

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

%

Date of decision: 9th March, 2016

+

RFA No.75/2015 & CM No.7193/2016 (for stay)

ASHOK KUMAR

..... Appellant

Through: Mr. Sachin Datta, Sr. Adv. with Mr. B.B. Gupta, Ms. Kannupriya Tiwari, Mr. Madan Lal Gupta & Ms. Nauras S., Advs.

versus

ANIL AGGARWAL & ORS.

.... Respondents

Through: Mr. P.K. Rawal with Mr. Ajay Bahl & Mr. Tarun Agarwal, Advs. for R-1 to 5 & 8.

+

RFA No.219/2015 & CM No.18182/2015 (for directions) & CM No.6101/2015 (for stay)

ASHOK AGGARWAL

..... Appellant

Through: Mr. Sachin Datta, Sr. Adv. with Mr. B.B. Gupta, Ms. Kannupriya Tiwari, Mr. Madan Lal Gupta & Ms. Nauras S., Advs.

versus

**SANTOSH AGGARWAL (SINCE DECEASED)
& ORS.**

.... Respondents

Through: Mr. P.K. Rawal with Mr. Ajay Bahl & Mr. Tarun Agarwal, Advs. for R-1 to 5 & 8.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. RFA No.75/2015 impugns the judgment and decree (dated 4th September, 2014 of the Court of Additional District Judge-17 (ADJ)

(Central), Tis Hazari Courts, Delhi) of dismissal of CS No.214/2014, Unique I.D. No.02401C0418042002 filed by the appellant for declaration and injunction on the preliminary issue of being barred by Section 69 of the Indian Partnership Act, 1932.

2. The said appeal came up before this Court first on 9th February, 2015 and on 20th February, 2015 notice thereof was issued. The counsel for all the six respondents entered appearance and the trial court record was requisitioned. When this appeal was listed last on 30th November, 2015, it was informed that connected RFA No.219/2015 was listed on 9th March, 2016. Accordingly, this appeal was also posted for today.

3. RFA No.219/2016 impugns the judgment and decree (dated 17th December, 2014 of the same ADJ-17 (Central), Tis Hazari Courts, Delhi) on admissions in CS No.146/2014 filed by Smt. Santosh Aggarwal (Santosh) (who died during the pendency of the suit and was substituted by respondents no.1 to 4 viz. Pawan Aggarwal (Pawan), Rahul Aggarwal (Rahul), Payal Mittal (Payal) and Sonal Aggarwal (Sonal)) and Anil Aggarwal (Anil) being respondent no.5 against respondents no.7 to 11 viz. M/s Om Ram Dharam Kanta, Sh. Rajinder Aggarwal (Rajinder), Smt. Laxmi

Devi (Laxmi), Smt. Veena Rani (Veena) & Smt. Krishna Devi (Krishna) as also against Ashok Aggarwal (Ashok) being the appellant in the said appeal, for recovery of possession of property No.1-A, Shahzada Bagh Extension, Delhi.

4. The said appeal came up before this Court first on 8th April, 2015 when notice thereof was issued and the parties referred to mediation and execution stayed. Mediation remained unsuccessful. The respondents no.1 to 5 in the said appeal filed CM No.18182/2015 for a direction to the appellant therein to deposit arrears of use and occupation charges and notice thereof was also issued. Though respondents no. 9 to 11 in the said appeal viz. Laxmi, Veena and Krishna remain unserved but the counsels inform that they were not contesting the suit before the Trial Court also. In the circumstances, their service is dispensed with.

5. Passover is sought on behalf of the counsel for the appellant (Ashok Kumar and Ashok Aggarwal are one and the same person) in both appeals.

6. The counsel for the appearing respondents opposes and states that the matters if passed over would not reach again. It is further stated that the

appellant has not paid any amount for use and occupation of the property from which he has been ordered to be ejected since May, 2003.

7. On enquiry, it is informed that the enquiry into the claim for arrears and for *mesne* profits is underway in the suit from which RFA no.219/2015 arises.

