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

% *Date of Decision : September 10, 2015*

+ **RFA(OS) 87/2015**

KULBHUSHAN DANIA Appellant
Represented by: Mr.Sumit Kumar Khatri, Advocate

versus

ASHOK KUMAR DANIA & ANR Respondents
Represented by: None

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA
PRADEEP NANDRAJOG, J. (Oral)

CM No.19097/2015

For the reasons stated in the application delay of 8 days in filing the appeal is condoned.

RFA (OS) No.87/2015

1. The appeal is listed for preliminary hearing today and we have drawn attention of learned counsel for the appellant to the provision of Order 41 Rule 11 of the Code of Civil Procedure, 1908, informing learned counsel that as per practice directions issued by this Court the record of CS (OS) No.1117/2008 has been sent by the Registry to this Court along with the appeal. We have asked learned counsel whether a date be fixed for hearing

the appellant or dispense with said requirement and hear the appeal today itself. Learned counsel says that he would like to argue the appeal for admission today itself. Accordingly, we have heard learned counsel in the appeal and have perused the record of the suit.

2. Appellant was the plaintiff. He sought partition of House No.7 built on part of Khasra No.445, New Hari Nagar, Mandawali; New No.7, Dayanand Block, Shakarpur Extension, Delhi-110092. He also sought an injunction against the defendant restraining them from parting with possession of a tenanted premises F-14, Vijay Block, Vikas Marg wherefrom business under the name M/s.Dania Photographs was being carried on.

3. Defendant No.1 in the suit is the brother of the appellant. Defendant No.2 is his father.

4. Case pleaded in the plaint is that to defendant No.2 and his deceased wife Sheela, were born two sons : the plaintiff and defendant No.1; and two daughters named Vijay Lakshmi and Namita. It is pleaded that the father was a photographer by profession and was working with M/s.Mahattas' Co. in Connaught Place as a dark room photo portrait printer, and to augment his income he used to devote himself as a dark room photograph printer at his house. The plaintiff used to help the father. That the father acquired a plot of land ad-measuring 200 square yards comprised in Khasra No.445, Mandawali Fazalpur which bears No.7, Dayanand Block, Shakarpur for a sum of ₹2,700/- on which a dwelling unit was constructed in the year 1969 and the family shifted to the said premises. It is pleaded that motivated by the sister Vijay Laxmi the plaintiff acquired a shop bearing No.D-4/495A, Aruna Park, Shakarpur as a tenant, but tenancy was in the name of the

father, however it was the plaintiff who was carrying on the business from the shop. It is pleaded that the appellant managed the shop till August, 1974 when he joined service and that the business at the shop was managed by the father and attendants. It is pleaded that shop at F-14, Vijay Block, Vikas Marg, Shakarpur Extension, though taken on rent by the brother, was actually taken on rent by the appellant who invested his income for setting up the shop. It is pleaded that since 1980 the father left employment with Mahattas and the father and the brother of the plaintiff devoted themselves full time to the business. It is pleaded that in the name of defendant No.1 the appellant submitted an application to DDA pursuant where to a LIG flat was allotted. Pleading that defendant No.1 shifted to Maitri Apartments and that thereafter the appellant lived with his parents in House No.7, Dayanand Block, Shakarpur and spent money whenever required to renovate the house, prayer made is to partition the suit property as also to restrain the brother from surrendering the tenancy rights at F-14, Vijay Block, Vikas Marg, Shakarpur Extension.

5. The defendants remained ex-parte. The appellant led evidence, during which he exhibited documents Ex.PW-1/1 to Ex.PW-1/104A. Besides the appellant examined one Ganesh Verma as his witness.

6. In his testimony towards examination-in-chief the appellant deposed as pleaded in the plaint as also proved documents Ex.PW-1/1 to Ex.PW-104/A.

7. On April 16, 2013 the suit was dismissed by the learned Single Judge noting that the plaintiff conceded being in Government service and it was not his case that the suit property belonged to a joint Hindu family. It was noted that the appellant was trying to project a case that the suit property

was acquired out of joint funds.

8. An appeal was filed against the judgment and decree dated April 16, 2013 which was allowed by the Division Bench noting that the grievance of the appellant was that oral testimony of the appellant and one more witness examined by him was not considered by the learned Single Judge.

9. The impugned decree dated May 21, 2015 has therefore reconsidered the matter and the suit has been dismissed once again.

10. We have perused the record of the suit and find that there is hardly any credible documentary evidence to show that the plaintiff i.e. the appellant contributed a penny for the acquisition of the suit property.

11. Ex.PW-1/1 is a nomination signed by the father of the appellant for purposes of payment of gratuity and the nominee is the mother. We fail to understand as to what relevance said document has. There is no document exhibited as Ex.PW-1/2. Ex.PW-1/3 to Ex.PW-1/14 are receipts showing defendant No.2 to be tenant of a shop at Shakarpur. Ex.PW-1/15 to Ex.PW-1/18 are bills raised by Dhania Photographers. Ex.PW-1/19 is a record of miscellaneous accounts pertaining to business of photography and similar is the position with respect to Ex.PW-1/20. Ex.PW-1/20A is a document showing that Dhania Photo Services was given membership No.626 with M/s.Hindustan Photo Films Manufacturing Company. No document has been exhibited as Ex.PW-1/21. Ex.PW-1/22 collectively are electricity bills in the name of the father pertaining to the suit property. No document has been exhibited as Ex.PW-1/23 to Ex.PW-1/31. Document Ex.PW-1/32 is on a chit of paper and appears to be a bill raised towards supply of some material at 7, Dayanand Block and is raised in the name of DANIA and similar would be the position regarding Ex.PW-1/33, Ex.PW-1/34, Ex.PW-

