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

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Date of Decision: 10.09.2015

% **RSA 84/2015 and C.M. No.3439/2015**

RAJBIR SINGH

..... Appellant

Through: Mr. Piyush Sharma & Mr. A.K.
Mishra, Advocates.

versus

MAHENDER SINGH & ORS

..... Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The present second appeal under Section 100 CPC is directed against the judgment and decree dated 08.12.2014 passed by the First Appellate Court, namely the ADJ-03 (South-West), Dwarka Courts Complex, New Delhi in RCA No. 31/2013 preferred by the appellant/ defendant. The said first appeal had been preferred by the appellant/ defendant to assail the judgment and decree passed by the learned Civil Judge-XIII (Central), Delhi in Suit No.1133/2009 titled *Sh. Mahender Singh Vs. Rajbir Singh*, whereby

the suit of the respondents/ plaintiffs had been decreed against the appellant/ defendant.

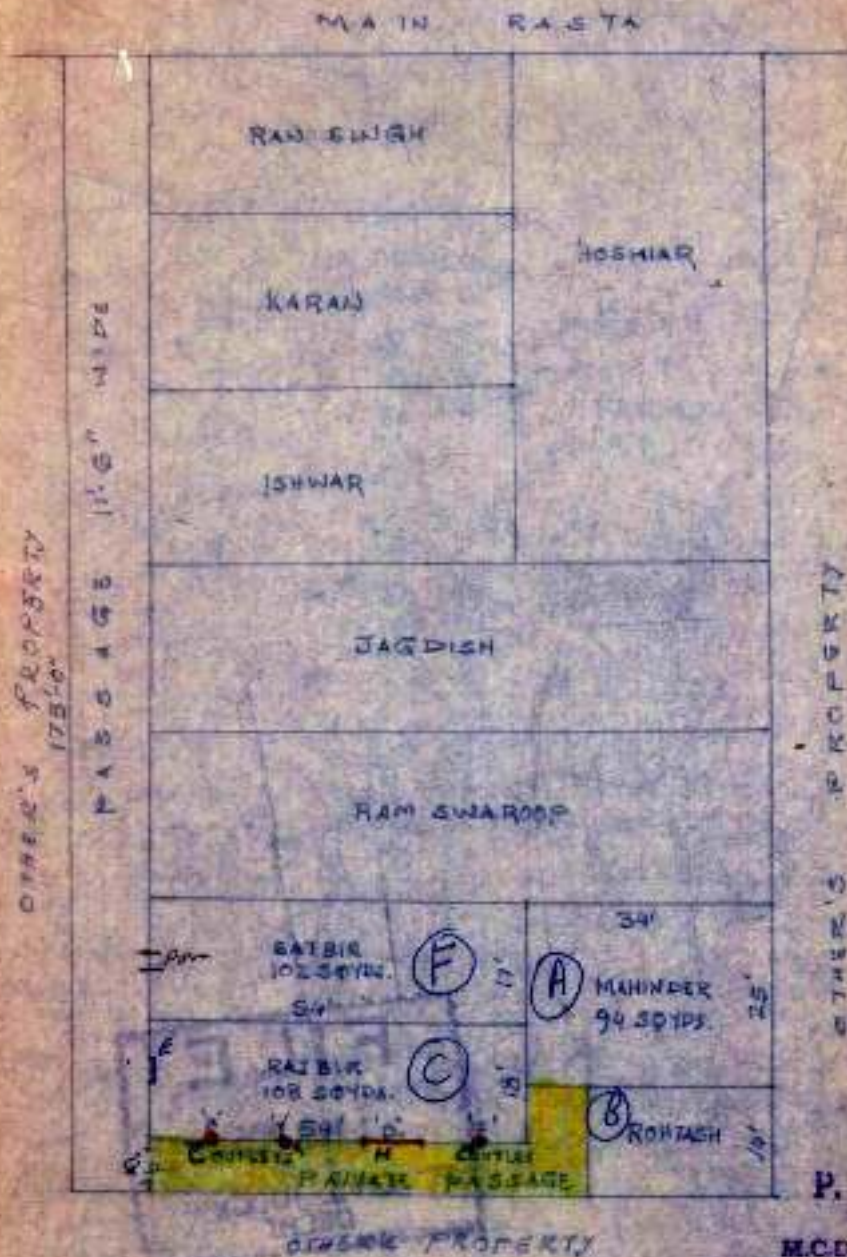
2. The respondents/ plaintiffs had filed the aforesaid suit to seek reliefs of permanent and mandatory injunction against the appellant/ defendant on the premise that plaintiff No.1 is the brother of the defendant, and plaintiff No.2 is the paternal uncle of the said two brothers. There is another brother of plaintiff No.1 and the defendant, namely Sh. Satbir Singh, who though not impleaded as a party to the suit as no cause of action had arisen against him, appeared as a witness in support of the plaintiff's case.

