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

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Date of Decision : March 04, 2016

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FAO(OS) 553/2015

VIJAY KUMAR

..... Appellant

Represented by: Mr.Anupam Srivastava, Advocate
with Ms.Sharmistha Ghosh, Advocate
with Appellant in person

versus

SHASHI NAG & ORS

..... Respondents

Represented by: Mr.Brijender S.Dhull, Advocate
Respondent No.1 and 3 in person

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

1. Suit property bearing Municipal No.4/4, Block F, Vasant Vihar, New Delhi was owned in equal share by Late Sh.Deen Dayal Mathur and his wife Kaushalya Mathur. Deen Dayal Mathur died on May 13, 1991 and inheritance was under a will dated November 26, 1989 executed by him, which was accepted by his wife and four daughters named Veena, Shashi, Shobha and Malini. As per the will, Deen Dayal bequeathed his undivided share in favour of his wife and four daughters. Kaushalya already having 50% undivided interest in the property thus became owner of 60% share

thereof. The four daughters became owner of the remaining 40% share i.e. each had 10% share in the property.

2. The mother and four daughters decided to redevelop the property and entered into a collaboration with a builder on May 04, 1996 as per which the builder reconstructed the property using his own funds and became the owner of the basement and the second floor. The ground and the first floor along with the terrace rights became the property of the mother and the four daughters. A flat each on the front and the rear was constructed on the ground floor and the first floor and in this manner the mother and the daughters became joint owners of four flats as also the roof rights.

3. Kaushalya died on May 27, 2002 and had executed a will on July 08, 2000, which will was accepted by the four daughters. She bequeathed her 60% undivided share equally amongst her four daughters, each of whom had 10% undivided interest in the four flats on the ground floor and the first floor. Inheriting equally Kaushalya's 60% undivided share, the four daughters inherited 25% undivided share in the four flats.

4. In her will dated July 08, 2000, the mother recorded that her daughter Shashi was residing on the front ground floor and would thus reside therein and inherit the same.

5. Veena died on June 26, 2008 bequeathing her estate in favour of her husband : Vijay Kumar (the appellant).

6. Accepting the ownership of Deen Dayal Mathur and his wife Kaushalya, as also accepting the will dated November 26, 1989 executed by Deen Dayal Mathur as also the will dated July 08, 2000 executed by Kaushalya, Vijay Kumar instituted a suit registered as CS (OS) No.2659/2015 seeking to nullify the bequest in the will dated July 08, 2000

executed by Kaushalya bequeathing the front ground floor flat to Shashi on the plea that since Kaushalya had a 60% undivided share in the ground floor and the first floor she could not have made a specific bequest of the flat on the front of the ground floor. Pleading that share of the four sisters was 1/4th each and pleading further that under the will executed by his wife on March 23, 2006, probate whereof had been obtained by him he had become the owner of 1/4th share in the property, Vijay Kumar sued for partition of the four flats, two each on the ground and the first floor as also sought declaration that the ground floor front portion earmarked in favour of Shashi under the will dated July 08, 2000 was void.

7. The learned Single Judge has held vide impugned order dated November 03, 2015 that the appellant and his predecessor-in-interest having accepted the will dated June 08, 2000, the appellant cannot question the stipulation and for which an additional reason has been given. The same is paragraph 7 of the will dated March 23, 2006 executed by Veena Rani. The learned Single Judge has held that the appellant would not be entitled to 1/4th share in all the flats. He would be entitled to his share in the remaining flats.

8. The will dated March 23, 2006 executed by Veena Rani, inter-alia, records as under in paragraphs 7 to 9:-

“Whereas the front unit at Ground floor is occupied by my sister Smt.Shashi Nag who has been living with her husband Late Sh.Shanti Narain Nag and the back unit of the Ground Floor was occupied by my mother for her residence. Till my mother was alive, two units at First Floor were given on rent which was being distributed among my mother Smt.Kaushalya Mathur and her four daughters equally and after her death, two units at First Floor were given on rent from time to time, the rent of which was being distributed among

me and my three sisters equally.

8. Whereas my mother vide Will dt. 8th July, 2000 devised and bequeathed that after her death her 60% share in Ground Floor Units and First Floor Units and proportionate rights in the land underneath and terrace rights to her four daughters equally with a stipulation that Ground Floor Unit where my sister Smt.Shashi Nag has been living with her husband Late Sh.Shanti Narain Nag would continue to live and inherit the same after her death and the other three daughters namely, Smt.Veena Kumar, Smt.Shobha Lal, Smt.Malini Bahadur Mathur shall divide among themselves the remaining there units i.e., one back unit at Ground Floor and two units at First Floor.

9. Whereas my mother Smt.Kaushalya Mathur had expired on 27th May, 2002 and according to her Will the aforesaid four units have been mutated in my favour and my three sisters namely, Smt.Shashi Nag, Smt.Shobha Lall and Smt.Malini Bahadur. Thus each of the sisters has inherited one unit out of the four units. The front unit at Ground Floor has been inherited by my sister Smt.Shashi Nag and remaining three units have been inherited by me and my two other sisters namely Smt.Shobha Lall and Smt.Malini Bahadur Mathur.”

9. Whilst it may be true that being owner of 60% undivided share in the four flats, Kaushalya Mathur could not have bequeathed a separated portion to her daughter Shashi, but surely, the four sisters could have entered into any kind of a settlement concerning their 25% share in the ground floor and the first floor and the settlement could even be by way of a partial partition separating the share of one sister, with jointness retained qua the terrace rights.

10. It is in this context that Veena's will dated March 23, 2006, clause 7 to 9 whereof we have reproduced hereinabove, becomes important.

11. Today, in Court learned counsel for Shobha and Malini and we note that even Malini who is present affirm that Shashi has become the owner of the ground floor front flat as agreed between the four sisters and that the terrace rights continued to be common. The agreement being oral, as per the law declared by the Supreme Court in the decision reported as (1976) 3 SCC 119 Kale & Ors. Vs. Deputy Director of Consolidation & Ors. has to be in recognition of an oral family settlement concerning immovable property where rights are extinguished and created without insisting upon written registered documents.

12. The predecessor-in-interest of the appellant : his late wife, has in her will dated March 23, 2006 accepted in clause 9 that her sister Shashi has inherited the ground floor front unit and thus she along with Shobha and Malini remained the joint owners of the remaining three units. The appellant claims a right under the said will dated March 23, 2006 executed by his wife and therefore he cannot claim 1/4th share in the four flats on the plea that there is jointness. Inter-se the four sisters, under an oral agreement, separation of jointness qua the four flats took place, by Shashi getting the front flat on the ground floor in satisfaction of her 1/4th share in the four flats. The other three sisters remained joint in the remaining three flats and thus the appellant would have 1/3rd share in the other three flats. The remaining 1/3rd share each being that of Shobha and Malini.

13. The partition would therefore be of the three flats. The flat on the ground floor in the front is no longer joint property. It is the exclusive property of Shashi who has no interest left in the other three flats.

14. For the reasons hereinabove recorded and the law declared by the Supreme Court in Kale's case, we dismiss the appeal maintaining the destination reached by the learned Single Judge, but for reasons abovenoted.

15. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

MARCH 04, 2016

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