“Burden of proving fact especially within knowledge.-
When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

17. If this document was executed, this document must be in possession of the defendant. It is the defendant who have alleged in their written statements about the execution of this document. Despite opportunities, defendants did not file this document before this court. In these circumstances, the court has to draw adverse inference against the defendant to the effect that defendants are telling a lie regarding the ownership of this property as pleaded by the defendants in their Written Statements. In such circumstances, the plaintiff is able to discharge the onus to prove this issue and this Issue is decided in favour of the plaintiff.”

9. This Court is entitled to interfere with the findings and conclusions of the trial Court only if the same are illegal or perverse or cause grave prejudice or injustice. I do not find any of such ingredients exist so as to enable this Court to interfere in appeal with the impugned judgment and decree. Merely because two views are possible, this Court is not entitled to interfere with one plausible view as taken by the trial Court.

10. The appeal accordingly being devoid of merits, is therefore dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

C.M. No.501/2011 in RFA No.20/2011

Since the main appeal is dismissed, no orders are required to be passed in this application which is disposed of as such.

MARCH 18, 2011
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VALMIKI J. MEHTA, J.