

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

% Order delivered on: 16th October, 2014

+ **CS(OS) No. 2288/2009**

ACHERAJ LAL LAMBAPlaintiff
Through Mr. Arvind Sharma, Adv.

versus

TILAK RAJ LAMBA AND ANR.Defendants
Through Defendants are ex-parte

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The plaintiff has filed a suit for declaration, partition and possession in respect of property bearing No. 1/7033, Shivaji Park, Shahadra, Delhi- 32 earlier known as plot No.3, admeasuring 157 sq. yards out of khasra no.244-245 situated in area of village Sikdarpur, Shivaji Park, Illaqua Shahadara, Delhi-32, together with all superstructure, fittings, fixtures, annexures annexed and attached thereto with all concerning rights of the land under the said property (hereinafter referred to as the 'suit property') against the defendants.

2. The suit as well as the interim application being I.A. No.15596/2009 (under Order XXXIX Rules 1 & 2 CPC) were listed before Court for first time on 2nd December, 2009 when the summons were issued in the main suit and notice in the interim application and the Court directed the defendants to maintain the status-quo in

respect of the suit property. The defendants were proceeded *ex-parte* vide order dated 24th January, 2011. The written statement is only filed by the defendant No.3 wherein it is stated that the suit has been filed in collusion and connivance with the defendants No.1 and 2 and the plaintiff has malafidely not impleaded the daughters of the deceased as a party to the suit. It is stated that on one hand, the plaintiff and defendants are claiming the owners on the basis of the alleged agreement to sell and on the other hand they are claiming right on the basis of the alleged Will dated 17th November, 1993, it is not clear that on the basis of which document the plaintiff is seeking relief in the suit. It is further stated that Smt. Vidya Wanti died intestate and therefore, all her legal heirs became the owner of 1/7th undivided share in the suit property and thus, the plaintiff is entitled to 1/7th undivided share in the suit property and not 1/3rd share.

3. Brief facts of the case are that the plaintiff and the defendants are real brothers and are children of Late Shri Soudagar Mal Lamba and Late Smt. Vidya Wanti. Late Smt. Vidya Wanti, wife of Late Shri Soudagar Mal Lamba and the late mother of plaintiff and defendants was the registered owner of the suit property by virtue of a registered sale deed dated 30th December, 1957, duly registered with the concerned Sub Registrar, Delhi. The original registered sale deed dated 18th December, 1957 duly registered on 30th December, 1957 is in possession of the plaintiff's eldest brother/defendant No.1.

4. It has been stated that during her lifetime, Smt Vidya Wanti agreed to sell the suit property vide Agreement to Sell dated 17th

November, 1993 in favour of her three sons i.e. the plaintiff and defendants. Accordingly, all the necessary documents pertaining to the said transaction, including the agreement to sell dated 17th November, 1993, affidavit dated 17th November, 1993, receipt of consideration dated 17th November, 1993 and deed of Will dated 17th November, 1993 were executed by Smt Vidya Wanti and witnessed by one Smt. Pushpa Kumari, wife of Shri R.P.Sablok and one Smt. Rajrani, wife of Shri Ramesh Chand. It is stated that the original Will dated 17th November, 1993 of Smt Vidya Wanti is in the possession of plaintiff's eldest brother/defendant No.1.

5. By virtue of the aforesaid documents the suit property was transferred in favour of the plaintiff and defendants who became the owners of the suit property and as per Will dated 17th November, 1993, the suit property devolved upon the plaintiff and the defendants in equal share i.e. $1/3^{\text{rd}}$ each.

6. It is stated that however, due to the bad health of Smt. Vidya Wanti who expired on 4th December, 1993 the sale deed in terms of the aforesaid documents could not be completed and thus, could not be executed in favour of the plaintiff and defendants. Thereafter, after the death of Smt Vidya Wanti, the defendant Nos. 1 and 2 on 28th February, 1996 entered into an agreement to sell with the plaintiff *qua* the suit property with respect to their respective shares of the suit property i.e. $1/3^{\text{rd}} + 1/3^{\text{rd}} = 2/3^{\text{rd}}$ of the undivided portion of the suit property for a consideration of Rs.66,000/-. The defendant Nos.1 and 2 also executed an affidavit, registered General Power of Attorney

and registered Wills all dated 28th February, 1996 in favour of the plaintiff.

