

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

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Date of decision: 14th August, 2013

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R FA 197/2012 & CM No.7806/2012 (for stay)

LALIT MOHAN

..... Appellant

Through: Mr. Rakesh Kumar Garg, Adv.

Versus

RASHMI BANSAL & ORS

..... Respondents

Through: Mr. V. Shrivastav and Mr. Bharat
Deepak, Advocates.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and preliminary decree dated 7th January, 2012 (in Civil Suit No.57/2009/2006 of the Court of Additional District Judge (ADJ) Central-07, Tis Hazari Courts, Delhi) of partition of property No.65-66, Ram Nagar, Paharganj, Delhi, declaring the appellant/defendant and the three respondents/plaintiffs to be having 1/4th share each in the said property.

2. Notice of the appeal was issued but proceedings with respect to the final decree permitted to continue. The appeal was admitted for hearing on 5th August, 2013 when finding, that the controversy is in a narrow compass, the appeal posted for hearing for today and the Trial Court record requisitioned.

3. On first call passover was sought for the reason of the senior counsel engaged for the appellant being in some other Court. He is not available even now. The counsels for the respondents have been heard and the Trial

Court record perused.

4. The three respondents instituted the suit from which this appeal arises pleading (in the amended plaint), a) that Sh. Rajender Nath Gupta, father of the appellant/defendant and the respondents/plaintiffs was the owner of the said property; b) that he died on 3rd March, 2000, leaving the appellant/defendant as his son and the three respondents/plaintiffs as his daughters and Smt. Kanta Gupta as his widow; c) that the mother of the parties Smt. Kanta Gupta also died on 21st December, 2000; d) that thus the appellant/defendant and the three respondents/plaintiffs had a 1/4th share each in the said property; e) that the appellant/defendant has been residing for long at Singapore; f) that the appellant/defendant however claiming to be the sole owner of the said property under the Wills allegedly executed by the parents had agreed to sell the property and in collusion with the purchaser had attempted to forcibly dispossess the respondents/plaintiffs who were in possession of the said property and which attempted was thwarted. The respondents/plaintiffs thus, besides claiming the relief of partition also sought the relief of permanent injunction, restraining the appellant/defendant from selling, alienating or transferring or creating any third party interest in the said property and/or from dispossessing the respondents/plaintiffs therefrom and the relief of declaration that the Wills of the parents relied upon by the appellant / defendant were null and void and the consequential relief of cancellation of the said Wills.

5. The appellant/defendant contested the suit by filing a written statement *inter alia* on the ground that he was on the basis of registered Will dated 11th June, 1991 of the father Sh. Rajender Nath Gupta and the registered Will dated 11th August, 2000 of the mother Smt. Kanta Gupta, the

sole and absolute owner of the property and which he had agreed to sell to Sh. Yogender Garg.

6. The respondents/plaintiffs filed a replication to the written statement and on the pleadings of the parties, the following issues were framed on 24th July, 2006 and 15th December, 2009:

- “(1) Whether the suit of the plaintiffs is not maintainable as they were not entitled to file a suit for partition being female LRs?*
- (2) Whether Sh. Rajender Nath Gupta had bequeathed the suit property in favour of the defendant, if so, to what effect? OPD*
- (3) Whether the plaintiffs and the defendant have 1/4th share each in the suit property? OPP*
- (4) Whether suit of the plaintiffs is not maintainable for want of proper court fees? OPD*
- (5) Whether the defendant did not have any right to alienate or sell the suit property? OPP*
- (6) Whether the Wills dated 11.06.91 and 11.08.2000 are forged and fabricated documents? OPP*
- (7) Whether the plaintiffs are entitled for decree of declaration as prayed for? OPP*
- (8) Whether the plaintiffs are entitled for decree of permanent injunction as prayed for? OPP*
- (9) Whether the plaintiffs are entitled for decree of mandatory injunction as prayed for? OPP*
- (10) Relief.”*

7. The respondents/plaintiffs examined all three of themselves as witnesses. The appellant/defendant did not himself appear in the witness box and his attorney Sh. Yogender Garg was examined as sole witness on behalf of the appellant/defendant.

