

\$~8 & 9

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

CS(OS) 2053/2007, IAs No.13673/2008 (of defendants u/S 340 CrPC), 10465/2014 (u/O 15 R-3 CPC), 25309/2014 (of defendants u/O VI R-17 CPC), 13339/2015 (u/O VI R-17 CPC), 13340/2015 (for condonation of delay) & Crl. M.A. No.11574/2016 (of plaintiff u/S 340 CrPC)

SUDHIR KUMAR AGARWALA Plaintiff
Through: Mr. Nikhil Chawla, Adv.

Versus

SURENDRA KUMAR AGARWALA & ORS Defendants
Through: Mr. A.K. Goel and Mr. Anshul Goel,
Adv.

AND

+ CS(OS) 2311/2007 & IAs No.9089/2016 (u/O 18 R-17 CPC) & 9090/2016 (u/S 24 CPC)

SUDHIR KUMAR AGARWALA Plaintiff
Through: Mr. Nikhil Chawla, Adv.

Versus

SURENDRA KUMAR AGARWAL & ORS. Defendants
Through: Mr. A.K. Goel and Mr. Anshul Goel,
Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

%

30.08.2016

1. CS(OS) No.2053/2007 has been filed (i) for partition of the properties of Smt. Shanta Agarwala as listed in paras 5 & 6 of the plaint including CS(OS) 2053/2007 & CS(OS) 2311/2007

page 1 of 8

basement and ground floor of S-104, Greater Kailash Part-II, New Delhi; and, (ii) for rendition of accounts with respect to the bank balances, fixed deposits and other investments of the said Smt. Shanta Agarwala.

2. The plaintiff and the three defendants in CS(OS) No.2053/2007 are stated to be the only heirs of the said Smt. Shanta Agarwala.

3. The counsel for all the three defendants in CS(OS) No.2053/2007 states that though earlier the said defendants were disputing that the plaintiff has 1/4th share in the estate of Smt. Shanta Agarwala but now, in view of the decision of the Court in United Kingdom, the defendants are not disputing that the plaintiff and the defendants No.1 to 3 have 1/4th share each in the entire estate of Smt. Shanta Agarwala. He thus states that a decree for partition be passed. It is however stated that the estate of Smt. Shanta Agarwala comprises only of (i) basement and ground floor of House No.S-104, Greater Kailash Part-II, New Delhi (upper floors of the said house are stated to be owned by others); and, (ii) two fixed deposit receipts (FDRs) with IDBI Bank.

4. The plaintiff in CS(OS) No.2053/2007 in para 5 of the plaint has listed six properties of Smt. Shanta Agarwala, besides the basement and ground floor of S-104, Greater Kailash Part-II. However, properties at serial Nos.(i) to (iv) listed therein are situated outside India and cannot be the subject matter of this suit.

5. The counsel for the plaintiff agrees. The counsel for the plaintiff however states, that property at Lajpat Nagar, New Delhi at serial No.(v) has been sold and no relief of partition with respect thereto also is claimed; that the agricultural and commercial lands at Bareilly, Uttar Pradesh listed at CS(OS) 2053/2007 & CS(OS) 2311/2007

serial No.(vi) in para 5 of plaint in CS(OS) No.2053/2007 are still existing and have to be partitioned; that there are other movable assets of Smt. Shanta Agarwala, besides two FDRs aforesaid and a decree for rendition of accounts with respect thereto be passed.

6. The counsel for the defendants in CS(OS) No.2053/2007 states that as per the defendants there are no agricultural and commercial lands in Bareilly, Uttar Pradesh in the name of Smt. Shanta Agarwala but if the plaintiff is able to give any particulars thereof, the defendants also would be benefited and have no objection to a decree with respect thereto also being passed.

7. The counsel for the plaintiff states that according to the plaintiff, the defendants have already sold the said lands and he is seeking his share of the sale proceeds.