7. It is further stated that the plaintiff owing to his profession had shifted to Gwalior and permitted defendant No.2 to enjoy the suit property. The defendant No.2 till date is enjoying the entire suit property. It is alleged that though by virtue of the said agreement to sell dated 28th February, 1996 together with the two registered Wills and registered General Power of Attorney, the plaintiff had become the owner of the entire suit property, however, being the real brother, the plaintiff permitted the defendant No.2 to enjoy the suit property.

8. It is further alleged that as the relations were very cordial, the plaintiff always visited and stayed at the suit property whenever he is in Delhi and enjoyed the suit property. It is also stated in the agreement to sell and other documents as aforesaid, that the physical possession of the suit property with all superstructures, fittings, fixture, annexure etc. have been delivered to the plaintiff, however, being the brother, the plaintiff allowed the defendant No.2 to use the same till the time he shifts to other place.

9. It is stated that there is no dispute that the plaintiff and the defendants are the owners of the suit property as per the Will dated 17th November, 1993 of Late Smt. Vidya Wanti and the property devolves upon the parties in 1/3rd equal share.

10. Thereafter, the plaintiff made requests on various occasions to the defendant No. 1 and 2 to execute the sale deed in favour of the plaintiff in terms of the agreement to sell and all other documents

dated 28th February, 1996 and on each such occasion, the defendants on one or the other pretext always avoided the same.

11. It is alleged that at some point of time, the defendant No.1 agreed to execute all documents and/or sale deed in favour of the plaintiff, however, defendant No.2 always delayed the same. The plaintiff also requested defendant No.1 to talk to defendant No.2 so that necessary documentations can be completed. On 28th April, 2004, defendant No.1 on the assurance to speak to the defendant No.2, collected the originals of agreement to sell dated 28th February, 1996, affidavit dated 28th February, 1996, payment receipt dated 28th February, 1996, the registered General Power of Attorney dated 28th February, 1996 and two registered Wills both dated 28th February, 1996. While collecting the originals of the aforesaid documents, defendant No.1 duly acknowledged the receipt of the said originals.

12. It is also stated that the original sale deed dated 18th December, 1957 (registered on 30th December, 1957) in favour of Late Smt. Vidya Wanti and the original Will dated 17th November, 1993 executed by Late Smt. Vidya Wanti were already in possession of defendant no.1 who had in his own handwriting acknowledged on 28th April, 2004 at the back of the photocopy of the General Power of Attorney dated 28th February, 1996. The General Power of Attorney dated 28th February, 1996 bearing original acknowledgement by defendant No.1 with respect to the physical possession of the Original Will dated 17th November, 1993.

13. It is alleged that the plaintiff again requested the defendants to execute the sale deed in favour of the plaintiff, since they had already received the sale consideration from the plaintiff, however, the defendants on one pretext or the other pretext avoided the same. The plaintiff became aware of the reasons of delay by the defendants, when defendant No.2 demanded from the plaintiff some more money to execute the documents which was not acceptable to the plaintiff. Thereafter, the plaintiff sought and demanded the return of the original documents from defendant No.1 and the defendant No.1 on the pretext and on assurance that he will try to explain defendant No.2 never returned the originals of the aforesaid documents.

14. It is alleged that the registered Wills both dated 28th February, 1996 executed by the defendant No. 1 and 2 are still in operation and as per Will dated 17th November, 1993 of Late Smt. Vidya Wanti, the plaintiff is entitled to his share i.e. 1/3rd in the suit property with its superstructure, fittings etc.

15. It is further alleged that since 2004, the plaintiff has been regularly meeting the defendant No.1 and 2 and requested them to partition the suit property and transfer 1/3rd share of the suit property together with its superstructure, fittings, furniture and annexures etc. attached to the suit property in favour of the plaintiff. The defendants on one or the other pretext always avoided for the same and on the contrary, the plaintiff was asked by the defendant No.2 to transfer his 1/3rd share in favour of the defendant No.2 who is presently residing in the suit property.

16. It is further stated that the son of the plaintiff is employed in Delhi and thus the plaintiff wanted permanent physical possession of his share in the suit property. However, since March, 2009 the defendants on one or the other pretext avoided the same.

17. Thereafter, the plaintiff issued a legal notice dated 4th May, 2009 upon the defendants to partition the suit property and hand over the plaintiff 1/3rd share of the suit property including actual and physical possession of the same to the plaintiff within 15 days of the receipt of the notice. While the notice sent to defendant No.1 never returned unserved, the one sent to defendant No.2 has been returned with the remarks 'refuse'. However, the defendants denied the plaintiff's 1/3rd share and the enjoyment of the same.