8. The learned ADJ has in the impugned judgment decided Issue No.(1) supra against the appellant/defendant holding, that the appellant/defendant had failed to prove that the suit property was being used as a dwelling house

and in any case Section 23 of the Hindu Succession Act, 1956 which created such bar was deleted with effect from 9th September, 2005 and the suit from which this appeal arises was instituted thereafter on 2nd January, 2006 and the said plea was thus in any case not available to the appellant/defendant.

9. The learned ADJ clubbed Issues No.(2) and (6) supra for decision and held the appellant/defendant to have not proved the Wills dated 11th June, 1991 and 11th August, 2000 of the parents on which the defense of the appellant/defendant was based. Accordingly, the said issues were decided against the appellant/defendant.

10. Similarly, the Issues No.(3), (4), (7) & (8) were also decided against the appellant/defendant. The appellant/defendant having failed to prove the Wills on the basis of which he was claiming himself to be the sole owner and in the absence of the Wills it being not disputed that the respondents/plaintiffs would also have a share, under Issue No.(5) it was held that the appellant/defendant did not have any right to sell the entire property.

11. Axiomatically, it was held that the appellant/defendant and the three respondents/plaintiffs have 1/4th share each in the property and the preliminary decree for partition was passed and the appellant/defendant restrained from selling, alienating or parting with the property and from dispossessing the respondents/plaintiffs from possession thereof; declaration was also made that the documents dated 11th June, 1991 and 11th August, 2000 purporting to be Wills of Sh. Rajender Nath Gupta and Smt. Kanta Gupta were null and void and the Sub-Registrar with whom the said documents were registered was directed to make an endorsement to the said effect in his records.

12. The counsel for the appellant/defendant who till now was waiting for the senior counsel has chosen to argue and the only contention made is that the burden of Issue No.(6) supra to prove that the Wills dated 11th June, 1991 and 11th August, 2000 were forged and fabricated was on the respondents/plaintiffs and which the respondents/plaintiffs, it is argued, have failed to discharge. Upon attention of the counsel for the appellant/defendant being drawn to Issue No.(2), onus whereof was on the appellant/defendant, he states that not proving the Wills and declaring the same to be forged and fabricated are two different things; he further urges that though the effect of the appellant/defendant not proving the Wills would be of the appellant/defendant and the three respondents/plaintiffs being entitled to 1/4th share each in the property but the Issue No.(6) qua forgery and fabrication ought not to have been decided in favour of the respondents/plaintiffs. Reliance in this regard is placed on para 14 of ***Rajasthan State Electricity Board Vs. Bajrang Lal Khetawat*** AIR 1987 Rajasthan 164 to contend that even though the appellant/defendant had failed to prove the Wills, the respondents/plaintiffs could not get benefit from the said lapse on the part of the appellant/defendant.

13. As the aforesaid discussion would show, the sole question to be adjudicated on merits (leaving apart the technicalities) was the existence of the Wills and since it is the appellant/defendant who had propounded the said Wills, the onus to prove the Wills was on the appellant/defendant and which admittedly the appellant/defendant has not discharged. As far as the contention of the counsel for the appellant/defendant of the same not leading to the inference of forgery and fabrication on the part of the appellant/defendant is concerned, there is no finding to the said effect in the

impugned judgment, though as a corollary of non-proving of Wills, the Issue No.(6) has been decided in favour of the respondents/plaintiffs. The apprehension thus of the appellant/defendant that the impugned judgment holds him guilty of the offences of forgery and fabrication, is misplaced. All that the judgment does is to say that the appellant/defendant is unsuccessful in proving the Wills on the basis of which he was claiming the sole ownership of the property; on the said finding alone, the relief of declaration and cancellation has been granted, and to which there is no challenge.

14. No other argument has been urged.

15. The appeal, therefore, fails and is dismissed, leaving the parties to bear their own costs. Decree sheet be drawn up.

16. The Trial Court record be returned immediately as the same may be required for preparation of the final decree.

RAJIV SAHAI ENDLAW, J.

AUGUST 14, 2013

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