3. The case of the plaintiffs was that the plaintiff No.1 is the owner and in use and enjoyment of a residential house, and similarly, plaintiff No.2 was also the owner and in possession of a *Gher*, which were situated in the Lal Dora Abadi in village Jaffarpur Kalan, falling in Khasra No.495. The plaintiffs stated that the defendant is the owner of another portion of the property falling in the same Khasra, where he has built his residential house, and Sh. Satbir Singh, the third brother is similarly the owner and in possession of a residential house in the same area.

4. The plaintiffs filed along with plaint as Annexure-A the site plan, wherein the properties of plaintiff No.1, plaintiff No.2, the defendant and the said Sh. Satbir Singh – along with dimensions, were demarcated. The said Annexure-A was led in evidence by the plaintiffs as Ex. PW-1/1. To understand the controversy, the said site plan is being reproduced herein below:

Annex A

SITE PLAN OF PROPERTY COMPRISED IN KHOSRA NO 495 SITUATED
IN LAL DORA ABADI, OF VILL. JAFAR PUR KALAN, NEW DELHI.



Ext. P.W. 1/1
C.F. Delhi
20/2/06

[Signature]

P. P. VERMA
ARCHITECT

M.C.D. Licence No. 1485
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5. In the aforesaid plan, the portion marked 'A' belongs to plaintiff No.1; the portion marked 'B' belongs to plaintiff No.2; the portion marked 'C' belongs to the defendant; and the portion marked 'F' belongs to the third brother Sh. Satbir Singh.

6. The plaintiffs stated that the said portions had been allotted to the parties in a family partition and settlement. Under the family partition and settlement, a passage, i.e. a private Gali was left alongside the property of the defendant so as to enable the two plaintiffs to access their respective properties marked as 'A' & 'B'. The said private Gali has been shown in Ex. PW-1/1 as a private passage which is four feet wide, in yellow colour. The plaintiff claimed that the defendant was given an area admeasuring 108 sq. yards, whereas the plaintiff, under the division, was allotted an area admeasuring 94 sq. yards. Plaintiff No.2 had been given less area due to allotment of excess area in some other place. The plaintiff stated that in the family partition between the parties, it was mutually agreed that Satbir Singh would open his gate towards the Eastern side and, in the same way, the defendant would also open his gate towards the Eastern side on the common passage. In Ex. PW-1/1, the passage has been shown as 11' 6" wide. The plaintiffs further stated that it was agreed that the defendant would have no right to open any gate towards the private passage shown in Ex. PW-1/1 in yellow colour, and that the said private passage would be exclusive property of the plaintiffs. The plaintiffs also stated that for the last 6-7 years since family partition, they have been the exclusive users and in enjoyment of the said private passage. They further stated that they installed a gate at point 'G' as shown in Ex. PW-1/1 and the said gate is opened and closed by them.

The plaintiffs stated that after the family settlement took place, the defendant raised construction of a pukka building on the rear portion of his plot marked 'C' in Ex. PW-1/1, about 2-3 years before the institution of the suit, which was completed when the suit was filed. The plaintiffs stated that they were absent for some time from their residence, and during that period, the defendant opened the gate towards the private passage of the plaintiffs at point 'H' shown in the site plan. He also created three outlets bringing down water from the first floor and the roof into the private passage. Plaintiff No.1 questioned the defendant in this regard, but received no satisfactory answer.

