

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

% *Order Pronounced on: April 22, 2014*

+ **I.A. No.6287/2011 in CS(OS) No.944/2011**

KALLU BABU ROHATGI Plaintiff
Through Mr.N.S.Negi, Adv.

versus

RAJ KUMAR ROHATGI & ORS Defendants
Through Mr.S.D.Kushwaha, Adv. for D-1.
Mr.K.K.Rohatgi, Adv. for D-2 & 3.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The plaintiff, Sh.Kallu Babu Rohatgi, filed the suit for partition in respect of the property bearing No.A-164, Hari Nagar, Ghanta Ghar, Delhi (hereinafter referred to as the "Suit Property") against the six defendants, namely, Raj Kumar Rohatgi, Vinod Kumar Rohatgi, Parmod Kumar Rohatgi, Subhash Chand Rohatgi, Manju Rani Rohatgi and Rekha Rohatgi.
2. By order dated 25th April, 2011, injunction order was passed restraining all parties to the suit from creating any third party right, title, possession and construction in respect of the suit property. The matter was also referred to the Delhi High Court Mediation and Conciliation Centre for settlement by negotiation. However, it appeared that the settlement could not be arrived at between the parties and the parties were directed to file the written statement.

3. The case of the plaintiff is that late Sh.Phool Chand Rohatgi, father of the plaintiff and the defendants purchased the suit property from one Sh.Chakar Pani @ Nathu Ram S/o Sh. Manohar Lal, by virtue of the registered sale deed dated 9th January, 1961 for a total consideration of Rs.1400/-. Initially, it was a plot of land measuring 220 Sq. Yards which was got constructed up to one and a half storey building by the late father of the parties who died in Delhi on 29th January, 1983 leaving behind his widow Smt.Anupwati Rohatgi, five sons i.e. plaintiff and defendants No.1 to 4, and two daughters i.e. defendants No.5 & 6.

4. It is also stated that Smt.Anupwati Rohatgi also died in Delhi on 27th January, 2000 and as of today, there are five sons and two daughters of late Sh.Phool Chand Rohatgi. During her lifetime, Smt.Anupwati Rohatgi along with the plaintiff and the defendants entered into an agreement/family settlement dated 26th June, 1992. It is alleged by the plaintiff that late Sh.Phool Chand Rohatgi stated to have executed a Will dated 20th September, 1981 in respect of the suit property bequeathing the property in his wife Smt.Anupwati Rohatgi. By virtue of the same, Smt.Anupwati Rohatgi became absolute owner/successor of the suit property. In view thereof, she and all other legal heirs of Sh.Phool Chand Rohatgi had executed a family settlement and agreed that all the five sons and two daughters and the widow would have equal rights in the suit property and it was agreed that the property would be sold and proceeds thereof would be divided among all eight co-sharers of the suit property and the expenses which were to be incurred at the time of disposing of the suit property would be deducted from the sale proceeds before distribution amongst the co-sharers.

5. Till the time of execution of the family settlement, the plaintiff was not in possession of any part of the suit property. However, it was mutually agreed that the possession of half barsati with one room be given to the plaintiff and accordingly, the plaintiff was put into possession. It was also agreed that the respective parties, who are in possession of respective portions of the suit property, would vacate the same on receipt of their respective shares of the consideration.

6. The said agreement referred to the Will dated 20th September, 2011 in para 4 of the agreement. After the death of late Smt. Anupwati Rohtagi on 27th January, 2000, shares of all sons and daughters became 1/7th each as per the case of the plaintiff and defendants except defendants No.2 & 3.

7. It is alleged in the plaint that defendants No.4 & 5 are in possession of different parts of the suit property. The rest of the defendants are settled and residing at the places mentioned in the memo of parties. Since most of the defendants are well-settled and residing separate, parties have not been able to get together and to dispose of the suit property so that the proceeds can be distributed amongst the co-owners. The suit property is 220 Sq. Yards and there are seven co-owners (the mother already expired). The suit property cannot be divided by metes and bounds and only mode of possible partition is to sell the property to the highest bidder or a person who is ready to pay market value of the suit property.

8. Defendant No.1 has supported the claim of the plaintiff. Defendants No.4 to 6 have not filed any written statement. Defendants No.2 & 3 have filed separate written statement but taken the same plea. They have opposed the claim on the allegations that they have contributed for purchase and

construction of the suit property and agreement dated 26th June, 1992 has become barred by time.

9. The main case of the defendants No.2 and 3 is that the said agreement dated 26th June, 1992 is a contract between the parties therein to sell off the suit property belonging to the mother Smt. Anupwati and divide it equally if it could be sold for more than Rupees Ten Lac and also if it can be done within a period of four months. Therefore, this agreement falls under the category of 'contingent contract' wherein time was the essence of the contract. Though all the parties including the plaintiff had full freedom to act this contingent contract could not be executed at all for twenty years and therefore perished with afflux of time.