8. In view of the aforesaid and finding that the suit from which RFA No.219/2015 arises was filed as far back as on 1st April, 2003 and the plaintiff / decree-holder therein is not receiving any monies and considering the nature of the controversy and the fact that in the event of it being found that no case for decree on admissions is made out, the matter will have to be remanded, it is deemed appropriate to hear the counsels finally at this stage on the appeal. At this stage, the senior counsel for the appellant has also appeared and the counsels have been heard.

9. Ashok Kumar @ Ashok Aggarwal (hereinafter called Ashok) on 2nd May, 2002 instituted the suit from which RFA No.75/2015 arises against Anil, Rajender and Santosh, pleading i) that Ashok was a partner along with Anil and Rajender of M/s Om Ram Dharamkanta (Firm) carrying on business at properties no.1 and 1-A, Sahazadabagh Extension, Delhi; ii) the

Firm was a tenant in the said two properties and paying rent of Rs.9,600/- per month thereof to the respective owners of two properties; iii) property no. 1 ad-measures 150 sq. yds. and is owned by Smt. Reena Devi and Smt. Shiksha Devi who were receiving rent of Rs.4,800/- thereof and property no.1-A ad-measuring 164 sq. yds. was owned by Santosh and Laxmi who were receiving rent of Rs.4,800/- thereof from the Firm; iv) that the two properties were being used as one without any partition; v) that Anil and Rajender filed a suit for partition against Santosh pleading that they had acquired the 50% share of Laxmi in property No.1-A and a collusive decree dated 20th September, 2001 of partition by metes and bounds of the said property no.1-A was passed between Anil and Rajender on the one hand and Santosh on the other hand; vi) that it was concealed from the said suit that Ashok as a partner of the Firm was also a tenant in property no.1-A or that the Firm was a tenant in the property; vii) that the motive behind the said collusive suit was to oust Ashok from the partnership business and the tenancy rights and possession of the property. Accordingly, a decree a) for declaration that the decree dated 20th September, 2001 was a nullity and illegal; and b) for injunction restraining Anil, Rajender and Santosh from using the decree dated 20th September, 2001 and / or from dispossessing

Ashok from property No.1 and 1-A, Sahazadabagh Extension, Delhi and / or from raising any construction in accordance with the decree dated 20th September, 2001, was sought in the suit.

10. On 10th February, 2003, the following issues were framed in the suit:

- “1. Whether the suit is maintainable in view of preliminary objections?
2. Whether the plaintiff is entitled for decree of declaration as prayed for? OPP
3. Whether the plaintiff is entitled for decree of permanent injunction? OPP
4. Relief.”

and Issue no.1 was ordered to be treated as a preliminary issue. The preliminary objections on which the preliminary issue was framed was that as per Ashok also the Firm was the tenant in the premises but the suit had been filed not by the Firm but by Ashok as a partner of the Firm and since the firm was not registered, the suit was not maintainable under Section 69 of the Partnership Act.

11. The suit remained pending from 10th February, 2003 till 4th September, 2014 i.e. for nearly 11 years at the said stage of hearing of arguments on the preliminary issue framed. In between Santosh died and

applications for setting aside of the abatement and for substitution of legal heirs were filed and allowed and Pawan, Rahul, Payal, and Sonal being the husband and children of Santosh were substituted in her place. Ultimately, vide judgment / order dated 4th September, 2014 supra, the preliminary issue was decided in favour of defendants in the suit and suit dismissed as aforesaid.

12. The learned ADJ has decided the aforesaid preliminary issue against Ashok, finding/holding/observing:

- (i) that the rights claimed by Ashok as a tenant in the property were on behalf of the Firm and not for his own individual self;
- (ii) that the entire claim of Ashok in the suit was based upon partnership deed dated 20th May, 1992;
- (iii) the claim of Ashok had arisen out of the partnership deed and which partnership was un-registered;
- (iv) that even otherwise the decree dated 20th September, 2001 qua which the suit was filed was based on ownership rights in the

property and was not concerned with who was the tenant in the property;

- (v) that the suit was thus not maintainable in view of the preliminary objections in the written statement.