18. In ex-parte evidence, the plaintiff filed affidavit dated 21st April, 2011 of Mr. Acheraaj Lal Lamba reiterating the contents of the plaint and also exhibited certain documents exhibited as Ex.P-1 to Ex. P-12 in support of its case. The same are as follows:

- The original certified copy of the sale deed dated 18th December,1957 duly registered on 30th December,1957 exhibited as Exhibit P-1
- The original English translated copy of the sale deed marked as Exhibit P-2
- The copy of the General Power of Attorney dated 28th February, 1996 bearing original acknowledgment of defendant No.1 dated 28th April, 2004 exhibited as Exhibit P-3

- The photocopy of the registered Will dated 28th February, 1996 executed by defendant No.2 bearing original acknowledgement of defendant No.1 dated 28th April, 2004 exhibited as Exhibit P-4.
- The photocopy of the registered Will dated 28th February, 1996 executed by defendant No.1 bearing original acknowledgement of defendant No.1 dated 28th April, 2004 exhibited as Exhibit P-5.
- The photocopy of the Agreement to Sell dated 28th February, 1996 executed by defendant Nos.1 and 2 bearing original acknowledgement of defendant No.1 dated 28th April, 2004 exhibited as Exhibit P-6
- The photocopy of affidavit dated 28th February, 1996 executed by the defendant Nos.1 and 2 bearing original acknowledgement of defendant No.1 dated 28th April, 2004 exhibited as Exhibit P-7.
- The photocopy of payment receipt dated 28th February, 1996 executed by defendant Nos. 1 and 2 bearing original acknowledgement of defendant No.1 dated 28th April, 2004 exhibited as Exhibit P-8
- The General Power of Attorney dated 28th February,1996 bearing original acknowledgement by defendant No.1 with respect to the physical possession of the original Will dated 17th November, 1993 and the registered sale deed of the suit property in favour of Smt Vidya Wanti exhibited as Exhibit P-9

- Copy of the legal notice dated 4th May, 2009 exhibited as Exhibit P-10
- The original envelope containing the legal notice sent to defendant No.2 which was refused by him, bearing the remark 'refuse' exhibited as Exhibit P-11
- The plaint exhibited as Exhibit P-12 bearing the signatures of the plaintiff at points 'A' and 'B' in the plaint.

19. The ex-parte evidence was closed vide order dated 15th September, 2011. The evidence filed by the plaintiff has gone unrebutted as no cross-examination of the plaintiff's witness was carried out, therefore, the statements made by the plaintiff are accepted as correct deposition.

20. Learned counsel for the plaintiff states that the deceased has left behind four daughters namely, Ms. Pushpa Kumari, Ms. Raj Rani, Ms. Lalita Arora and Ms. Mahindra Kumari Jaggi and should be impleaded as defendants. By vide order dated 13th October, 2011 and 12th January, 2012 the above said daughters were impleaded as defendant Nos. 3 and 4 and defendant Nos. 5 and 6 respectively.

21. Despite service, no one appeared on behalf of defendant Nos. 4, 5 and 6 and consequently defendant Nos. 4, 5 and 6 were proceeded ex-parte vide order dated 2nd May, 2012.

22. When the matter was taken up, no one appeared and argued the matter on behalf of defendant No.3. The plaintiff had tendered chief affidavit dated 21st April, 2011 in *ex parte* evidence. The *ex parte* evidence was closed on 15th September, 2011.

23. Therefore, the evidence adduced by the plaintiff has gone un rebutted. There is no cross-examination of PW-1 on behalf of the defendant No.3 also.

24. In view of the above said reasons and evidence adduced by the plaintiff, the suit of the plaintiff is entitled to the relief claimed in prayer (a), (b) and (c) of the plaint. A preliminary decree is passed at present, Ms. Kajal Chandra (Mob. 9810133536/011-46612100) is appointed as a Local Commissioner, who would visit the suit property and to file her report with regard to modes of partition of the suit property in question by metes and bounds by separate possession if possible as per share falling to the parties. Fee of the Local Commissioner is fixed at Rs. 60,000/- at present which shall be paid by the plaintiff at this stage.

25. Report of the local commissioner to be submitted by the next date i.e. 7th May, 2015 so that the appropriate orders are passed.

(MANMOHAN SINGH)
JUDGE

OCTOBER 16, 2014