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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA 405/2001

22nd February, 2011

SH. HARPHOOL SINGH (Now deceased)
THROUGH LRS.

..... Appellant

Through: None.

VERSUS

SMT. DAROPATI & ORS.

..... Respondents

Through: None

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? Yes
3. Whether the judgment should be reported in the Digest? Yes

VALMIKI J. MEHTA, J (ORAL)

1. This case is on the Regular Board of this Court since 3.1.2011. Today it is effective Item No. 10 on the Regular Board. It is 1.00 P.M. and no-one appears for the parties. I have, therefore, perused the record and am proceeding to dispose of the matter.

2. The facts of the case are that one Sh. Gainda Ram, was the owner of the subject property bearing municipal No. 16/700E, Bapa Nagar, Tank Road, Dhobi Wali Gali, New Delhi admeasuring 45 sq. yds. Sh. Gainda Ram died intestate leaving behind his two sons Sh. Beni Parshad and Sh. Malkhan Singh. Plaintiff in the suit was Sh. Beni Parshad and who claimed the relief of partition by metes and bounds of the subject property against the defendant Nos. 2 to 6 who were the widow and children of late Sh. Malkhan Singh i.e. the legal heirs of Sh. Malkhan Singh. The defendant No. 1/Sh. Harphool

Singh/appellant was the person who purchased the subject property from Smt. Savitri Devi widow of late Malkhan Singh/defendant No. 2 by means of documents being the Agreement to Sell, Power of Attorney and receipt dated 22.9.1987 and which documents were duly proved and exhibited in the trial court.

3. By the impugned judgment and the decree, the trial court has held Sh. Beni Parshad and Sh. Malkhan Singh as the two sons who were entitled to half shares in the subject property inasmuch as their father Sh. Gaimda Ram had died intestate. The property was therefore to be partitioned between the branches of Sh. Beni Parshad and Sh. Malkhan Singh.

4. By the impugned judgment and the decree the trial court has held that the documents dated 22.9.1987 being the Agreement to Sell (exhibited as Ex. DW-1/1), General Power of Attorney (exhibited as Ex. DW-2/1) and the receipt (exhibited as Ex. DW-2/2) did not confer ownership rights in the subject property because ownership right in the property can only be conferred by a sale deed under Section 54 of The Transfer of Property Act, 1882. I may note that defendant Nos. 2 to 6 who were legal heirs of Sh. Malkhan Singh, including Smt. Savitri Devi who sold the subject property to the defendant No.1/appellant by the documents dated 22.9.1987, remained *ex parte* in the trial court. Obviously, they preferred to remain *ex parte* as they had received consideration for sale of the property from the appellant/defendant No. 1 and, therefore, were in collusion with the plaintiff and subsequently legal heirs of Sh. Beni Pershad because if the suit was decreed they would again get a half share in the property.

5. In my opinion, the trial court has clearly fallen into an error in disregarding the documents dated 22.9.1987 as not conferring any ownership rights to the appellant/defendant No. 1. In Delhi, immovable properties are transferred by means of documents being Agreement to Sell, Power of Attorney, Receipt etc. and which mode of transfer of properties has now been accepted by the courts. A Division Bench of this Court while holding that the right, title and interest in an immovable property passes by means of such documentation is the decision in the case of **Asha M. Jain Vs. The Canara Bank (2001) 94 DLT 841 (DB)**. In this decision, the Division Bench has referred to earlier decisions of a Division Bench and Single Benches of this Court, and held that these documents confer right, title and interest in the property. The trial court has therefore committed a clear cut illegality and perversity in holding that the appellant/defendant No. 1 did not derive any ownership rights by virtue of documents dated 22.9.1987.

6. The next issue which arises is that can the documents dated 22.9.1987 transfer the subject property to the appellant/defendant No. 1, although Sh. Gainda Ram, the original owner of the property died intestate leaving behind two sons being Sh. Beni Pershad and Sh. Malkhan Singh, who would have therefore inherited the property in equal shares. The answer to this is found in Section 41 of The Transfer of Property Act, 1882 and which gives ownership rights to a transferee for consideration from any ostensible owner although the ostensible owner may not be the actual owner of the property. In the present case, the admitted case of the plaintiff/Beni Pershad was that the property was allowed to be mutated in the House Tax records in the

name of Sh. Malkhan Singh. No doubt, the mutation in Municipal record does not confer title, but since this was the case of devolution on the death of Sh. Gainda Ram and Sh. Malkhan Singh was one of the sons of late Gainda Ram, the property being found in the House Tax record as being shown in the name of Sh. Malkhan Singh for a sufficiently long period (with the consent of Beni Prasad) can be taken as Sh. Malkhan Singh being the ostensible owner of the property in terms of Section 41 of The Transfer of Property Act. Any other interpretation in the facts of the present case would lead to grave injustice to the appellant who has paid valuable consideration for the purchase of this property.

7. The trial court had also framed Issue No. 5 on the ground whether the suit for partition was maintainable without asking for possession in the circumstances of the present case i.e. whether at all such a suit was maintainable. Trial court has held that the suit for partition was maintainable because the relief of possession is implied in the suit for partition against the other co-sharers who were the joint owners. Once again, these findings and conclusions of the trial court are wholly illegal and perverse because the property was not in possession of the other joint owners/co-sharers being the branch/legal heirs of Sh. Malkhan Singh and the property was in fact in the possession of the appellant/defendant no.1 who was not related to the parties and not a legal heir of Gainda Ram. The trial court therefore was wholly unjustified in holding that the suit was maintainable. Once the plaintiff/legal heirs of Sh. Beni Pershad were out of possession, they were bound to sue for possession, and also pay appropriate court fee and

which having not been done, the suit is itself liable to be dismissed on this ground.

8. Considering the status of the parties of not being very affluent persons, and the fact that the property in question is only 45 sq. yds., and not situated in a posh locality, benefit of Section 41 of The Transfer of Property Act must clearly flow to the appellant because Sh. Beni Parshad by his consent allowed the property to be shown in the name of Sh. Malkhan Singh in the records of the Property Tax Department (being an indication of ostensible ownership) and after the death of Sh. Malkhan Singh it is his widow who received valuable consideration and sold the right, title and interest in the property to the appellant/defendant No. 1. As already stated, the legal heirs of Sh. Malkhan Singh after taking the consideration, remained *ex-parte* in the trial court.

9. In view of the above, I accept the appeal and set aside the impugned judgment. The suit for partition is therefore dismissed leaving the parties to bear their own costs. Decree sheet be prepared. Trial court record be sent back.

February 22, 2011
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VALMIKI J. MEHTA, J.