7. The further case of the plaintiffs was that a meeting of the family members and relatives was called, wherein the defendant admitted that he would remove the outlets and would also close the gate. Consequently, the plaintiff did not report the matter to the Police. The defendant also put a Chhajja on the first floor of his newly constructed house, extending about 1½ feet into the private Gali/ passage of the plaintiffs. The defendant did not remove the gate, outlets and Chhajja which he did not have the right to construct. Consequently, the suit was preferred.

8. The defendant filed his written statement contesting the suit. The defendant admitted the ownership of the respective portions, as described by the plaintiffs in Ex. PW-1/1. However, he disputed the site plan. The defendant stated that the father of the plaintiff, defendant and Sh. Satbir, namely Sh. Jhuttar Singh and his brother, i.e. plaintiff No.2 in his lifetime in March 1995 had partitioned - by metes and bounds, the entire abadi land and other property equally between his three sons aforesaid. In the partition, the

plaintiffs were given their portions, and a major portion of the abadi land in the Gali/private passage was given to the defendant. The defendant stated that at the time of partition, the plaintiffs were given the right to use the Gali/private passage for accessing their house to and fro, and that the defendant was given exclusive possession of the land and the Gali/private passage. The defendant claimed that he had installed the gate at the beginning of the Gali/private passage to ensure its safety. He stated that the gate is opened and used by both the plaintiffs and the defendant under a common mutual understanding. The defendant also admitted that he had created an opening and installed a gate at point 'H', and also created three outlets. However, he stated that the plaintiffs only had a right to use the private Gali/private passage shown in yellow in Ex.PW-1/1, to access their properties. The defendant stated that the Gali/private passage is in the exclusive possession, occupation and use of the defendant since 1995, and that the plaintiffs have got no exclusive right or title to the land in the Gali/private passage. Thus, the right of the plaintiffs to object to, or to seek a restraint against the defendant using portion of the private Gali/ private passage adjoining the wall of the house of the defendant, was denied.

9. The plaintiffs filed their replication, wherein they explained that Sh. Satbir Singh and the defendant were given 108 sq. yards and 102 sq. yards plot respectively, but the plaintiff got 94 sq. yards plot and that the Gali in question was left by the plaintiffs from their own area of the plot since the plaintiff was given only 94 sq. yards. The remaining share of the plaintiff was adjusted in the Gali/ private passage, which fell to their share. Thus, the plaintiffs stated that the private Gali was part & parcel of the area allotted to

them.

10. The Trial Court framed the issues on 20.10.2005, which were as follows:

- “1. Whether there is no cause of action in favour of the plaintiff? OPD*
- 2. Whether the plaintiff is entitled to decree of mandatory injunction, as prayed for? OPP*
- 3. Whether plaintiff is entitled for decree of permanent injunction, as prayed for? OPP*
- 4. Relief.”*

11. The plaintiff No.1 examined himself as PW-1; Sh. Satbir Singh as PW-2 and Sh. Rohtas Singh as PW-3. The plaintiff's witnesses were duly cross-examined by the defendants counsel. PW-1 deposed that the lesser area was given to the plaintiff (94 sq. yards) as Gali shown in Ex. PW-1/1 - which runs parallel to the side wall of the defendant's property, was given exclusively to the plaintiffs for their use and enjoyment. In this way, the shortfall in the land/ plot allotted to the plaintiff No.1 and plaintiff No.2 was made up in the private Gali shown in yellow colour in Ex. PW-1/1. The defendant examined himself as DW-1 and exhibited the site plan filed by him as Ex. DW-1/1.

