

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

+ RFA(OS) 80/2013

KULBHUSHAN DANIA Appellant
Through: Mr. H.S. Sharma, Advocate.

versus

ASHOK KUMAR DANIA & ANR Respondents
Through: None.

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL
HON'BLE MS. JUSTICE PRATIBHA RANI

ORDER (ORAL)

: REVA KHETRAPAL, J.

1. This appeal is directed against the judgment and decree dated 16th April, 2013 passed by a learned Single Judge of this Court dismissing the suit of the appellant for partition, rendition of accounts, possession by way of separate share and permanent injunction against the Respondent No.1 and his late father Shri Shyam Sunder Dania, who was alive at the time of the filing of the suit in the year 2008.

2. The aforesaid suit was filed in respect of the property bearing Khasra No.445, House No.7, Dayanand Block, Shakarpur Extension, Delhi-110092 and in respect of tenanted business premises bearing Shop No.R-16, Main Market Shakarpur Extension, Delhi-110092,

running under the name and style of M/s. Dania Photo Service and Shop No.F-14, Vijay Block, Vikas Marg, Shakarpur Extension, Delhi-110092 in the name and style of M/s. Dania Photographers.

3. The facts in a nutshell are that the father of the Appellant, namely, Shri Shyam Sunder Dania had acquired a plot of approximately 200 sq. yds. in the year 1967. He constructed a small room therein in the year 1969 and thereafter the entire family shifted from the tenanted premises in which they were residing to the said house on 30th May, 1969. The Plaintiff's case is predicated on the fact that though the said plot was purchased by the plaintiff's father, Shri Shyam Sunder Dania, but construction was raised thereon from the money which included money earned by the Appellant as well as savings from the contribution of the Appellant. The Appellant asserts that while still a teenager, he was helping his father in running the business of photography from the two shops, details whereof have been set out hereinabove. It is further asserted that in August, 1974 the Appellant joined a Government job but even thereafter continued to manage the affairs of the shops with the help of attendants and his father.

4. Summons of the suit were duly served on the Respondents as well as Shri Shyam Sunder Dania, father of the parties. The Respondents, however, chose not to contest the case and were accordingly proceeded *ex parte* in default of appearance.

5. Shri Shyam Sunder Dania, the father of the parties died during the pendency of the suit.

6. We find from the record that *ex parte* evidence was adduced by the Appellant by examining himself as PW1 and by producing in the witness box three other witnesses. The learned Single Judge, however, while dealing with the suit though discussed the documentary evidence on record tendered by the Appellant (PW1), has nowhere in his judgment made reference to the remaining oral evidence adduced by the Appellant. The Appellant apart from examining himself had examined three other witnesses, one of whom was particularly significant, being PW2 Shri Ganesh Verma, proprietor of M/s. Rama Studio, Shakarpur Extension, who in his testimony categorically stated that he had worked with the Appellant from 1975 right upto 1990 during which period the Appellant was running two shops with his father and his brother (i.e. the Respondent No.1) in which he was carrying on photography business. The evaluation of the testimony of this witness in our opinion was crucial for arriving at the conclusion as to whether the Appellant had made contributions to the joint family funds as asserted by him in the plaint. We, however, find that there is not even a passing reference to the testimony of this witness in the judgment impugned before us. It has also been brought to our notice that the Respondent No.2 who has filed a probate case, being Test. Case No.27/2009, has deliberately abstained from appearing in the present suit as evidenced by order dated 9.4.2013 passed in Test. Case No.27/2009, wherein it is clearly recorded that the counsel for the Petitioner (Respondent No.2 herein) has instructions not to appear in the suit filed by the Appellant. We, therefore, think it appropriate to remand the matter to the learned

Single Judge and leave it to the learned Single Judge to draw his own inferences and conclusions from the material emerging on the record.

7. Resultantly, the file of Suit No.1117/2008 is remanded to the learned Single Judge for deciding the matter afresh after taking into account the testimony of all the witnesses and the available documents with the usual note of caution that nothing stated in this order shall have any bearing on the merits of the decision to be rendered by the learned Single Judge.

8. The matter will now be listed before the learned Single Judge on 16th September, 2013.

9. The appeal stands disposed of in the above terms.

**REVA KHETRAPAL
JUDGE**

**PRATIBHA RANI
JUDGE**

July 24, 2013
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