

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

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Judgment reserved on: 30th October 2015
Judgment delivered on: 23rd November 2015

+ **FAO(OS) 589/2015 & CM No.24212/2015 (condonation of delay)**

AMIT KUMAR

.... Appellant

versus

ANOOP KUMAR

.... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Ashutosh Jha, Advocate.

For the Respondent : None.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGEMENT

SANJEEV SACHDEVA, J

1. The appellant/defendant has filed the present appeal against the order dated 31.07.2015 whereby a preliminary decree of partition has been passed by a learned Single Judge in the suit filed by the respondent/plaintiff for partition under Order XII Rule 6 of the Code of Civil Procedure.

2. The plaintiff had filed the suit for partition of property bearing No.AC-3/20, Shalimar Bagh, Delhi, contending that the property was jointly purchased by the plaintiff and the defendant by a sale deed dated

05.07.2002 in equal shares. It is contended that the sale consideration of Rs. 2,40,000/- was paid by the plaintiff as well as the defendant jointly by issuing individual pay orders of Rs. 1,20,000/- each in favour of the seller. It is contended by the plaintiff that the properties were jointly purchased by the parties for the residence of their parents and after the demise of the parents, the defendant/appellant had sought to sell the property and in these circumstances, the plaintiff has claimed partition of the subject property.

3. The defendant has filed the written statement contending that at the time of purchase of the property, the defendant had paid the entire sale consideration as it was decided between the family members that initially the said amount of sale consideration of Rs. 2,40,000/- would be given to the father by the defendant and the father of the defendant would deposit Rs. 1,20,000/- each in the account of both the defendant and the plaintiff and the property would be purchased. Thereafter the plaintiff would pay half of the amount of the sale consideration within a period of one year of the said sale deed of the property and in case of failure, the plaintiff shall execute a relinquishment deed in favour of the defendant but neither the half amount of sale consideration was paid back nor the plaintiff has executed any relinquishment deed in favour of the defendant.

4. Learned Single Judge by the impugned order has noted that admittedly the sale deed for purchase of the property in the suit was jointly in favour of the plaintiff and the defendant. He further noted that 50% of the sale consideration was paid by the plaintiff by preparing a bank draft from

his own account. The execution of the sale deed has not been denied by the defendant. The learned Single Judge further noted that the defendant had not challenged the sale deed in any Court of law for more than 12 years and, accordingly, has passed a preliminary decree of partition in exercise of powers under Order XII Rule 6 of the Code of Civil Procedure.

5. We have heard the learned counsel for the parties. Learned counsel appearing for the appellant/defendant has admitted that the sale deed of the property was in joint name showing the shares of the plaintiff as well as the defendant as 50% each. It is not denied that 50% of the sale consideration of Rs. 1,20,000/- was paid by the plaintiff from his bank account. The only contention raised is that the said amount was paid by the defendant to his father, who deposited the same in the account of the plaintiff. It is also admitted by the counsel for the appellant that no suit or proceedings have been initiated by the appellant/defendant since the year 2002 till the filing of the written statement in November 2014 seeking to challenge the sale deed or, in any manner, seeking to recover the said amount allegedly paid by the defendant to the plaintiff. It is also admitted that no proceedings for specific performance of the alleged agreement, whereby the plaintiff had agreed to relinquish his shares in favour of the defendant, has been filed.

6. It is an admitted position that the sale deed shows the plaintiff as 50% co-owner of the property. It is also admitted that the plaintiff paid his share of the sale consideration to the seller. No proceedings seeking specific performance of the alleged agreement to repay the amount or relinquish his

share have been instituted by the defendant for over 12 years. Since the parties are co-owners of the property, we find no infirmity in the order of the learned Single Judge in passing a preliminary decree of partition in favour of the plaintiff and partitioning the property between the plaintiff and the defendant in equal proportion. The plea raised by the appellant/defendant that the entire sale consideration was paid by him and the sum of Rs. 2,40,000/- was paid by him to his father, who, in turn, deposited Rs.1,20,000/- into the account of the plaintiff and Rs. 1,20,000/- into the account of the defendant for the purchase of the said property is of no consequence inasmuch as the appellant has not initiated any proceedings either for recovery of the said amount or seeking specific performance of the alleged agreement by the plaintiff to relinquish his shares in favour of the defendant. No proceedings have been initiated challenging the sale deed whereby the plaintiff has been shown as 50% owner of the property. We are also of the view that the preliminary decree was liable to be passed in view of unequivocal admissions made by the defendant.

