

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

Date of decision: 25th July, 2013

+ **RFA 441/2004**

DR.MANMOHAN SINGH GROVER **Appellant**

Through: Mr. Sunil Malhotra with Ms. Sonali
Malhotra, Advocates.

Versus

MOHINDER SINGH GROVER **Respondent**

Through: Mr. S.C. Singhal, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUSTICE RAJIV SAHAI ENDLAW, J.

1. This first appeal is preferred against the judgment and decree dated 31st March, 2004 of the learned Additional District Judge (ADJ) in Suit No.306/2003 filed by the sole respondent to this appeal. Though the said suit was filed, besides against the appellant, against Smt. Maya Devi and Smt. Jaswant Kaur also but it is stated that Smt. Maya Devi and Smt. Jaswant Kaur have since died and have as such been deleted and now the *lis* is between the appellant and the respondent only.

2. The respondent/plaintiff had filed the said suit for recovery of possession of the rear portion of the first floor of house No.25/22, Tilak Nagar, New Delhi. It was the case of the respondent/plaintiff that the said house comprising of ground floor, first floor and second floor belonged to the appellant/defendant and the respondent/plaintiff who are brothers as well as their another brother Sh. S. Avtar Singh Grover (who was not a party to

the suit and is not a party to the appeal also); that there was an oral partition between the appellant/defendant, respondent/plaintiff and the said Sh. S. Avtar Singh Grover in which the rear portion of the first floor for possession of which the suit was filed, had fallen to the share of the respondent/plaintiff; that though the respondent/plaintiff in pursuance to the said partition was in possession of the said rear portion of the first floor but had temporarily allowed the use of the same to the appellant/defendant as a licensee and the appellant/defendant had inspite of termination of his license refused to vacate the same.

3. It may be mentioned at this stage that Smt. Maya Devi and Smt. Jaswant Kaur supra against whom also the suit was filed were then also residing in the said rear portion of the first floor along with the appellant/defendant but on their demise, they were deleted as aforesaid.

4. The appellant/defendant filed a written statement denying the oral partition pleaded by the respondent/plaintiff and claiming himself to be in possession of the said rear portion of the first floor as one of the three co-owners of the said house.

5. On the pleadings of the parties, the following issues were framed on 17th May, 1996:

“1. Whether the Plaintiff is entitled to the possession of the property No.25/22, Tilak Nagar, New Delhi?

2. Whether the first defendant is in occupation of the portion shown yellow in the plan annexed to the plaint, in the capacity as licensee?

3. Whether the suit is bad for non-joinder of S. Avtar Singh as a joint owner?

4. Whether the first defendant is liable to pay damages at

the rate of Rs.100/- per day w.e.f. 1.3.1993.

5. *Relief.”*

and the following issues were framed on 11th July, 1997 and 6th September, 1999:

“IA. Whether the Plaintiff is entitled to possession of the portion shown yellow in the plan of the Property 25/22, Tilak Nagar, New Delhi?

IB. Whether the property 25/22, Tilak Nagar, New Delhi has been partitioned?

2. *Whether the defendant no.1 is in occupation of the portion shown yellow in the plaint as licensee of the plaintiff and the same has been terminated?*

3. *Whether suit is bad for non-joinder of S. Avtar Singh?*

Subsequent to that the following additional issue was framed on 6.9.99:

i. Whether the colored/Black & White Sketches/Line diagrams were prepared and signed by the parties and delivered to the parties as stated in para no.2-A of the Plaint? OPP”

6. The learned ADJ in the impugned judgment has upheld the claim of the respondent/plaintiff of oral partition and of having allowed the appellant/defendant use of the said rear portion of the first floor as a licensee and accordingly passed a decree in favour of the respondent/plaintiff and against the appellant/defendant for recovery of possession thereof. Arrears of mesne profits/damages for use and occupation in the sum of Rs.29,000/- and mesne profits/damages for use and occupation @ Rs.100/- per day (i.e. Rs.3000/- per month) with effect from the date of institution of the suit and till recovery of possession were also awarded.

7. Notice of this appeal was issued and vide order dated 16th September,

2004, subject to the appellant/defendant depositing 50% of the decretal amount, the operation of the impugned judgment and decree stayed. Vide subsequent order dated 9th October, 2006, the appellant/defendant was directed to deposit a lump-sum amount of Rs.1 lakh towards mesne profits from the date of institution of the suit.

8. The respondent/plaintiff is informed to have withdrawn the amounts so deposited by furnishing a Bank Guarantee.

9. When the hearing of the appeal commenced today, it was informed that Sh. S. Avtar Singh Grover, brother of the parties hereto, has instituted CS(OS) No.1317/2008 in this Court for partition of the said house, impleading the appellant and the respondent herein as defendants thereto. On enquiry, it is informed that Sh. S. Avtar Singh Grover also does not admit the oral partition pleaded by the respondent/plaintiff and accepted by the learned ADJ. Thus, while the case of Sh. S. Avtar Singh Grover and the appellant/defendant is that the property has not been partitioned as yet, the case of the respondent/plaintiff is that the property was orally partitioned and which the respondent/plaintiff has been successful in proving in the suit from which this appeal arises. It is further informed that issues have been framed in CS(OS) No.1317/2008 on 17th July, 2013 and evidence has been ordered to be recorded before a Court Commissioner within a period of three months. On further enquiry, it is told that the Advocate for the appellant/defendant and the Advocate for the said Sh. S. Avtar Singh Grover in the said suit are different.

