

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

% **Date of decision: 23<sup>rd</sup> March, 2016**

+ **RFA 37/2014 & CMs No.1754/2014 (for stay) & 7780/2016 (of R-3&4 for direction)**

**MOHD. SHAMIM**

**.... Appellant**

Through: Ms. Gyan Mitra, Adv.

Versus

**MST. AMAN JAMAL & ORS**

**..... Respondents**

Through: Mr. Ajay Sharma, Mr. Punam Lau and  
Mr. S.U. Abbas, Advs. for R-3&4.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

1. The appeal impugns a judgment and preliminary decree of partition of the Court of Additional District Judge (ADJ)-08 (Central), Tis Hazari Courts, Delhi in Suit No.121/2010 declaring that “all the sisters are entitled to 1/8<sup>th</sup> share in the suit property and 1/24<sup>th</sup> in the share of Mohd. Shamil and the brothers are entitled to 1/4<sup>th</sup> share in the suit property and 1/12<sup>th</sup> in the share of Mohd. Shamil”.

2. The appeal is pending in this Court since 28<sup>th</sup> January, 2014. However, a perusal of the order sheet shows that the respondents No.1&2 namely Mst. Aman Jamal and Mst. Surraiya Jamal appeared on caveat and

though no notice of the appeal was issued but the counsel for the respondents No.3&4 Mst. Shahida Jamal and Mst. Hoor Jamal also started appearing and the Trial Court record was requisitioned and the parties were referred to mediation.

3. On 9<sup>th</sup> February, 2016, though no report from the mediation cell had been received but the counsel for the appellant and the counsel for the respondents No.1&2 stated that before the Mediation Centre a Settlement Agreement dated 18<sup>th</sup> January, 2016 had been arrived at between the appellant and the respondents No.1&2 whereunder the respondents No.1&2 had agreed not to claim any right, title, interest or share in the property or against the appellant on receipt of Rs.18 lakhs each from the appellant. The appellant on 9<sup>th</sup> February, 2016 paid the said sum of Rs.18 lakhs to each of the respondents No.1&2 and the decree impugned in this appeal insofar as in favour of respondents No.1&2 was modified in terms of Settlement Agreement which was ordered to form part of the decree.

4. On 9<sup>th</sup> February, 2016 itself arguments on the appeal vis-a-vis the respondents No.3&4 were also heard and certain observations made and recorded in the order and the counsel for the respondents No.3&4 sought time to respond thereto. Thereafter, the matter was adjourned on a few dates

to explore the possibility of settlement between the appellant and the respondents No.3&4 also but no settlement could be arrived at.

5. The counsel for the respondents No.3&4 has been heard further.

6. The position which emerges is as under:

- (i) that the respondents No.3&4 along with the respondents No.1&2 had filed the suit for partition from which this appeal arises;
- (ii) that in the said suit, besides the appellant who is the brother of the respondents No.1 to 4, one Mohd. Shamil another brother of the appellant and respondents No.1 to 4 was impleaded as the defendant No.2;
- (iii) that however the respondents No.3&4 subsequent to the filing of the suit withdrew themselves from the suit stating that they did not claim any share in the property and that they admitted the appellant being the sole owner of the property;
- (iv) though the counsel for the respondents No.3&4 on 9<sup>th</sup> February, 2016 had stated that the respondents No.3&4 after so withdrawing from the suit filed an application for again joining in the suit and their said application was rejected and that order had attained finality and

this Court had recorded so in the order dated 9<sup>th</sup> February, 2016 and also observed that the order of rejection of the application was not under challenge in these proceedings but the counsel for the respondents No.3&4 today states that only the respondent No.4 Mst. Hoor Jamal had made such an application and no application for re-joining the suit was filed by the respondent No.3 Mst. Shahida Jamal;

(v) the Trial Court nevertheless in the preliminary decree impugned in this appeal, declared the respondents No.3&4 also to be having a share in the property.

7. It was in the aforesaid factual scenario that on 9<sup>th</sup> February, 2016 it was enquired from the counsel for the respondents No.3&4 as to how the decree, awarding share in the property to the respondents No.3&4 who had withdrawn from the suit stating that they did not claim any share in the property and admitted to the appellant / defendant being the sole owner of the property, could be sustained.