1/35, Ex.PW-1/36, Ex.PW-1/37, Ex.PW-1/38, Ex.PW-1/39, Ex.PW-1/40, Ex.PW-1/41, Ex.PW-1/42, Ex.PW-1/43, Ex.PW-1/44, Ex.PW-1/45, Ex.PW-1/46, Ex.PW-1/47, Ex.PW-1/48, Ex.PW-1/49, Ex.PW-1/50, Ex.PW-1/51, Ex.PW-1/52, Ex.PW-1/53, Ex.PW-1/54, Ex.PW-1/55, Ex.PW-1/56, Ex.PW-1/57, Ex.PW-1/58, Ex.PW-1/59, Ex.PW-1/60, Ex.PW-1/61, Ex.PW-1/62, Ex.PW-1/63, Ex.PW-1/64, Ex.PW-1/65, Ex.PW-1/66, Ex.PW-1/67, Ex.PW-1/68, Ex.PW-1/69, Ex.PW-1/70, Ex.PW-1/71, Ex.PW-1/72, Ex.PW-1/73, Ex.PW-1/74, Ex.PW-1/75, Ex.PW-1/76, Ex.PW-1/77, Ex.PW-1/78, Ex.PW-1/79, Ex.PW-1/80, Ex.PW-1/81, Ex.PW-1/82, Ex.PW-1/83, Ex.PW-1/84, Ex.PW-1/85, Ex.PW-1/86, Ex.PW-1/87. Ex.PW-1/88 is an electricity bill in the name of the appellant, but without referring to any property. Ex.PW-1/89 is an electricity bill in the name of the father. Ex.PW-1/90, Ex.PW-1/91, Ex.PW-1/92, Ex.PW-1/93, Ex.PW-1/94, Ex.PW-1/95 and Ex.PW-1/96 are bills raised by different suppliers of goods to supply of goods to Dhania Photographers. There is no document exhibited as Ex.PW-1/97. Ex.PW-1/98 is copy of an FIR lodged by the appellant against his younger brother. Ex.PW-1/99 is a photocopy of a will purportedly executed by Shyam Sunder as per which his estate would devolve upon his daughter Namita. Ex.PW-1/100 is a copy of a probate sought by Namita Dhania of the will executed by her father. Ex.PW-1/101 is a copy of the purported reply filed by the appellant opposing probate sought of the will executed by the father filed by the sister. Ex.PW-1/102 is copy of an application filed under Order 7 Rule 11 by the appellant in the probate petition filed by his sister. Ex.PW-1/103 is an order passed by the Additional Rent Controller concerning Property No.F-14, Vijay Block, Shakarpur. The landlord is one Joginder Babbar and the respondent therein is the brother of the appellant.

12. We have repeatedly called upon learned counsel for the appellant to show relevance of the documents concerning proof of the case pleaded by the appellant. Learned counsel has no answer.

13. We have asked learned counsel whether he is aware of the law of blending i.e. what facts need to be proved if the case set up is that a family member who acquire the property from his own asset blended the same with the property of the joint family. The learned counsel says that he has no idea of the law of blending and has heard the said legal concept today for the first time.

14. It is apparent that the appellant has no case, because as projected by the appellant in the plaint, the appellant could succeed only if the appellant could successfully show that the father and two sons were common in mess and constituted a joint family. They were pooling in their resources for their common living. They were joint in mess and though acquired in the name of the father the suit property was intended to be purchased for the benefit of the family.

15. We have perused the testimony of the appellant and the witness examined by him to prove the case set up by the appellant and we find that the appellant has not even deposed as to who used to run the common kitchen and that he used to hand over his earnings to his father or his mother. The appellant has not even dared to produce his bank statement of account in which his salary was credited to show the withdrawals thereof. The appellant has not deposed that there was a common kitchen. As per the plaint it was the father and the brother of the appellant who were carrying on photography business from a tenanted premises. Though not pleaded in the plaint, learned counsel for the appellant concedes that the appellant is in

Government service and could not have carried on any business. The other witness of the appellant Sh.Ganesh Verma has simply deposed that he had learnt the skill of photography from the appellant. He has deposed that the business was that of the joint family of the appellant, a fact which could never be in the knowledge of Ganesh Verma.

16. We have perused all the exhibited documents and the testimony of the appellant and his witness and concur with the view taken by the learned Single Judge that the appellant has failed to prove his case even with respect to the uncontroverted testimony of the appellant and his witness. The reason is obvious. Counsel for the appellant does not even know the law on blending and thus it is apparent that such evidence which was required to be led to prove the fact that there existed a joint family and that the father blended his personal property with that of the joint family has not been led. It is not the case of the appellant that the nucleus wherefrom the funds were generated by the father was inherited by the father and thus had an ancestral character. The bills concerning construction material being purchased are not in the name of the appellant. The appellant has led no evidence of making payment to the supplier of the goods. As noted above large number of electricity bills in the name of the father have been proved by the appellant. It is apparent that living in the same house along with the father the appellant has managed to lay his hands on various bills and he has filed the same. But, they do not even remotely connect appellant's contribution to the suit property or the business being run by the father and brother of the appellant.

17. The appeal is accordingly dismissed in limine but without any order as to costs.

CM No.19096/2015

Dismissed as infructuous.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

SEPTEMBER 10, 2015
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