10. It is also alleged by defendants No.2 and 3 that the agreement could not be implemented within four months and the suit property was not sold. The suit property could not be sold at all for over 20 years and the agreement remained only on paper and therefore Smt. Anupwati wife of late Phul Chand Rohatgi did not relinquish her right in the suit property. Thus, the mother Anupwati wife of Phul Chand did not lose her ownership rights in the suit property and remained the owner during her life time.

11. It is submitted by them that presuming for sake for argument that the agreement dated 26th June, 1992 is a family agreement, however, it affects a division of property and creates new rights, title and interest in favour of the parties therein. The plaintiff was given immediate possession of a portion of the suit property exclusively and perpetually. The agreement is in writing and therefore it is compulsorily registerable as per the Registration Act. Cases of ***Roshan Singh vs. Zile Singh***, 1988 RLR (SC) 239, para 9 and ***Bankey Bihari vs. Surya Narain alias Munno***, (2004) 11 SCC 393 relied

upon. In the absence of registration as in the present case the consequences as per the Registration Act would follow and this agreement dated 26th June, 1992 cannot be received as evidence of any transaction affecting such property and is of no benefit to the plaintiff. The said agreement was obtained by coercion and undue influence and even otherwise a mere reading of the agreement shows that it was not final. All the parties were free to act on the agreement. The agreement was not acted upon since 1992 by any of the parties including the plaintiff who is an advocate and therefore, after the death of the mother Smt.Anupwati 27th January, 2000, it is the Will of the owner Smt.Anupwati which comes into full force and overrides the contingent agreement dated 26th June, 1992.

12. The plea taken by the defendants No.2 and 3 in their written statement that late Smt.Anupwati has executed a Will dated 15th January, 1986 bequeathing the property in favour of defendants No.2 and 3 is without any force as it is admitted by them that family agreement dated 26th June, 1992, which was executed after six and half years of execution of the alleged Will dated 15th January, 1986 herself has stated that said Will is null and void. The said defendants have admitted their signatures in the family settlement in Ex.P 6. Even the family settlement was not challenged by them for many years.

13. There is also no force in the submission that they were not aware about the Will of late Smt.Anupwati dated 15th January, 1986 and had they been aware they would have not signed the agreement. In para 18 and 19 of the facts mentioned in written statement of defendant No.2, the defendant No.2 has reproduced the clauses of agreement dated 26th June, 1992 at page 9 of the written statement “that if Smt.Anupwati Rohatgi has executed any

Will in favour of anyone, same shall be deemed as null and void after executing this agreement”. Defendant No.3 has also reproduced certain clauses of family agreement dated 26th June, 1992 in para 9 at pages 6 and 7 of his written statement and said clause is again reaffirmed by defendant No.3 at page 7 of the written statement.

14. Clause 9 of the agreement between all legal heirs of late Sh.Phool Chand Rohatgi reads as under:

“9. That this agreement is irrevocable.”

15. The submissions of defendants No.2 and 3 are also not tenable on the ground that the agreement became unenforceable by efflux of time and by virtue of Will dated 15th January, 1986, the defendants No.2 and 3 have succeeded the suit property. It is despite the fact that agreement dated 26th June, 1992 was executed by the testator of Will dated 15th January, 1986 and it was specifically mentioned at page 4 of the agreement dated 26th June, 1992 (clause 10) that “if Smt.Anupwati Rohatgi has executed any Will in favour of any one, the same shall be deemed as null and void after executing this agreement.”

16. The defence taken by defendants No.2 and 3 that except them no one was aware of alleged Will is a moonshine defence as wife of defendant No.2 is a doctor and they have replied notice dated 21st April, 1992 through reply dated 28th April, 1994 and when late Smt.Anupwati came to know about the Will, she directed that Will should be cancelled and on her instructions agreement dated 26th June, 1992 was executed.

17. Thus, the plea taken by defendants No.2 and 3 is totally false at the face of it. There is no legal or factual issue which needs trial in the matter.

Therefore, a preliminary decree of partition is passed in respect of suit property bearing No.A-164, Hari Nagar, New Delhi. Each party to the suit shall have 1/7th share in the suit property.

18. With regard to the actual physical partition of the suit property by metes and bounds, I appoint Ms.Meenakshi Sood, Advocate, (Mobile No.9999969923) as the Local Commissioner to suggest the mode of partition of the suit property. The Local Commissioner shall hear the submissions of the parties and shall also physically inspect the suit property. She shall be provided with relevant plans of the same by the parties who shall also cooperate with the Local Commissioner. The fee of the Local Commissioner is fixed at Rs.60,000/- at present apart from all other out of pocket expenses which shall be borne by the parties in proportion to their respective shares in the suit property.

19. The parties shall appear before the Local Commissioner on 9th May, 2014 at 3.30 p.m.

20. The Local Commissioner is expected to file her report by the next date.

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21. List the matter before Roster Bench on 2nd July, 2014 for framing of issues, subject to orders from Hon'ble the Judge In-charge (Original Side).

**(MANMOHAN SINGH)
JUDGE**

APRIL 22, 2014