8. The counsel for respondents No.3&4 has today drawn attention to page 593 of the Trial Court record being an application filed by the respondents No.1&2 as the then only plaintiffs, under Order XXII Rule 4 read with Section 151 Civil Procedure Code, 1908 (CPC), for substitution of

legal representatives of the defendant No.2 Mohd. Shamil, stating that the said Mohd Shamil died on 10<sup>th</sup> November, 2010 and was unmarried and had not left any Will and hence his name be deleted from the array of parties. The counsel for the respondents No.3&4 has next drawn attention to the order dated 7<sup>th</sup> January, 2012 on the said application *inter alia* recording:

*“It is an admitted fact that he was unmarried and he did not left behind any LR except his brother and sisters. All those brothers and sisters are already on record. Ld. counsel for defendant no.1 submitted that the defendant No.1 had succeeded the entire estate, whereas, the sisters also claim that they had also succeeded the share of Md. Shamil, after his death. The issue of succession by any of them is to be decided at the relevant stage. However, there is no other LR except the brother and sisters who are already on record and therefore, the name of Md. Shamil is ordered to be deleted from the array of party. Ld. counsel for the plaintiff is directed to place on record the amended memo of parties.”*

9. The counsel for the respondents No.3&4 has next invited attention to the amended memorandum of parties filed in the suit pursuance to the aforesaid order and in which the names, besides of the appellant and the respondents No.1&2, of the respondents No.3&4 as heirs of the defendant No.2 Mohd. Shamil were shown.

10. The counsel for the respondents No.3&4 agrees that the respondents No.3&4 as on 7<sup>th</sup> January, 2012 were not “already on record”. There is no

mention in the order dated 7<sup>th</sup> January, 2012 supra for inclusion of the respondents No.3&4 as heirs of the said Mohd. Shamil. All that the order observes is that the brothers and sisters of Mohd. Shamil being already on record, the name of Mohd. Shamil be deleted from the array of parties. The counsel for the respondents no.1&2 / plaintiffs however in pursuance to the said order, instead of filing an amended memorandum of parties deleting the name of Mohd. Shamil as defendant No.2, filed the amended memorandum of parties to which attention is invited by the counsel for the respondents No.3&4 and which is clearly contrary to the order in pursuance to which the same was filed. In fact, it is also not known as to when the said amended memorandum of parties was filed. Not only so, the respondents no.1 and 2 in their application, on which the said order directing deletion of name of defendant No.2 Mohd. Shamil was made, also had not sought impleadment of respondents no.3 and 4 as heirs of defendant No.2 Mohd. Shamil but had sought deletion of name of defendant No.2 Mohd. Shamil from memo of parties in the suit.

11. On my query, how filing of an amended memorandum of parties contrary to what was claimed before the Court and on the basis whereof the Court had passed an order and in contravention of the order can create any

rights in favour of any party, the counsel agrees that the memo of parties to which he had drawn attention could not have and cannot create any rights in favour of respondents no.3&4. However the counsel now, while the order is being dictated states that written arguments in support of application were filed and in which such a stand was taken. He however agrees that neither the order of suit Court refers to written arguments nor observes that the respondents No.3&4, though on earlier occasion had withdrawn from the suit admitting the defence of the appellant / defendant No.1 of being the sole owner of the property of which partition was claimed (even to the exclusion of the defendant No.2) could be so brought back as heirs of defendant No.2 Mohd. Shamil. On enquiry, the counsel for the respondents No.3&4 states that the defendant No.2 Mohd. Shamil had supported the claim of the appellant / defendant No.1 of being sole owner of the property and disclaimed any right, title, interest or share in the property. However, after I have dictated so, the counsel for the respondents No.3&4 states that he needs to check the same.

12. The only claim of the respondents No.3&4 which has been urged, as heir of defendant No.2 Mohd. Shamil, does not find any mention in the impugned judgment as well. In fact the learned ADJ appears to have been

guided by the memorandum of parties of the suit as originally filed and having not realised that the respondents No.3&4 who in the suit as originally filed were plaintiffs, had withdrawn from the suit. It thus cannot be said that the impugned judgment and decree awarding share to the respondents No.3&4 is on the basis of the share of respondents No.3&4 as heir of Mohd. Shamil, inasmuch as there is no discussion on the said aspect.

13. No other argument has been urged.

14. The impugned judgment and decree awarding share to the respondents No.3&4 is thus clearly erroneous and has to be set aside and is so set aside.

15. The counsel for the respondents No.3&4 at this stage states that liberty be given to the respondents No.3&4 to, in an independent proceeding claim a share in the property, not as heirs of their father but as heirs of Mohd. Shamil.

16. The respondents No.3&4, if so entitled to, would be entitled to do so and the appellant would be entitled to defend the same on grounds as may be available to him.

17. The appeal thus qua the respondents No.3&4 is allowed and the impugned judgment and decree insofar as in favour of the respondents

No.3&4 and / or holding the respondents no.3 and 4 entitled to a share in the property is set aside leaving the parties to bear their own costs.

Decree sheet be drawn up.

**RAJIV SAHAI ENDLAW, J.**

**MARCH 23, 2016**

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