13. The suit from which RFA No.219/2015 arises, was filed by Santosh and Anil against the Firm, Rajender, Laxmi, Veena, Krishna and Ashok pleading:

- (i) that Santosh and Anil were the owners of property No.1A, Sahazadabagh Extension, Delhi and had been receiving rent of Rs.4,800/- from the tenant therein;
- (ii) that Anil and Santosh had been declared as co-owners of the said property vide decree dated 20th September, 2001;
- (iii) that Ashok had filed a suit for declaration of the said decree dated 20th September, 2001 as collusive and nullity and for permanent injunction and which was pending consideration;
- (iv) that as per the suit filed by Ashok also, it was the firm which was a tenant in the property;

- (v) that neither the firm nor its partners had paid any rent with effect from April, 2001;
- (vi) that the tenancy of the firm of which besides Ashok, Rajender, Laxmi, Veena and Krishna were partners was terminated vide notice dated 15th January, 2013;
- (vii) that the firm or its partners had neither paid arrears of rent nor vacated the property;
- (viii) that accordingly, the suit was filed for recovery of possession and for arrears of rent and *mesne* profits;

14. Ashok, who alone has impugned the decree for recovery of possession, contested the suit by filing a written statement pleading i) that Santosh and Anil having already partitioned the property no.1-A by metes and bound vide decree dated 20th September, 2001 could not jointly file a suit for ejectment of the tenant therefrom; ii) that the suit was barred by Section 50 of the Delhi Rent Control Act, 1958, iii) that even before the partition, rent of Rs.2,400/- each was being paid to Santosh and Laxmi; iv) that though according to the decree dated 20th September, 2001 Rajender was also the owner but had not been joined as plaintiff; v) that Surrender

Aggarwal (Surender) (who is respondent no.6 in RFA no.219/2015) was also claiming to be the owner of ¼ share in the property; vi) that the decree dated 20th September, 2001 on the basis of which Santosh and Anil were claiming to be co-owners was collusive; vii) that Anil was also a partner of the firm and could not file a suit against himself; viii) that no valid notice had been given; ix) that the description and dimensions of the property from which eviction was sought was wrong; x) Laxmi, Veena, Krishna were never admitted to the benefits of the partnership of the firm.

15. Surender filed an application for impleadment as plaintiff in the suit pleading that he was the purchaser of one half share of Laxmi i.e. 1/4th share in the property no.1A and disputing that Rajender along with Anil was the purchaser of the entire one half share of Laxmi in the said property and which application was allowed and Surender also impleaded as the plaintiff.

16. The learned ADJ has vide order / judgment impugned in RFA No.219/2015 passed a decree for recovery of possession on admissions (the claim for arrears of rent and *mesne* profits is pending enquiry) finding/observing/holding:

- (i) that it was not in dispute that the Firm was a tenant in the premises;
- (ii) that it was not in dispute that the rent of the premises was Rs.4,800/- per month;
- (iii) that the relationship of landlord and tenant was not in dispute;
- (iv) that even if the rent was being paid equally to the two landlords i.e. Rs.2,400/- to Santosh and Rs.2,400/- to Laxmi, the same did not mean that there were two separate and distinct tenancies; that no particulars of separate and distinct tenancies had also been pleaded; reliance in this regard was placed on ***Charanjit Lal Mehra Vs. Kamal Saroj Mahajan*** (2005) III AD (SC) 525;
- (v) that the denial of relationship of landlord and tenant was vague and not specific; reliance in this regard was placed on ***Association for Vountary Action Vs. The Child Trust*** (2013) IX AD (Delhi) 180:

