

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

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Date of decision: 18th March, 2016

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RFA No.498/2010 & CM No.5238/2015 (for stay)

PREM MEHTA

..... Appellant

Through: Appellant in person.

Versus

RAJ KUMAR MEHTA & ORS.

..... Respondents

Through: Mr. Sanjiv Bahel, Adv.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 impugns the judgment and decree dated 9th March, 2010 of the Court of Sh. Pitamber Dutt, Additional District Judge (ADJ), Delhi in Suit No.394/2009 filed by the deceased respondent no.1 / plaintiff against the appellant/defendant no.1 and the respondents no.2&3/defendants no. 2 and 3 namely Sh. Tony Mehta & Ms. Meenakshi Periera for partition of immovable property No.7A/70, WEA, Karol Bagh, New Delhi ad-measuring 173.25 sq. yds. and for declaration that the deceased respondent no.1 / plaintiff was the owner of ground and barsati / second floor of the said property and that the appellant and the respondents no.2 and 3 were entitled to the first floor of the said property.

2. Notice of the appeal was issued and the Trial Court record requisitioned. The appeal, on 1st December, 2011 was admitted for hearing and ordered to be listed in due course. Vide order dated 8th April, 2013 on the application of the respondent no.1 / plaintiff that inspite of there being no stay of execution, execution was held up owing to the trial court record having been requisitioned in this Court, the trial court record was sent back. The appeal came up for hearing on 14th July, 2015 when the appellant appeared in person and stated that she had lost faith in her advocate and the appeal be decided. Accordingly the counsel for the respondent no.1 / plaintiff was heard, trial court record re-requisitioned and the judgment reserved giving opportunity to the appellant or her counsel to file written arguments within four weeks. No written arguments have been filed on behalf of the appellant. The trial court record has been received and perused.

3. The respondent no.1 / plaintiff in or about October, 1998 filed the suit from which this appeal arises pleading i) that Late Sh. Bhag Mal Mehta who was the father of the respondent no.1 / plaintiff, father-in-law of the appellant and grandfather of the respondents no.2&3 died on 8th March, 1990 at 7A/70, WEA, Karol Bagh, New Delhi; ii) the said Sh. Bhag Mal

Mehta during his lifetime executed his last Will on 21st July, 1989 and which Will was registered with the Sub-Registrar, New Delhi as Document No.3495 in Additional Book No.III, Volume No.514 at Pages 75-80 dated 21st July, 1989; iii) that in the aforesaid Will Sh. Bhag Mal Mehta mentioned property No.7A/70, WEA, Karol Bagh, New Delhi, measuring 173.25 sq. yds. as his self acquired property and the suit was being filed seeking partition of the said property by metes and bounds as per the said Will; iv) that the respondent no.1 / plaintiff had already obtained Succession Certificate in respect of movable assets of Late Sh. Bhag Mal Mehta; v) that after the death of Sh. Bhag Mal Mehta, the respondent no.1 / plaintiff requested the appellant and the respondents no.2&3 / defendants to partition the property by metes and bounds as per the Will but they were refusing to do so; vi) that as per the said Will, the respondent no.1 / plaintiff had become the absolute owner of the entire ground floor and the barsati floor and the appellant and the respondents no.2 &3 / defendants were entitled to first floor only of the property; vii) that the respondent no.1 / plaintiff was in possession of the entire ground floor and the appellant and the respondents no.2&3/defendants were in possession of first floor of the property; the barsati floor was jointly occupied by the respondent no.1 / plaintiff and the

appellant and the respondents no.2&3 / defendants “though the defendants allegedly claim their possession over the same”; viii) accordingly, the relief of partition of the property by metes and bounds as per their respective shares by virtue of the Will was claimed.

4. The appellant and the respondents no.2&3 / defendants contested the suit by filing a joint written statement pleading i) that the suit had not been properly valued for the purpose of court fees and jurisdiction; ii) that the Will propounded by the respondent no.1 / plaintiff was forged and fabricated; iii) that the respondent no.1 / plaintiff had not obtained probate of the Will and unless the Will is proved, relief of partition cannot be granted; iv) that at the time of his death, Sh. Bhag Mal Mehta was 97 years old and all his mental and other physical faculties were not working; Sh. Bhag Mal Mehta was mentally not sound at the time of making of the alleged Will dated 21st July, 1989; v) the respondent no.1 / plaintiff by producing somebody else in place of Sh. Bhag Mal Mehta got the Will registered; Sh. Bhag Mal Mehta never accompanied the respondent no.1 / plaintiff to the office of the Sub-Registrar as he was unable to move; Sh. Bhag Mal Mehta was suffering from various ailments; he could not see properly; he used to lock himself in the bathroom and would not open the door of the bathroom