10. The material question for adjudication in CS(OS) No.1317/2008 in which the appellant/defendant and the respondent/plaintiff are parties,

would also be whether the property had been orally partitioned as is claimed by the respondent/plaintiff. In this appeal also, challenge is *inter alia* to the finding of the learned ADJ of the house having been orally partitioned. It has as such been enquired from the counsel for the respondent/plaintiff as to how the same question can be subject matter of adjudication in this appeal as well as in CS(OS) No.1317/2008.

11. The counsel for the respondent/plaintiff contends that as far as the appellant/defendant and the respondent/plaintiff are concerned, there already exists finding of the learned ADJ of the said oral partition and the appeal be heard to test the validity of the said finding. It is further contended that the respondent/plaintiff is over 70 years of age and has been litigating for long and without any benefit whatsoever. It is contended that no future mesne profits also are being paid by the appellant/defendant.

12. In my opinion, there can be no final and conclusive finding on the plea of the respondent/plaintiff of oral partition without all the parties thereto and/or all the owners of the property being parties to a proceeding. Sh. S. Avtar Singh Grover who admittedly is/was also the owner of the house along with the appellant/defendant and the respondent/plaintiff and was also a party to such oral partition, was never a party to this proceeding. The finding in this proceeding of oral partition having been effected or otherwise would not bind Sh. S. Avtar Singh Grover and would thus not serve any purpose. This appeal is thus not an appropriate proceeding to render finding on the plea of respondent/plaintiff of oral partition specially when the suit aforesaid with all owners as parties thereto is pending consideration. The possibility of conflicting findings cannot be ruled out and

this Court would not proceed to render a finding which would not serve any purpose.

13. Faced therewith the counsel for the respondent/plaintiff has agreed that the outcome of this appeal be made dependant on the outcome of CS(OS) No.1317/2008 but has sought directions for expediting disposal of CS(OS) No.1317/2008. He has further requested that the mesne profits/damages for use and occupation decreed in favour of respondent/plaintiff be secured in the event of the respondent/plaintiff ultimately succeeding.

14. The counsel for the appellant/defendant is agreeable to the aforesaid course of action.

15. In these circumstances, the appellant/defendant present in Court through counsel has given the following undertaking to this Court:

(i) that in the event of the respondent/plaintiff succeeding in establishing in CS(OS) No.1317/2008 that there was an oral partition and in which oral partition the rear portion of the first floor aforesaid had fallen to the share of the respondent/plaintiff, the appellant/defendant shall within 30 days of the said judgment, hand over vacant, peaceful and physical possession of the said rear portion of the first floor to the respondent/plaintiff, subject of course to the right of appeal of the appellant/defendant thereagainst; and,

(ii) that unless there is a stay of operation of the said judgment in favour of the respondent/plaintiff herein in CS(OS) No.1317/2008 within the said period of 30 days therefrom, the possession shall be so handed over and this appeal shall then stand dismissed;

(iii) that the appellant/defendant in such case would also pay to the respondent/plaintiff the entire amount due towards arrears of mesne profits together with interest thereon @ 10% per annum with effect from 30th day of each month for which the mesne profits were/ are due and till the date of payment;

(iv) that if the said mesne profits with interest are not so paid within 30 days of judgment, the appellant/defendant shall be liable for consequences of breach of undertaking given to the Court and the respondent/payment shall also be entitled to recover the same from the appellant/defendant's share/portion of the said house and the appellant/defendant shall not alienate, encumber or part with possession of his share/portion of the house till the decree for mesne profits/damages for use and occupation against him is satisfied.

16. The appellant/defendant further has no objection to the respondent/plaintiff who is a defendant in CS(OS) No.1317/2008 making an application for amendment of issues therein qua claiming mesne profits/damages for use and occupation and if in the judgment in CS(OS) No.1317/2008 the respondent/plaintiff is held entitled to mesne profits for use and occupation with effect from the date of institution of that suit at a rate higher than Rs.3000/- per month, the appellant/defendant's share/portion of the said house shall also stand as security therefor.

17. The appellant/defendant further undertakes to co-operate in expeditious disposal of CS(OS) No.1317/2008 and not to delay recording of the evidence therein and to join the respondent/plaintiff in applying to the Court before which the said suit is pending for taking up the same on

priority.

18. Needless to state that if the respondent/plaintiff fails in his plea in CS(OS) No.1317/2008 then this appeal shall stand allowed and the judgment and decree impugned herein shall stand set aside, subject of course to the right of appeal of the respondent/plaintiff thereagainst.

19. The respondent/plaintiff also agrees to in that event, *restitute* the amount received under the interim orders in this appeal.

20. With the aforesaid directions, this appeal is disposed of, leaving the parties to bear their own costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

JULY 25, 2013

Bs..