

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **R.S.A. No.19 of 2010 & C.M. No.2146 of 2010 (for stay)**

Decided on : 1st March, 2013

KRISHAN SHARMA Appellant

Through: Appellant in person.

Versus

RAJ RANI BHARDWAJ & ORS Respondents

Through: Mr. V.B. Andley, Senior Advocate with
Mr. Priyank Sharma & Mr. K.C. Baliar
Singh, Advocates for R-1 & 2.
Mr. Rajan Tyagi, Advocate for R-3.
Mr. Balvinder Ralhan, Advocate for
R-4 (a) & (b).
Ms. Kusum Lata Sharma & Mr. Karan
Sharma, Advocates for R-9.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

1. This is a regular second appeal under Section 100 CPC against the judgment/decree dated 12.10.2009 passed by the learned Additional District Judge in R.C.A. No.19/2003 dismissing the first appeal of the appellant.

2. Briefly stated the facts of the case are that the plaintiffs/respondent Nos.1 and 2 herein had filed a suit bearing No.399/2001 for declaration,

injunction, partition and possession in respect of House No.118, Gali No.6, Kishan Nagar, Safdarjung Enclave, New Delhi, which was decided by the Civil Judge in favour of the plaintiffs/respondent Nos.1 and 2 on 11.3.2003.

3. The case setup in the plaint was that the aforesaid property belonged to Gopal Devi and her husband, Baboo Ram Sharma (parents of the parties). On account of death of Gopal Devi and Baboo Ram, it is stated that the four sons and two daughters, who were left behind by them, were legally entitled to 1/6th share each in the said property. The respondent Nos.1 and 2 (herein) are the two daughters while as the present appellant Krishan Sharma is the grandson of Gopal Devi. So far as the other sons and daughters are concerned, they are respondents in the present appeal and are represented by their legal heirs. The appellant, who was the defendant No.7 in the suit, filed his written statement admitting that the suit property belonged to Gopal Devi and that she was survived by four sons and two daughters; however, he resisted the prayer of the respondent Nos.1 and 2 for partition of the suit property on the ground that the suit property was the only dwelling unit available to the appellant and the other respondents and, therefore, by virtue of Section 23

of the Hindu Succession Act, the respondent Nos.1 and 2, being the daughters, could not claim partition and would only have a right of residence. The learned trial court framed following four issues :-

- “1. Whether the plaintiff is entitled for the decree of declaration? OPP*
- 2. Whether the plaintiff is entitled for the partition and possession, as claimed? OPP*
- 3. Whether the property is wholly or partly occupied by the tenants at that time of institution of the suit? OPD*
- 4. Relief.”*

4. The learned Civil Judge decided all the issues against the Defendant No.7/appellant and in favour of the Plaintiffs/Respondents 1 and 2 and returned a finding that the property was partly occupied by the tenants.

5. The trial court, accordingly, passed a preliminary decree on 11.3.2003 in favour of Plaintiffs/respondent Nos.1 and 2 and the remaining co-sharers in the property as the legal heirs of Gopal Devi.

6. Feeling aggrieved by the said order of passing preliminary decree dated 11.3.2003 the appellant (herein) along with respondent Nos.10 and 11 (herein) preferred an appeal bearing No.19/2003 titled Sanjeev Sharma

& Ors. vs. Raj Rani Bhardwaj & Ors. The learned Additional District Judge upheld the judgment and the preliminary decree passed by the trial court holding that the plaintiffs/respondent Nos.1 and 2 were entitled to 1/6th share each in the suit property and directed appointment of a Local Commissioner for the purpose of exploring the modalities of partition by metes and bounds.

7. Still not feeling satisfied, the appellant has preferred the present regular second appeal. The appeal though filed in the year 2010, considerable time has been taken by the appellant to effect service on the respondents on account of death of some of the co-sharers in the property. Be that as it may. After service of all the respondents, on 5.7.2012, the matter was adjourned to 18.7.2012 for the purpose of preliminary hearing with regard to substantial question of law involved in the matter; however, no submissions have been made and the matter has been invariably adjourned at request of either the counsel for the appellant or the appellant himself.