and if somebody asked him to come out of bathroom, he used to say that he was sitting in his bedroom and not to disturb him; he used to take off his clothes and would not put them on himself until somebody helped him; vi) that Sh. Bhag Mal Mehta was suffering from various ailments since the year 1976 and his health worsened day-by-day and in the year 1989, he was totally bed-ridden and could not even walk properly; vii) that in fact Sh. Bhag Mal Mehta had executed a Will dated 10th March, 1975—the said Will is genuine and correct; viii) that there was no reason for Sh. Bhag Mal Mehta to change the said Will; ix) that partition has already taken place in the year 1971, during the lifetime of Sh. Bhag Mal Mehta—as per the wish, and the defendants were given the first floor and the barsati floor and the ground floor which was having more than six rooms was given to the respondent No.1/plaintiff; x) that it was agreed between the parties in the Succession Court that movable properties shall be divided equally without prejudice to their rights; and xi) denying that the barsati floor was jointly occupied by the parties and claiming that the defendants were in exclusive possession of the first floor and the barsati floor; and, xi) that partition has to take place as per the registered Will dated 10th March, 1975 which is the only and genuine Will left by Sh. Bhag Mal Mehta.

5. The respondent No.1/plaintiff filed a replication controverting the contents of the written statement and further pleading—(a) that Sh. Bhag Mal Mehta, even at the age of 96 years was in good sound position, was mentally and physically much better than other persons of that age and moving on his legs and carried out his daily activities by himself and had perfect vision and was a voracious reader of newspapers; (b) that the Will dated 21st July, 1989 clearly stated that the Will dated 10th March, 1975 is revoked; (c) that when the parties appeared for the succession on the basis of Will dated 21st July, 1989, the Succession Court considering the fact that the Will dated 10th March, 1975 had been revoked and relying on the Will dated 21st July, 1989 granted Succession Certificate of movable properties to the parties as mentioned in Will dated 21st July, 1989; and, (d) reiterating that the Will dated 21st July, 1989 is the validly executed last Will of Sh. Bhag Mal Mehta.

6. On the basis of the pleadings aforesaid of the parties, on 25th October, 2004, the following issues were framed:

<i>“Issue No.1</i>	<i>Whether the plaintiff is entitled to partition as prayed for?</i>	<i>OPP</i>
<i>Issue No.2</i>	<i>Relief.”</i>	

Thereafter, vide order dated 16th December, 2009, the following additional issues were framed:

- “1. *Whether the suit has not been properly valued for the purposes of court fees and jurisdiction? OPD*
2. *Whether the deceased/executant of Will was not of sound mind at the material time of execution of the Will? If so, its effect? OPD*
3. *Whether the suit is not maintainable in the present form? OPD”*

7. The respondent No.1/plaintiff examined Sh. Ashwini Kumar Mata, Advocate, one of the attesting witnesses to the Will dated 21st July, 1989. The respondent No.1/plaintiff having died by then, his son Dr. Nutan Mehta substituted in his place also appeared in the witness box and closed plaintiff's evidence. The appellant/defendant and respondents No.2&3 / defendants examined only appellant and one Sh. Vinod Kumar and closed defendant's evidence.

8. The learned ADJ, on the basis of the pleadings and the evidence led before him, has found / observed / held:

- (i) that the controversy in the suit revolved around the validity of the Will dated 21st July, 1989;

- (ii) that the respondent No.1/plaintiff had examined one of the attesting witness to the Will who had proved the said Will;
- (iii) that the attesting witness in his cross-examination denied that Sh. Bhag Mal Mehta did not personally go to the Sub-Registrar Office and did not present himself for the purpose of registration or that any other person impersonated himself as Sh. Bhag Mal Mehta for the purpose of registration of the Will;
- (iv) that the Legal Representative of the respondent No.1/plaintiff (i.e. Dr. Nutan Mehta) had deposed that the Succession Certificate was granted without going into merits and controversies of respective Wills and also deposed that Sh. Bhag Mal Mehta was hail and hearty and had no problem regarding walking, talking, vision and climbing stairs etc;
- (v) that as per the law, propounder of the Will has to show that the Will was signed by the testator and that the testator had put his signatures to the testament of his own free will and that the testator at the relevant time was in a sound disposing state of mind and understood the nature and effect of the disposition and that the testator

had signed in the presence of two witnesses who attested it in the presence of the testator and in the presence of each other;