8. In view of the aforesaid, no further proceedings are required in CS(OS) No.2063/2007.

9. A preliminary decree for partition of the estate of Smt. Shanta Agarwala is passed, declaring the plaintiff and the three defendants i.e. Shri Surendra Kumar Agarwala, Shri Sunil Kumar Agarwala and Shri Dilip Kumar Agarwala to be having 1/4th undivided share each therein.

10. Decree sheet be prepared.

11. I have enquired from the counsels, whether the basement and ground floor of S-104, Greater Kailash Part-II are divisible by metes and bounds.

12. Both counsels state that they are not and a final decree for partition by sale thereof and distribution of sale proceeds as per the shares of the parties be also passed.

13. I have cautioned the counsel for the plaintiff that if he seeks a decree also for partition of agricultural and commercial lands in Bareilly, even the particulars whereof are not given, the drawing up of the decree and all consequent actions in pursuance thereto including sale of basement and ground floor of S-104, Greater Kailash Part-II will be held up.

14. The counsel for the plaintiff states that he has no instructions in this regard and seeks adjournment.

15. On request of the counsel for the plaintiff the matter was passedover to enable the counsel for the plaintiff to obtain telephonic instructions.

16. The counsel for the plaintiff after passover states that the plaintiff is not pressing for the decree for partition of the lands in Bareilly, Uttar Pradesh as is sought in the plaint.

17. The counsel for the plaintiff however states that evidence may be required to be taken in CS(OS) No.2053/2007 with respect to the relief of rendition of accounts. It is stated that though the defendants have denied that the deceased Smt. Shanta Agarwala had any other investments besides the FDRs with IDBI Bank but the plaintiff will prove before the Court by leading evidence the other assets held by Smt. Shanta Agarwala and of which the defendants are liable to render accounts.

18. The counsel for the defendants states that the defendants have no objection to a decree for rendition of accounts being also passed and to the accounts being taken.

19. Once that is the position, the evidence, if any, has to be led by the plaintiff before the Court Commissioner to be appointed pursuant to the decree for rendition of accounts with respect to the accounts between the

parties.

20. On enquiry, it is informed that the defendants are in possession of the ground floor and the plaintiff is in possession of the basement of property No. S-104, Greater Kailash Part-II, New Delhi.

21. Both counsels agree that upon sale of basement and ground floor of property No.S-104 Greater Kailash Part-II, New Delhi, vacant peaceful physical possession of the basement and/or the ground floor will be delivered to the purchaser and both parties shall not part with possession of the portion in their respective possession.

22. Since the counsels have stated that the only immovable property i.e. S-104, Greater Kailash Part-II, New Delhi is not capable of division by metes and bounds and will have to be sold, a final decree for partition is also passed (a) for sale of the basement and ground floor of property No. S-104, Greater Kailash Part-II, New Delhi and for distribution of sale proceeds between the plaintiff and the three defendants as per their respective share under the preliminary decree; and, (b) for distribution of the amount due under the two FDRs bearing no.010105000150644 and 01010600017400 with the IDBI Bank, 1/16, Sirifort Institutional Area, Khel Gaon Marg, New Delhi in the name of Smt. Shanta Agarwala between the plaintiff and the three defendants as per their share under the preliminary decree.

23. Decree sheet be drawn up.

24. A decree for rendition of accounts of the other investments and monies and moveable assets of Smt. Shanta Agarwala is also passed.