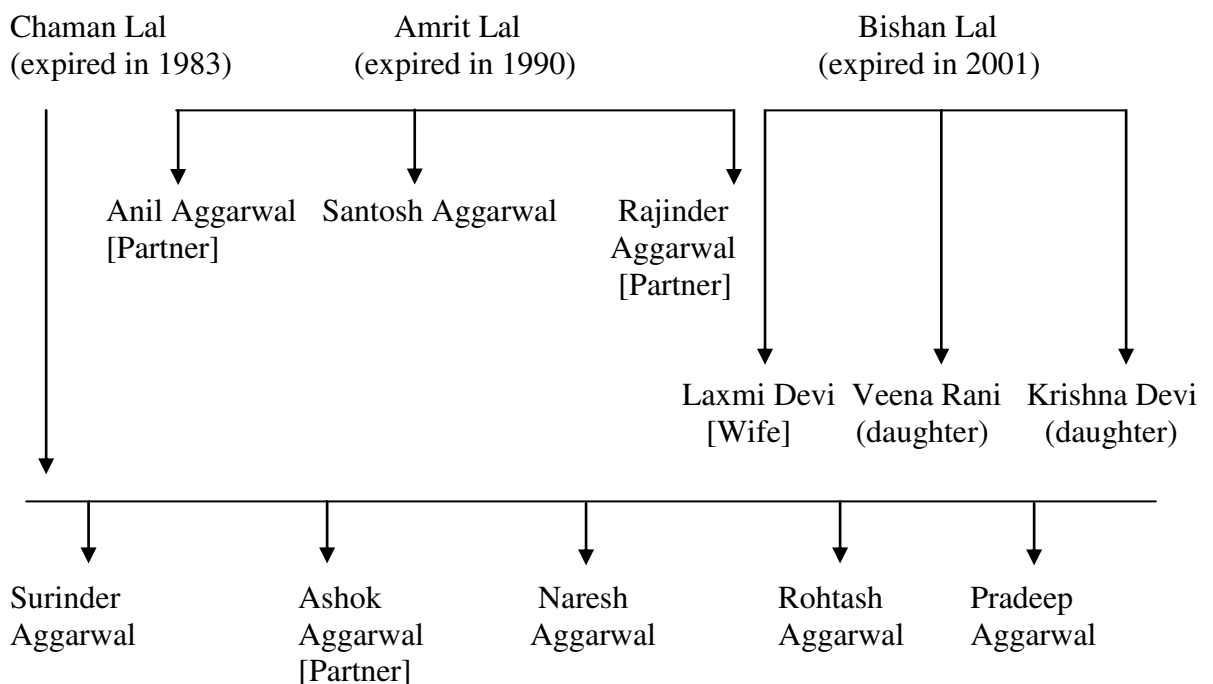
- (vi) that it mattered not that the stand of Santosh and Anil in the suit in which decree dated 20th September, 2001 had been passed, was of Anil and Rajender being tenant and not the Firm;
- (vii) Surender was however opposing the eviction relying upon judgment dated 23rd August, 1982 of the Division Bench of the Orissa High Court in case No.965/1977 titled ***South Eastern Roadways Vs. Satyanarayan***;
- (viii) Surender had however sought impleadment in the suit on ground of assignment of right to the tune of 1/4th undivided share in the property stating that he was desirous of continuing the present suit and was on that basis impleaded as plaintiff no.2A;
- (ix) Surender could not take a contradictory stand by now contending that he did not want the relief claimed in the suit;
- (x) Surender had already instituted CS(OS) No.1436/2004 in this regard for partition *inter alia* of property No.1A and of declaration of the decree dated 20th September, 2001 as a nullity and which suit was pending consideration;

(xi) however the pendency of the suit for partition with respect to the property had no bearing on the subject suit for recovery of possession against a tenant whose tenancy had been determined;

(xii) even otherwise, the plaintiffs as co-owners were entitled to maintain a suit;

Accordingly, a decree for recovery of possession on admissions was passed in favour of legal heirs of Santosh and Anil but not in favour of Surender and against the Firm, Ashok, Rajender, Laxmi, Veena and Krishna.

17. At this stage, it is apposite to describe the relationship between the parties. Their family tree is as under:



18. Being of the view that upon a view in RFA no.219/2015 being taken, the outcome of RFA no.75/2015 will follow, I first proceed to deal with RFA No.219/2015. The record of the suit from which RFA no.219/2015 arises had not been requisitioned but while correcting this judgment, I have requisitioned the said record also and perused the same.