(vi) that the attesting witness to the Will examined by the respondent No.1/plaintiff had proved so;

(vii) that once the aforesaid is proved, the onus of the propounder of the Will is discharged unless any other special circumstances are pleaded;

(viii) that in the instant case, the appellant and the respondents No.2&3 / defendants had pleaded that Sh. Bhag Mal Mehta was not possessing good mental health for two years prior to his death and that he was not behaving rationally;

(ix) that though the appellant/defendant appearing in the witness box deposed on the same line and also stated that her son used to take Sh. Bhag Mal Mehta to Wellington Hospital and dispensary at Pusa Road but claimed that she was not in possession of medical prescription to show that she ever bought any medicine for Sh. Bhag Mal Mehta or that she was visiting Wellington Hospital for the ailment and deposed that she had disposed of all the said documents;

(x) that the appellant/defendant could not even tell the name of the Doctor under whose treatment Sh. Bhag Mal Mehta was;

(xi) that Sh. Vinod Kumar examined by the appellant and the respondents No.2&3 / defendants also deposed on the same line but the evidence of the appellant and the respondents No.2&3 / defendants was vague and bald regarding the mental and physical health of Sh. Bhag Mal Mehta; they had not specifically shown as to from what ailment Sh. Bhag Mal Mehta was suffering and had also not produced any material on record to show that Sh. Bhag Mal Mehta was not in a sound disposing mind;

(xii) that the respondent No.1/plaintiff had thus successfully proved that Sh. Bhag Mal Mehta had executed the registered Will dated 21st July, 1989 which was duly attested by attesting witnesses;

(xiii) that the appellant and the respondents No.2&3 / defendants had failed to prove that the suit was not properly valued for the purposes of court fees and jurisdiction;

(xiv) that no probate of the Will was required to be obtained before making a claim on the basis thereof; reliance was placed on ***Santosh***

Kakkar Vs. Ram Prasad 71 (1998) DLT 147 holding that the executor or legatee can establish his rights under a Will executed in Delhi without seeking probate;

(xv) that since the shares of the parties in the properties were as per the Will which had been proved, no preliminary decree was required to be passed.

Accordingly, a decree for partition was passed partitioning the property by metes and bounds as per Will dated 21st July, 1989 of Sh. Bhag Mal Mehta.

9. In the absence of the appellant having not addressed any arguments, I have perused the grounds in the memorandum of appeal. It is the contention of the appellant therein:

(a) that the findings of the learned ADJ are based on conjectures and on faulty appreciation of evidence;

(b) that the learned ADJ has failed to appreciate that the suit for partition was not maintainable without claiming possession;

- (c) that the attesting witness to the Will examined was also the draftsman of the Will—no reliance could be placed on his evidence;
- (d) that the learned ADJ has not given due weightage to the testimony of Sh. Vinod Kumar examined by the appellant/defendant and respondents No.2&3 / defendants.

10. I have personally perused the documents and of witnesses on the Trial Court file and find the learned ADJ to have correctly appreciated the evidence before him and to have reached the right conclusion on the basis thereof. The attesting witness examined by the respondent No.1/plaintiff is found to have i) explained his relationship with Sh. Bhag Mal Mehta; he has deposed that his in-laws were living across the road from Sh. Bhag Mal Mehta and Sh. Bhag Mal Mehta had requested him to advise him in the matter of his Will; ii) he has further deposed that the Will was prepared in his office then in vicinity, in East Patel Nagar; iii) he has further deposed of Sh. Bhag Mal Mehta having instructed him qua the contents of the Will and being in a sound disposing mind; iv) he has deposed that he along with Sh. Bhag Mal Mehta and the other attesting witness Sh. V.R. Iyer had gone together to the office of the Sub-Registrar, Delhi for registration of the Will;

v) he has identified his own signatures, signatures of Sh. Bhag Mal Mehta, signature of Sh. V.R. Iyer, other attesting witness as well as signature of Sh. I.C. Garg, Advocate at Sub Registrar Office who facilitated the registration, on the original Will on trial court record and deposed of the chronology in which signatures were put. The Will thus stands proved by him. I have carefully perused his lengthy cross-examination by the counsel for the appellant and the respondents No.2&3 / defendants and I do not find the same to have denied his testimony in proof of the Will and in proof of the mental condition of Sh. Bhag Mal Mehta at the time of making of the said Will. I find the appellant and the respondents no. 2&3/defendants to have also filed before the trial court the certified copy of the earlier Will registered on 20th March, 1975, though did not prove the same. The same is also found to have the same Sh. V.R. Iyer as witness. The signatures of Sh. Bhag Mal and Sh. V.R. Iyer on the Will registered on 20th March, 1975 and on the Will dated 21st July, 1989 at least to the naked eye appear to be of the same person, save with differences owing to passage of time. The earlier Will also contains witness of one Mr. S.S. Madan, Advocate.

