

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

% **Date of decision: 13th August, 2015.**

+ **RFA 73/2010**

DALIP KUMAR **..... Appellant**

Through: Mr. Khush Bir Singh, Adv.

Versus

OM PARKASH & ORS **..... Respondents**

Through: Mr. Bhagwat Prasad Gupta, Adv. for
R-8 to 10.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree dated 31st August, 2009 of the Court of Sh. Bhupesh Kumar, Additional District Judge (ADJ)-06 (West), Delhi of dismissal of a suit filed by the appellant for partition of the estate left behind by his father late Sh. Ram Prasad.

2. Notice of the appeal was issued. The respondents No.1, 4 & 5 died during the pendency of the appeal and their legal representatives were substituted vide orders dated 2nd May, 2013, 17th July, 2013 and 13th March, 2015 respectively. The Registrar (Appellate) has in orders dated 4th December, 2014 and 20th January, 2015 recorded that all the respondents have been served. However only the counsel for the appellant and the

counsel for the respondents No.8 to 10 appear. The other respondents are proceeded against *ex-parte*. Though the Trial Court record has not been requisitioned but considering the nature of the controversy, need therefor is not felt. The counsels have been heard.

3. The suit as aforesaid, was for the reliefs of partition and rendition of accounts with respect to the estate of late Sh. Ram Prasad of whom the appellant and the respondents are the legal heirs. The said estate comprises of (i) tenancy rights in two commercial premises (shops) being at 28/24, East Patel Nagar, New Delhi and at 4340, Ansari Road, Daryaganj, New Delhi; (ii) tenancy rights in a residential premises at 1997, Ganj Mir Khan, Daryaganj, New Delhi; (iii) a Maruti Car; (iv) jewellery; and, (v) cash in the savings bank account (in Allahabad Bank, Ansari Road).

4. On the pleadings of the parties, there was no dispute that, the (i) appellant; (ii) respondent No.1; (iii) respondents No.2 to 6 together; (iv) respondent No.7; (v) respondents No.8 to 10 together; (vi) respondent No.11; and, (vii) respondent No.12, have 1/7th share each in the estate of late Sh. Ram Prasad. Only the following issues were framed in the suit:

“1. Whether the tenancy right can be partitioned? *OPP*.

2. Whether D-8 to the exclusion of all others has inherited the tenancy in respect of shop no.4340, Ansari Road, Darya

Ganj, N.D.? OPD-8.

3. *Whether D-7 to the exclusion of all others has inherited the tenancy right of shop no.28/24, Patel Nagar, N.D. and house no.1997, Ganj Mir Khan, Daryaganj, Delhi? OPD-7.*

4. *Whether the plaintiff is entitled the decree of partition? OPP*

5. *Whether the plaintiff is entitled to rendition of account? OPP*

6. *Relief.”*

5. The learned ADJ, in the impugned judgment, has held:

(i) that the tenancy rights cannot be partitioned, owing to the small size of the tenancy premises and owing to the landlords having not been impleaded as parties to the suit and in the absence of the landlords, the tenancy rights being impartible;

(ii) that the defendant No.8 and the defendant No.7 had failed to prove Issues No.2 & 3 respectively, which were thus decided against them;

(iii) that since the tenancy rights are impartible, the appellant is not entitled to a decree for partition;

(iv) that the appellant, in his evidence, has not established any claim for rendition of accounts.

6. The counsel for the appellant today also has confined his contentions

to Issue No.1 only, decided against him, i.e. of the tenancy rights being not partible.

7. The counsel for the respondents No.8 to 10 contended, (a) that the rent of the tenancy premises at Daryaganj was Rs.100/- per month; (b) however the appellant, after the demise of the father mixed with the landlord and purported to increase the rent to Rs.2,200/- per month and in collusion with the landlord, got a petition for eviction under the Delhi Rent Control Act, 1958 filed against himself only; (c) that the respondent No.8 on coming to know of the same, applied for being impleaded therein and ultimately got the eviction petition dismissed and appeal by the landlord thereagainst was also dismissed. The only other argument is, that considering the small size of the two commercial tenancy premises and the business being carried on therein i.e. of a barber shop, there is no possibility of partition. It is also contended that it is the respondent No.8 only who has been paying / depositing the rent of the shop at Daryaganj to the landlord.

8. On enquiry, it is informed that while the shop at Daryaganj is in the control of the respondent No.8, the shop at East Patel Nagar and the residential house at Daryaganj are under the control of the respondent No.7.

9. It would thus be seen that the adjudication of the present appeal is to

be confined to the finding on Issue No.1 only and which is a purely legal finding to be returned i.e. whether a suit for partition with respect to the tenancy premises would lie or not. At this stage, the question, whether the tenancy premises owing to its small size permits or does not permit its partition by metes and bounds, is not to be gone into. The said exercise is to be undertaken after a preliminary decree for partition is passed and which stage did not arise, owing to the suit itself having been dismissed. However, while on the subject, I may record that even if the tenancy premises, owing to its small size or otherwise owing to the restrictions placed by the landlord are not divisible by metes and bounds, the same can always be partitioned by one or more of the several legal heirs appropriating the tenancy rights to himself / themselves to the exclusions of others in consideration of payment of ovalty or otherwise to the other legal heirs.

10. The counsel for the respondents No.8 to 10 at this stage states that all the other heirs have already surrendered their respective rights in the shop at Daryaganj in favour of the respondent No.8 and it is only the appellant who is fighting.