19. The question for adjudication in RFA no.219/2015 is, whether the trial court was correct in passing a decree for ejectment on admissions. If it is found that on the pleadings of the parties, the passing of a decree for ejectment on admissions is erroneous, the appeal will have to be allowed and the suit remanded for trial in accordance with law.

20. A perusal of the voluminous record of the suit from which RFA no.219/2015 arises, shows i) only the appellant Ashok to have filed a written statement for himself and on behalf of the firm defending the suit; ii) no replication by Santosh and Anil was filed thereto; iii) Surrender to have filed an application for impleadment in the suit as far back as on 14th May, 2003, claiming to be co-owner having 1/4th share in property no.1-A, Shahzada Bagh Extension, Delhi, vide registered Sale Deed from the person(s) to whom Laxmi had sold her share in the property and also claiming the decree dated 20th September, 2001 supra to have been collusively obtained by

Santosh, Anil and Rajender; iv) Santosh and Anil to have opposed the application of Surender for impleadment; v) application under Order XII Rule 6 of CPC on which decree on admissions has been passed to have been filed on 10th February, 2010 – till then the application of Surender for impleadment was pending; vi) Surender to have opposed the application under Order XII Rule 6 of the CPC claiming that he as owner / landlord to the extent of 1/4th share was not desirous of seeking eviction of the tenant; vii) Santosh and Anil to have filed application under Order I Rule 10 of the CPC and under Order VI Rule 17 of the CPC stating that Anil had gifted half of his half share i.e. 1/4th share in the property to Surender and seeking impleadment of Surender as a defendant in the suit; viii) Surender also to have on 27th October, 2010 filed an application under Order XXII Rule 10 of the CPC claiming that Anil had vide registered Gift Deed dated 13th July, 2010 gifted his 1/4th undivided share in property no. 1-A, Shahzada Bagh Extension, Delhi to Surender and Surender was desirous of continuing the suit and seeking substitution in place of Anil; ix) vide order dated 8th February, 2011, the application of Santosh and Anil under Order I Rule 10 and under Order VI Rule 17 of the CPC to have been dismissed and the application of Surender under Order XXII Rule 10 of the CPC to have been

allowed; x) there being no mention of the earlier application of Surender for impleadment in the suit claiming 1/4th share adversely to Anil; xi) the order dated 10th December, 2014 to be recording that Surender was opposing the application under Order XII Rule 6 of the CPC.

21. Though the stand of Santosh, Anil and Rajender in the suit in which decree dated 20th September, 2001 was passed was that Santosh was the owner of 50% share in property no. 1-A, Shahzada Bagh Extension, Delhi and Anil and Rajender were the owners of the other 50% share in property no. 1-A, Shahzada Bagh Extension, Delhi and Anil and Rajender were also the tenants in the said property but upon Ashok in the suit from which RFA no.75/2015 arises claiming that it was the firm which was the tenant in the property, Santosh and Anil, while filing the suit from which RFA no.219/2015 arises accepted the said stand of Ashok and impleaded the firm and all its partners as defendants to the suit.

22. In my view the said course of action is permissible and does not require setting aside of the decree of ejectment on admissions. It is always open to a litigant to, though claiming a certain set of facts to be correct, while instituting the suit claiming relief even if the state of affairs as claimed by the defendants were to be correct.

23. Though as per the decree dated 20th September, 2001 Santosh to the extent of 50% and Anil and Rajender to the extent of the remaining 50% were the owners of property no. 1-A, Shahzada Bagh Extension, Delhi but the suit for ejectment of the tenant in the property was filed by Santosh and Anil only and Rajender, who as per the decree dated 20th September, 2001 was also the owner along with Santosh and Anil was not joined as a plaintiff to the suit. However Rajender in his capacity as the partner of the firm was impleaded as a defendant to the suit and is not found to have opposed the claim of Santosh and Anil. Rajender, as a respondent to the appeal is still not opposing the decree.