8. Today also, the matter was passed over once and it has been taken up only at 3:45 p.m. The learned counsel for the appellant has still not

appeared and is stated to be on his legs in another court, a request for adjournment of three days is made.

9. I have considered the submissions made by the appellant, who is present in person; however, I find myself unable to agree to the request for grant of any further date.

10. Mr. Andley, the learned senior counsel appearing for respondent Nos.1 and 2 has been heard. So far as counsel representing rest of the respondents are concerned, they have adopted the submissions made by Mr. Andley, the learned senior counsel. The main contention urged by the learned senior counsel is that neither the factum of death of Gopal Devi is disputed nor the number of brothers and sisters is in dispute, therefore, in the instant case, an admission in this regard has been made by the appellant/defendant No.7 in the written statement. As a necessary corollary, the respondent Nos.1 and 2 (herein), being the daughters, are entitled to 1/6th share each. It was contended that the main contention of the appellant for denial of this 1/6th share to the respondent Nos.1 and 2 was that the house in question was the only dwelling unit available to the appellant and his brothers and according to Section 23 of the Hindu Succession Act, as this was the only dwelling unit available at the time

when the suit was filed, a married daughter would only have a right of residence in the property of her parents; she could not claim a right of partition if the house was being used as a dwelling unit. It was further urged since in the instant case the substantial portion of the property was under tenancy, therefore, this embargo of the daughter not having a right to claim partition was not applicable in such a contingency. Reliance in this regard was placed on the following judgments :-

1. *Narashimaha Murthy vs. Smt. Susheelabai & Ors.*; AIR 1996 SC 1826.
2. *Smt. Usha Majumdar & Ors. vs. Smt. Smriti Basu*; AIR 1988 Calcutta 115.

11. I have gone through the above two judgments as well as the provisions of law. I fully agree with the contention made by the learned senior counsel that the embargo of the daughter not being able to claim partition would be applicable only if the house in question was being used as a dwelling unit by the brothers for their residence and not if any portion of the house or substantial portion of the house has been let out to the tenants, while as in the instant case, this was not in dispute that the substantial portion of the suit property was under tenancy of third parties.

12. Apart from this, by the Act of 39 of 2005, Section 23 of the Hindu Succession Act has been deleted with effect from 9.9.2005. The necessary effect of this deletion is that any pending matter which involves a question which was earlier covered by Section 23 of the Hindu Succession Act would also not be taken as an embargo on the right of the daughter to claim partition in respect of the dwelling unit, meaning thereby that after the amendment, a daughter has been put at par with the brother to claim partition in respect of a property inherited by the siblings of a person.

13. Therefore, I feel that there was no infirmity in both, the judgment and the decree dated 11.3.2003 passed by the trial court as well as the order dated 12.10.2009 passed by the first appellate court.

14. The appeal shows that the learned counsel for the appellant, though has chosen not to appear today despite second call, he has formulated two substantial questions of law which are as under :-

“a) Whether the part let out by the owner of the only dwelling house during his/her life time and his/her legal heirs acquiring the only dwelling house in partly rented out status put with no further letting out of any portion by legal heirs after death of owner and getting even that portion let out by the owner also vacated after the death of owner, would bring the only

dwelling house out of purview of Section 23 of Hindu Succession Act?

b) Whether the preliminary decree passed by the court having no pecuniary jurisdiction right from inception is sustainable in the eyes of law? ”

15. Both these questions are actually answered by the trial court and the appellate court against the appellant. These are questions of fact which have already been adjudicated and in my considered opinion, they do not involve any substantial question of law any further.

16. For the reasons mentioned above, I feel since no substantial question of law is involved in the matter, therefore, the appeal deserves to be dismissed and accordingly, the same is dismissed.

17. The appellant present in court has stated that the matter is listed before the court of Ms. Snigdha Sarvaria on 6th April, 2013 at Tis Hazari Courts.

18. In view of the statement made by the appellant, let the parties appear before the said court on 6th April, 2013.

V.K. SHALI, J.

MARCH 01, 2013
‘AA’