12. The Trial Court decided all the issues in favour of the plaintiffs, and consequently, decreed the suit. The Trial Court held that a comparison of Ex. PW-1/1 and Ex. DW-1/1 – the plan filed by the defendant, shows that they do not have any material differences. The portions allotted to all the parties are shown exactly the same way in both the site plans. Even the

relevant position of the gate opened by the respondent in the disputed Gali is the same in both the site plans. The Trial Court held that the factum of mutual partition by oral arrangement was admitted between the parties. The defendant also admitted the size of the portions granted to the plaintiffs, himself and Satbir Singh. He, however, denied that the disputed Gali fell in the exclusive portion of the plaintiffs at the time of mutual partition.

13. The Trial Court observed that the cross-examination of PW-1 related only to the aspects about the dimensions of the plots of the parties, the Khasra number in question, and about one Jawahar Singh, whom the plaintiff proposed to produce as witness, but was not eventually produced for cross-examination. PW-1, it was observed, did not deviated from his original stand regarding the partition of the land and the disputed Gali falling into the portion of the plaintiffs.

14. The Trial Court accepted the plaintiffs case that since the total area of the plot allotted to the plaintiff No.1 was 94 sq. yards, the passage was exclusively given to the plaintiffs. The Court did not believe that the passage/ Gali was given exclusively to the defendant, thereby prejudicing the right of the plaintiffs to egress and ingress their own property. By applying the rule of evidence of preponderance of probabilities, the Court held that the plaintiffs had been able to establish their exclusive right over the private Gali. Consequently, the suit was decreed.

15. Consequently, the defendant was directed to close the gate opening towards the Gali/ private passage at point 'H' in the site plan Ex. PW-1/1. He was also directed to remove the outlets opening in the private Gali shown

in yellow colour in Ex. PW-1/1, as well as the Chhajja built at the first floor at his own portion, projecting towards the private Gali shown in Ex. PW-1/1. He was permanently restrained from building a staircase towards the said private Gali in future.

16. The First Appellate Court by the impugned judgment and decree affirmed the judgment and decree passed by the Trial Court and dismissed the appellant's first appeal. The First Appellate Court in its reasoning observed that the appellant/ defendant had admitted in his cross-examination that all the three brothers were given equal share by his father. Thus, the appeal of the appellants was dismissed.

17. The submission of learned counsel for the appellant is that the plaintiffs have themselves explained as to why a lesser area has been given to plaintiff No.2 while making allotment of the plot marked 'B' in Ex.PW-1/1. The reason was that he had been given other area at a different location. Learned counsel, therefore submits that the allotment of a lesser area of 92 sq. yards to plaintiff No.1 stands explained.

18. Learned counsel further submits that PW-1 in his cross-examination admitted that stone had been laid in the disputed Gali by the Gram Panchayat two years ago. Thus, it is submitted that the private Gali was not the exclusive property of the plaintiffs. Learned counsel further submits that the plaintiff could not tell the date, month or year when the family partition had taken place. He merely stated that the family settlement/ partition had been arrived at some 16-17 years ago. He also admitted that he was not present at the time and place when the settlement had been arrived at. He

also stated that he came to know about the family settlement when he started constructing his house one year after the family settlement and that he was informed about the family settlement by his father. He also could not give the date, month and year when the defendant had made the outlets 'X', 'Y' & 'Z' as shown in Ex.PW-1/1. He also stated that he was not present when the said outlets were made, and admitted that he had not lodged any complaint to the Police regarding the making of the said outlets.

19. Learned counsel further submits that PW-2 Satbir Singh, in his cross-examination, belied the claim of the plaintiffs. He, *inter alia*, stated that Sh. Mahender Singh and Sh. Rohtash – plaintiffs No.1 & 2 never told him about their share in the abadi land given for the disputed Gali.

20. Having heard learned counsel for the appellant and perused the judgment of the Trial Court, First Appellate Court and the evidence brought on record, I am of the view that there is absolutely no merit in the present second appeal and the same deserves to be dismissed.

21. The two Courts below have returned consistent findings of fact in favour of the respondent/ plaintiffs founded upon appreciation of evidence led by the parties. The appellant has not been able to point out any perversity or patent illegality in the approach of the Court in the matter of appreciation of the evidence to persuade this Court to take a different view.