24. Though no explanation has been offered as to why Rajender did not join Santosh and Anil in seeking ejectment of the tenant in the property but the reason therefor from a perusal of the records appears to be the FIR and the prosecution which was pending relating to the title claimed by Rajender to the property.

25. The question which arises is whether the decree for ejectment on admissions is bad for the reason of Rajender, who as per the decree dated 20th September, 2001 on which Santosh and Anil based their title to the property no. 1-A, Shahzada Bagh Extension, Delhi as landlord, not joining

in seeking eviction of the tenant. The learned ADJ has reasoned that even one of the landlords is entitled to claim ejectment of the tenant. Though this principle had evolved in relation to the filing of petitions for eviction of tenant under the Rent Acts but has now been followed in suits relating to ejectment of tenants after determination of tenancy also and I see no reason to take a different view. Thus I hold that Rajender not joining in seeking the eviction of the tenant from the premises is not fatal to the claim by the other landlords for ejectment.

26. Though Surender was earlier claiming to be 1/4th owner/landlord of the property adversely to Anil who was claiming to be the owner of one half share of the property (with the other half share belonging to Santosh) but upon Anil gifting his 1/4th share in the property to Surender, Surender did not claim that he had become the owner of 50% share in the property i.e. 1/4th share held by him vide sale deed aforesaid and 1/4th share which had come through Anil. Surender was satisfied with being impleaded as plaintiff no.2 along with Anil and did not press for impleadment in place of Anil. The same is indicative of Surender claiming only 1/4th share and not one-half share in the property. In this way, Santosh claims to be owner of half

share in the property and Anil and Surender each claim to be owner of 1/4th share in the property no. 1-A, Shahzada Bagh Extension, Delhi.

27. In a suit for ejectment of a tenant, title as owner is not required to be established and only title as landlord is enough. The stand of Ashok who alone is impugning the decree for ejectment was that Santosh and Laxmi were the owners / landlords. Laxmi is now not claiming any right in the property though a party to these proceedings. As aforesaid, earlier Anil and Rajender were claiming to have succeeded to 50% share of Laxmi and now Anil and Surender claim to have succeeded to the said 50% share of Laxmi in the property. None else has come forward, even according to Ashok, claiming title to the property.

28. Though it is the claim of Ashok in his written statement that the firm never attorned to anybody other than Laxmi as landlord along with Santosh and Ashok has also pleaded that the rent used to be paid by credit to the account of Santosh and Laxmi in the books of the firm, with them withdrawing the same from the accounts of the firm whenever they felt, but for a relationship of landlord and tenant to come into existence attornment is not necessary. Reference in this regard can be made to my judgment in ***Harvinder Singh Vs. Paradise Towers Pvt. Ltd.*** 2013 SCC Online Del. 309.

Thus no overt act of attornment by the firm, of Anil and Surender as landlords in place of Laxmi Devi is required once it is found that it is Anil and Surender who have succeeded to the share of Laxmi in the property.

29. The question for consideration also is, what is the effect of ambivalent stand of Surender. Surender is found to have taken varying stand at different stages of the suit. At one time he claimed that he also, as Santosh and Anil, was claiming ejectment of the tenant but at another point of time he is found to have opposed the application under Order XII Rule 6 of the CPC filed by Santosh and Anil. The learned ADJ has held that opposition by Surender to the claim for ejectment after seeking impleadment claiming to be interested in ejectment of the tenant did not entitle him to so oppose ejectment and that Santosh and Anil being owners / landlords to the extent of 75% share in the property were entitled to seek ejectment of the tenant. In my view, the principle, of one of the landlords being entitled to seek ejectment, would again apply. Thus the same also does not come in the way of the decree for ejectment on admissions.