11. The learned ADJ, in the impugned judgment, has given the following reasons for holding the tenancy rights to be impartible:

- (I) that the tenancy rights are governed by the Rent Act;
- (II) that after the death of the predecessor, all the legal heirs are in joint possession of the tenancy premises as tenants;
- (III) that in case the tenancy premises are partitioned, then each of the heirs would become individual tenants of the landlord in his / her respective share / portion of the property and the same would amount to creating another tenancy, which is prohibited by the Rent Act;
- (IV) that if the tenancy premises are partitioned, then each of the heirs would be individually liable to pay rent of his / her respective shares / portions and in case any one of them fails to pay the rent, the landlord would be entitled to evict;
- (V) that similarly, if the tenancy rights are partitioned, others would also become liable for eviction owing to a default by one;
- (VI) that the landlord is unlikely to agree to such partition;
- (VII) that without the landlord, no decree for partition of tenancy rights can be granted.

12. Though attention of the learned ADJ was invited by the counsel for the appellant/plaintiff to *V.N. Sarin Vs. Major Ajit Kumar Poplai*

AIR 1966 SC 432, *Lalit Kumar Seth Vs. S.R. Seth* 2008 VIII AD (Delhi) 753 and *Ram Lal Sachdev Vs. Smt. Sneha Sinha* AIR 2000 Delhi 92, but the learned ADJ has held the same to be not applicable since they pertain to the perpetual leasehold rights under the Delhi Development Authority and not to a tenancy protected under the Rent Act.

13. I am unable to concur with the reasoning aforesaid of the learned ADJ. A tenancy right, specially in a premises governed by the Rent Act and from which the landlord cannot evict save on the grounds provided in the Statute, is a valuable asset and there is no bar in any law whatsoever to partition thereof. Of course, the said partition has to be in accordance with law and the Court cannot direct partition in a manner prohibited by the Rent Act. Thus, the assumption by the learned ADJ, of the tenancy rights being *per se* impartible, is found to be erroneous.

14. I have already recorded hereinabove, one of the manners in which the tenancy premises can be partitioned. Similarly, if the tenancy premises and the number of heirs permit, partition can also be by devising modalities for use thereof by the heirs, without infringing the law governing the tenancy premises or the terms and conditions of the agreement, if any, of tenancy. Just like it has been held in judgments *supra* vis-a-vis constructions on

leasehold land, that the bar to subdivision of the leasehold rights in land is not a bar to subdivision of superstructure constructed thereon, with leasehold rights in land continuing to jointly vest in all the heirs, the tenancy rights in a premises can be partitioned by allocating exclusive use of different portions thereof (if possible) to different heirs, with the tenancy rights jointly vesting in all the heirs.

15. However as aforesaid, this is not the stage to consider the different modes in which the tenancy premises can be partitioned.

16. If a valuable asset as tenancy rights is held to be impartible, it would lead to the heir in control thereof appropriating the same to himself / herself, to the detriment of others. Physical impartibility of an asset does not make it impartible as the asset can always be permitted to be appropriated by an heir who bids the maximum for the same.

17. This Court, in *Iresh Duggal Vs. Virender Kumar Seth* MANU/DE/3068/2014 also held that tenanted premises can always be partitioned for *inter se* use among the tenants and merely because there is an *inter se* division amongst the tenants, for convenience of use of the tenanted property, the same will not amount to subletting, assigning or parting with possession of the tenanted premises *inter se* the tenants. It was further held

that mere *inter se* division amongst co-tenants, for the purpose of user of the tenanted premises, will not amount to subletting qua the landlord. It was yet further held that tenanted premises are bound to be partitioned for *inter se* use, without destroying the common tenancy rights. Reference in this regard can also be made to ***Bharat Insulation Co. Vs. Suraj Parkash*** 221 (2015) DLT 216.

18. The finding of the learned ADJ on Issue No.1 is accordingly set aside.

19. The onus of Issues No.2&3 was on the respondents/defendants No.7 & 8 respectively, who have been held to have not discharged the said onus and to have not proved the said issues, which in the impugned judgment, have been decided against the respondents No.7&8. No arguments in that respect have been addressed today.

20. The counsel for the appellant has not pressed for partition qua the other movable property or monies qua which also the suit was filed or for rendition of accounts of any of the assets.

21. The appeal thus succeeds to the aforesaid extent. The judgment and decree of the learned ADJ is set aside and a preliminary decree for partition is passed declaring the (i) appellant, (ii) respondent No.1, (iii) respondents No.2 to 6 together, (iv) respondent No.7, (v) respondents No.8 to 10

together, (vi) respondent No.11 & (vii) respondent No.12 to be having 1/7th share each in the two commercial tenancy premises at 28/24, East Patel Nagar, New Delhi and at 4340, Ansari Road, Daryaganj, New Delhi and in the tenancy rights in the residential premises at 1997, Ganj Mir Khan, Daryaganj, New Delhi.

22. No costs.

23. Decree sheet be drawn up.

24. The parties to appear before the District Judge (West) on 28th September, 2015 for further proceeding in accordance with law. The District Judge (West) to either proceed further himself or mark the suit to any other Judge.

25. Both counsels seek reference to mediation. The Court, before which the suit is pending, shall make efforts for amicable settlement, either himself or herself or through the Mediation Cell attached thereto.

Dasti.

RAJIV SAHAI ENDLAW, J.

AUGUST 13, 2015

bs

(corrected & released on 5th September, 2015)