7. The Court while considering the applicability of Order XII Rule 6 has to consider whether the so-called defence raised by the defendant is plausible or is completely sham. Merely because the defendant denies the claim of the plaintiff would not *ipso facto* imply that there is a defence raised by the plaintiff that requires framing of issues and relegating the parties to trial. Merely because defendant raises some dispute, it cannot be said that there was no unequivocal admission. The dispute raised has to be material to the controversy between the parties and should be germane to

the questions to be determined by the court. Every dispute raised would not be material to the controversy between the parties. Only such disputes as have a material bearing on the issues involved would be considered by the court to deny the claim of unequivocal admission. The Court has to only consider the facts that have a material bearing on the relief claimed. Merely because the defendant in opposition raises certain facts which may be disputed would not imply that there is a defence raised to the claim made in the plaint.

8. In the present case, the appellant/defendant does not allege that the amount was paid by him to his brother or to the seller on behalf of the brother but the plea is that the amount was paid to the father of the parties who in turn paid the same to the parties who then got the pay orders prepared and paid the same to the seller. On the other hand, the Appellant/defendant admits:

- (i) the sale deed dated 05.07.2002;
- (ii) that the sale deed is in joint names of the plaintiff and the defendant;
- (iii) that the sale consideration for his share was paid to the seller by the plaintiff from his own account;
- (iv) that he has not filed any proceedings to challenge the sale deed; and
- (v) that he has not filed any proceedings against the plaintiff for specific performance of the alleged agreement to repay the amount or to relinquish the share.

9. Looked at from another angle, even if it were to be considered that the amount had been paid by the defendant for the purchase of the property in favour of the plaintiff, the plea of the defendant would be hit by the Benami Transactions (Prohibition) Act, 1988. The defendant in terms of section 4 of the Benami Transactions (Prohibition) Act, 1988 would be prohibited from raising such plea or staking a claim to the share of the plaintiff.

10. The reliance placed by the appellant on the judgment dated 02.09.2008 in the case of **Daljeet Singh Anand v. Harjinder Singh Anand**, FAO(OS) 228/2008 is misplaced as in the said case the Court had declined to pass a decree under Order XII Rule 6. The facts of the said case are different inasmuch as in the said case the father of the parties was the owner of the property and had executed a conveyance deed in favour of the two sons. Apart from the conveyance deed, there was reliance placed on various other admitted documents executed by the parties. In the said case, the sale was without any consideration and there was also an allegation of fraud. The Court based on the analysis of various documents came to a conclusion that there was no unequivocal, clear or unambiguous admission in the said case. The Court in paragraph 15 of the said judgment has noted the two aspects, which persuaded the Court to decline to pass a decree based on admission. Paragraph 15 of the said judgment reads as under:-

“15. The trial court has, thus, exercised its discretion in a particular manner. It is possible to argue that the defence of the respondent in the written statement is weak in view of plethora of documents, execution whereof is admitted. At the same time, two aspects which come in our mind

and persuade us to approve the approach adopted by the learned Single Judge are the following:-

(a) The father of the parties, who is the original owner, filed an application under Order I Rule 10 of the CPC supporting the plea of the respondent that the documents were fraudulently executed. Though father of the parties has his independent right to take whatever proceedings he wants to institute on the basis of his averments, fact remains that even the father is dubbing the transaction as fraudulent.

The plea of the respondent or his father based on fraud by itself might not have been sufficient, which is raised many years after the execution of the document. But it assumes some relevance in the context of application under Order XII Rule 6 CPC when it is coupled with another circumstance listed below, namely:

(b) Allegation of the respondent is that the Conveyance Deed is without consideration and is, therefore, void. Indubitably, what is executed by the father is not a Gift Deed but a Sale Deed. Such a transaction has to be for valid consideration. Therefore, it is the right of the respondent to seek the transaction as void on the basis of his plea that there is no consideration passed while executing the sale deed. This aspect needs consideration.”

In view of the differences as noticed above, the said judgment does not come to the aid to the appellant.

11. Looked at from any angle, we find no infirmity in the order passed by the learned Single Judge in passing a preliminary decree under Order XII

Rule 6. We find no merit in the appeal. The appeal is accordingly dismissed leaving the parties to bear their own costs. Since we have considered and dismissed the appeal on merits, the application seeking condonation of delay is also dismissed.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

November 23, 2015
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