25. Decree sheet be drawn up.

26. Mr. Rajesh Goyal, Advocate (Tel Ph. No.9871906568) is appointed as the Court Commissioner to go into the accounts.
27. The fee of the Court Commissioner is tentatively fixed at Rs.1,00,000/- besides out of pocket expenses to be initially paid/borne by the plaintiff and to be adjusted out of the monies, if any, ultimately found due.
28. The Court Commissioner is requested to submit his report within six months, whereafter the final decree for recovery of any amounts found due from one part to another shall be passed.
29. The parties to appear before the Court Commissioner with prior appointment on 24th October, 2016.
30. CS(OS) No.2311/2007 has been filed by the plaintiff under Section 6 of the Specific Relief Act, 1963 for recovery of possession from the defendants of the ground floor of property No. S-104, Greater Kailash Part-II, New Delhi.
31. The counsel for the plaintiff states that upon enhancement of the minimum pecuniary jurisdiction of this Court and in accordance with Office Order dated 24th November, 2015 of Hon'ble the Chief Justice in exercise of powers under Section 4 of the Delhi High Court (Amendment) Act, 2015, CS(OS) No.2311/2007 is liable to be transferred to the District Court.
32. However once a decree for partition of the property has been passed and the property has been ordered to be sold the question of this suit remaining pending or any further proceedings therein does not arise.
33. The suit is accordingly disposed of as infructuous.

34. The counsel for the plaintiff has pressed for costs of both the suits. It is argued that the defendants in the suits aforesaid disputed the 1/4th share of the plaintiff on the basis of a Will of Smt. Shanta Agarwala and proceedings for probate whereof were instituted in the United Kingdom (UK) Court; upon the said Will being not believed, another Will was set up and only after the Will set up by the plaintiff was probated, have the defendants conceded to the claim of plaintiff in these suits. It is contended that the defendants vexatiously set up the Wills of Smt. Shanta Agarwala and thus the plaintiff is entitled to compensatory costs.

35. The defence of the defendants in these suits was on the basis of Wills which were subject matter of probate before the UK Courts. The claim, if any, of the plaintiff for costs ought to have been before the UK Courts. As far as this Court is concerned, the defendants, immediately after the probate of the Will set up by the plaintiff was granted by the UK Court, have conceded to the claim of the plaintiff. Thus the question of the plaintiff being entitled to any costs before this Court does not arise.

Crl. M.A. No.11574/2016 (of the plaintiff under Section 340 of the Cr.PC) in CS(OS) No.2053/2007.

36. The counsel for the plaintiff has argued that the defendants filed an affidavit before this Court disclosing the estate of Smt. Shanta Agarwala to be comprising of basement and ground floor of property No. S-104, Greater Kailash Part-II, New Delhi and to FDRs with IDBI Bank only; however the plaintiff along with the application has filed statement of accounts in the name of Smt. Shanta Agarwala with the Bank of Baroda, Hauz Khas Branch, New Delhi and from which statement of accounts it transpires that

CS(OS) 2053/2007 & CS(OS) 2311/2007 *page 7 of 8*

even after the demise of Smt. Shanta Agarwala, monies were drawn from the said account by cheques in the name of Dilip i.e. the defendant no.3 or by self cheques. It is argued that the same shows the knowledge of the defendants of the said account and which was suppressed by the defendants in the affidavit.

37. Section 340 of the Code of Criminal Procedure, 1973 (Cr.PC) vests a discretion in the Court whether to make a complaint of an offence within the meaning of Section 195 of the Cr.PC even if *prima facie* found to have been committed. Considering that the parties are brothers and are to still jointly sell the basement and ground floor of property No. S-104, Greater Kailash Part-II, New Delhi and rendition of accounts between them is still to be undertaken, it is deemed that at least in future bonhomie and brotherhood is maintained between them rather than prosecuting each other for offences alleged to be committed during the course of these legal proceedings. Thus, no case for proceeding under Section 340 of the Cr.PC is made out.

38. Dismissed.

39. The amount of Rs.5 lacs deposited by the plaintiff before this Court by way of security in terms of order dated 16th May, 2014 in CS(OS) No.2053/2007 together with interest, if any, accrued thereon be refunded forthwith to the plaintiff by issuance of a cheque in the name of the plaintiff and delivery thereof to the counsel for the plaintiff.

RAJIV SAHAI ENDLAW, J.

AUGUST 30, 2016

‘bs’/pp..