11. I have also perused the deposition of the appellant/defendant and agree that the appellant/defendant has not proved the factum of Sh. Bhag

Mal Mehta at the time of execution of the Will being not in a sound mental condition. She in her cross-examination admitted that Sh. Bhag Mal Mehta during his lifetime was residing on the ground floor of the subject property along with the family of the respondent No.1/plaintiff. She also admitted that Sh. Bhag Mal Mehta till two years prior to his death used to climb up to the first floor of the property where she was residing. As far as the testimony of Sh. Vinod Kumar examined by the appellant and the respondents No.2&3 / defendants is concerned, he is admittedly neither a neighbor nor a relative. However, he claimed to have visited Sh. Bhag Mal Mehta during the period 1988 to 1990 and claimed to have found him of unsound mind and not understanding anything; he has however not disclosed the reason for his such visits. In cross-examination, he stated that he used to visit the appellant/defendant who was living on the first floor, that would however still not explain his visit to the ground floor. Rather, he admitted that he had never seen the ground floor from inside and only used the staircase from the ground to the first floor. I find the said Sh. Vinod Kumar to be an interested and unreliable witness.

12. Even otherwise, the principal contention of the appellant/defendant as apparent from the grounds of appeal appears to be that the suit for partition

without claiming the relief of possession was not maintainable. No merit is found in the said contention. It is a settled position in law that while claiming the relief of partition, no separate relief for possession is required to be claimed. The relief of possession of separate share, if the property is capable of division by metes and bounds, is imbedded in the relief of partition. It was so held by Supreme Court in ***Prokash Chandra Mukherjee Vs. Saradindu Kumar Mukherjee*** (1971) 3 SCC 607.

13. Though the appellant, neither in her written statement jointly filed with her children respondents no. 2&3, nor in memorandum of appeal clearly so spelt out but the objection appears to be that once the case of the respondent no.1/plaintiff was that as per the Will of Sh. Bhag Mal Mehta he was the sole absolute owner of the barsati/second floor of the property and of which the appellant and respondents no. 2&3/defendants were in possession of, the remedy of the respondent no.1/plaintiff was to sue for possession and not for partition and which would require the respondent no.1/plaintiff to value the suit for purpose of court fee and jurisdiction at the market value of the said barsati/second floor. Merit is found in the said contention. Partition can be claimed only of what is joint and in which the shares of the parties are not determined, either in ratio and/or physically.

Here, the case of the respondent no.1/plaintiff was that he was the owner of ground floor, of which he was in exclusive possession and appellant and respondents no. 2&3 / defendants were the owners of first floor, of which they were in exclusive possession of. There was thus no need for partition thereof. As far as the barsati/second floor was concerned, that according to the respondent no.1/plaintiff himself belonged exclusively to him; the question of filing a suit for partition with respect thereto did not arise. However as aforesaid, the appellant and respondents no. 2&3/defendants did not clearly urge the said plea and which resulted in the same remaining to be adjudicated. I am now, after the parties have been litigating for over 18 years, not willing to non suit the respondent no.1/plaintiff for reason thereof. Such a plea indeed ought to have been taken by way of a preliminary issue. Now, when the real controversy between the parties i.e. as to the Will dated 21st July, 1989 has been adjudicated and as outcome whereof respondent no.1/plaintiff indeed is entitled to the barsati/second floor, it is not deemed appropriate to direct the respondent no.1/plaintiff to file, instead of a suit for partition, a suit for possession. More so when the difference is only in terms of court fee. In fact it is also not known what court fee is payable on final

decree for partition and whether the respondent no.1/plaintiff at all has gained.

14. There is thus no merit in the appeal.

15. Dismissed.

No costs.

Decree Sheet be prepared.

Trial Court file be returned.

RAJIV SAHAI ENDLAW, J.

MARCH 18, 2016

‘gsr/bs’..