22. The case of the plaintiffs with regard to the manner in which the properties were partitioned between the plaintiff No.1 and the defendant and the third brother Sh. Satbir is clearly the more probable and acceptable than that set up by the defendant. It is not the appellant's case that the father Sh.

Jhuttar Singh while partitioning his property, intended to give a larger share to any particular son, much less the appellant/ defendant. It is not the appellant's case that the father deliberately sought to deprive plaintiff No.1 an equal share. A perusal of Ex. PW-1/1 would show that the appellant got largest share admeasuring 108 sq. yards, and his brother Satbir got the adjoining plot admeasuring 102 sq. yards. Both these plots are East facing and have their openings in a passage which is 11" 6' wide. On the other hand, the plaintiffs were allotted their respective plots on the rear side and the area of the plot allotted to plaintiff No.1 was only 94 sq. yards, while that allotted to Rohtash was still lesser. So far as Rohtash plaintiff No.2 is concerned, the allotment of the smaller area to him has been explained by the plaintiffs who have stated that he got a smaller plot since he was given a larger area in some other place. However, that is not the position with regard to plaintiff No.1. Pertinently, Satbir, who is an equal brother to plaintiff No.1 and the defendant and was, therefore, an independent witness has supported the case of the plaintiffs that the private passage/ Gali marked in yellow colour in Ex. PW-1/1 was exclusively given for use and enjoyment by the plaintiffs. He stated that all the brothers were given equal shares in the plot during partition, and the disputed Gali was given to the plaintiffs. He deposed that the disputed Gali was never included in the share of the defendant, as, if that had been done, the total share of the defendant would turn out to be 138 sq. yards. He stated that this would have been totally incorrect as all the three brothers were given equal share. He also deposed that the gate at the entrance point of the disputed Gali had been put by the plaintiffs for private use and enjoyment of the Gali. It was not the case of the appellant/ defendant that Satbir had any reason or motivation to falsely

depose against him.

23. The endeavour of Mr. Sharma to read a line here and there from the testimonies/ cross-examination of PW-1 and PW-2 is of no avail. The failure of plaintiff No.1 to recall as to on what date the oral partition/ settlement had taken place does not lead to the inference that the same had not taken place, particularly, when he had claimed that the same had taken place some 16-17 years ago and, in any event, even the defendant/ appellant admitted that a partition/ settlement did indeed take place. Pertinently, the defendant/ appellant also did not dispute the factum that he had been allotted the plot marked 'C' in Ex. PW-1/1; the plaintiff No.1 had been allotted the portion marked 'A'; plaintiff No.2 was allotted the portion marked 'B' and Satbir Singh has been allotted the portion marked 'F' in Ex. PW-1/1. He also did not dispute the dimensions and location of the private passage. Even otherwise, a bare perusal of Ex. PW-1/1 shows that the purpose of the private passage was only to enable the plaintiffs to access the common wider passage admeasuring 11" 6' wide, as that is the only passage to their respective properties. On the other hand, the defendant and Sh. Satbir have their plots facing the said wide passage, and it does not make sense that the defendant should have an additional right to use the private passage when he already has access to his plot from the wide passage and, in the process, crowd the 4" narrow private passage of the plaintiffs.

24. When, in a case like the present the partition of the properties has been effected through an oral partition and the parties have occupied and constructed upon their respective portions, the finding with regard to the mutual understanding and agreement of the parties qua the utilization of the

passages, etc. necessarily has to be decided on the basis of preponderance of probabilities. Thus, the approach of the Courts below in accepting the case of the plaintiffs, which certainly is more probable, as opposed to that of the defendant – which is most improbable, is unexceptionable. As aforesaid, the defendant has not been able to establish that there was any special reason for the father Sh. Jhuttar Singh to give a larger share to the defendant at the cost of grave prejudice and inconvenience to plaintiff No.1 and also to his own brother plaintiff No.2.

25. In view of the aforesaid discussion, the present appeal is dismissed since no substantial question of law arises for consideration in this appeal.

VIPIN SANGHI, J

SEPTEMBER 10, 2015