30. The main question for consideration is the effect if any of the decree dated 20th September, 2001 for partition of the property by metes and bounds. It is the stand of Ashok that on such partition, the tenancy which

was at the rate of Rs.4,800/- per month stood bifurcated into two separate tenancies i.e. one under Santosh at the rent of Rs.2,400/- per month and the other under Anil and Rajender at the rent of Rs.2,400/- per month. If such a stand were to be correct then the Civil Court, by virtue of Section 50 of the Delhi Rent Control Act, 1958 would not have jurisdiction to order ejectment as the Delhi Rent Control Act applies to tenancies where the rent is till Rs.3,500/- per month.

31. However Ashok himself is impugning the decree dated 20th September, 2001 and seeking the setting aside thereof including by pursuing RFA no.75/2015. Ashok cannot be permitted to on the one hand seek setting aside of the decree dated 20th September, 2001 and the other hand resist his ejectment from the property relying thereon. Surender who as aforesaid now shares 50% with Anil is also stated to be, in CS(OS) No.1436/2004 filed by him, impugning the said decree dated 20th September, 2001 and seeking setting aside thereof.

32. I am of the view that for this reason alone there is no merit in the challenge by Ashok of the decree for ejectment on admissions on the said ground.

33. Even otherwise, as per Section 37 and Section 109 of the Transfer of Property Act, 1882 there is no severance of the tenancy by reason merely of partition between the co-owners and landlords and there is no separate demise in respect of divided part and the landlord to whom a divided part has been allotted acquires no right by reason merely of the partition to terminate the tenancy by giving notice to quit qua that part. Though the counsel for the respondents handed over photocopies of judgments viz. ***Charanjit Lal Mehra Vs. Kamal Saroj Mahajan*** 2005 III AD (SC) 525, ***Kamal Saroj Mahajan Vs. Charanjit Lal Mehra*** 2004 VI AD (Delhi) 537 and ***Mercury Travels (India) Ltd. Vs. Mahabir Prasad*** 89 (2001) DLT 440 (DB) but the same are found to be of no assistance on the said issue.

34. The senior counsel for the appellant though has drawn attention to the partition deed to contend that there has been division by metes and bounds but has not been able to cite any case law to the contrary, neither at the time of hearing nor thereafter.

35. On the contrary, I find the Division Bench of the High Court of Kolkata in ***Dr. Amar Prasad Goopta Vs. Arun Kumar Shaw*** AIR 1979 Cal 367 and the High Court of Allahabad in ***Mahmudul Haq Vs. Seventh Addl. District and Sessions Judge*** MANU/UP/0774/1984 to be holding that there

is no splitting up of the pre-existing tenancy on partition amongst landlords. It is also not the case of Ashok that the firm which was a tenant had agreed to partition.

36. The only other defence of Ashok was as to the identity of the property. However the senior counsel for appellant has not been able to substantiate that Santosh and Anil, in the guise of ejectment from property no.1-A, are ejecting the firm from property no.1 also.

37. I thus do not find any ground to interfere with the decree for ejectment on admissions and RFA no.219/2015 is dismissed.

38. The purport of the suit filed by Ashok, from dismissal whereof RFA no.75/2015 arises, was only to dispute the claim in the decree dated 20th September, 2001 of Anil and Rajender being tenants in the property No.1-A, Shahzada Bagh Extension, Delhi and to stake the claim of tenancy of the firm in the said property. However now that Santosh, Anil and Rajender who were parties to the decree dated 20th September, 2001 have accepted the tenancy of the firm and sought ejectment on that basis, the said question no longer survives. Else, Ashok is not found to have any cause of action to challenge the decree dated 20th September, 2001. The said decree is amongst the co-owners of property no.1-A, Shahzada Bagh Extension,

Delhi. Ashok does not claim to be the co-owner or having any right in the property save as a partner of a firm which was claimed to be the tenant in the property. No purpose will therefore be served in adjudicating the question on which the said suit has been dismissed. The senior counsel for the Ashok has in fact raised no arguments in this regard.

39. There is thus no merit in RFA no.75/2015 also. It is also dismissed.

40. The parties being members of a family, I refrain from imposing costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MARCH 09, 2016

‘gsr’

(corrected and released on 22nd June, 2016)