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

% *Date of Decision: February 10, 2016*

+ **FAO(OS) 562/2015**

PREM BHATIA & ORS Appellants
Represented by: Mr.Sajan K.Singh, Advocate with
Mr.K.Jha, Advocate

versus

KAMLESH BHALLA & ORS Respondents
Represented by: Ms.Richa Kapoor, Advocate for R-1
Mr.Prasun Kumar, Advocate for R-2
and R-3.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

1. Yet another case of cacophony created by learned counsel for the parties. Measured by the legal merits or factual dimensions, the suit out of which instant appeal arises, filed in the year 2010, does not justify its longevity.

2. The chequered career of this *lis* and its zigzag climb up the precipice of justice contextually deserves a brief narration.

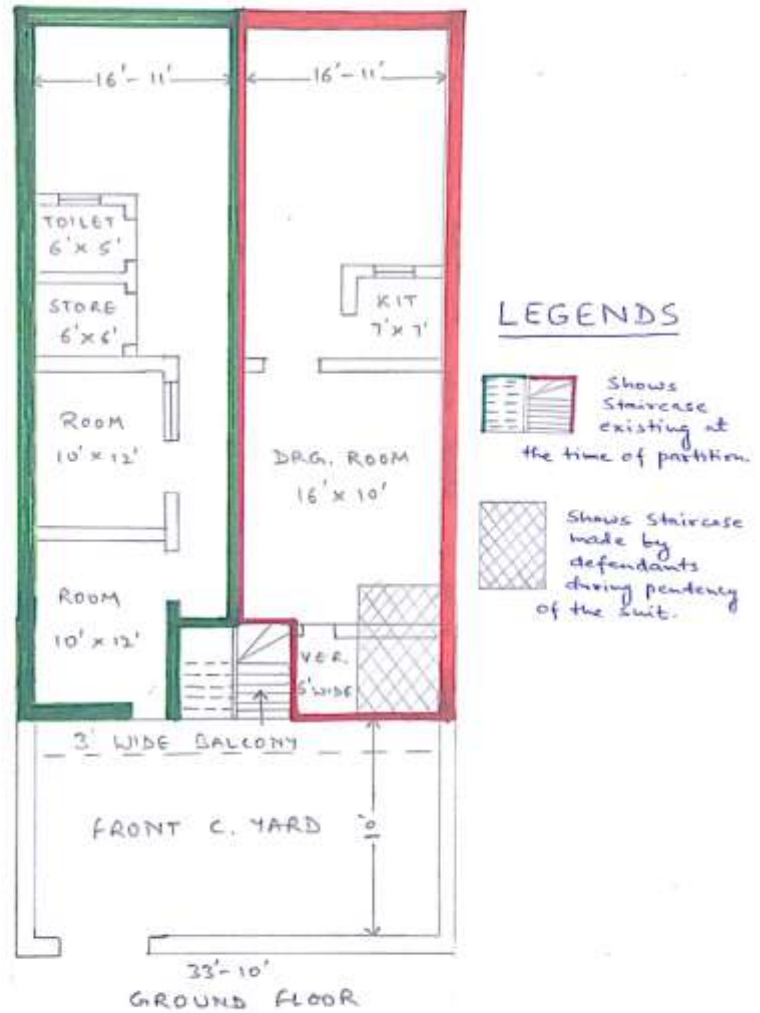
3. Bihari Lal Bhatia owned a plot of land ad-measuring 279.55 sq.yards bearing municipal No.30/5, Punjabi Bagh, New Delhi. He died intestate on September 18, 1978 survived by his wife Shanti Devi, two sons Sushil and Sudarshan, two daughters Kailash and Kamlesh, and a grand-daughter Neelam who was the daughter of his pre-deceased daughter Raj Rani. The four living siblings and the daughter of the deceased sibling relinquished their right in the property owned by Bihar Lal Bhatia in favour of his wife Shanti Devi, who died intestate on May 23, 1987, and once again Neelam daughter of late Raj Rani relinquished her share in the property and thus the two sons and the two living daughters inherited $1/4^{\text{th}}$ share each in the subject property.

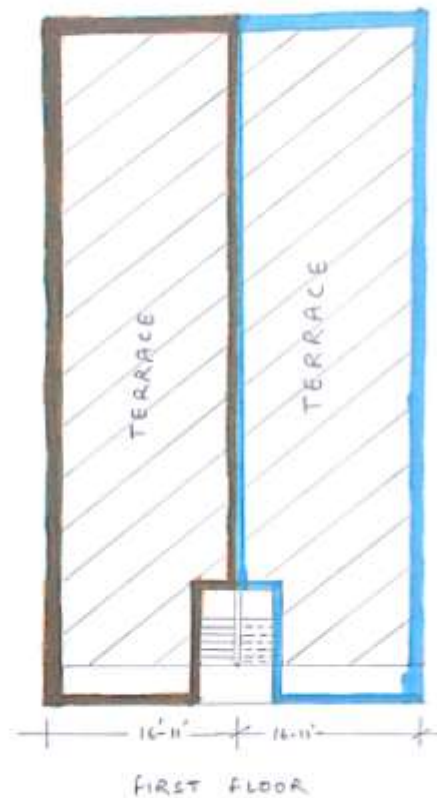
4. Sushil have been died, his $1/4^{\text{th}}$ share was inherited by his wife and four daughters.

5. On March 21, 1995, Kailash, Kamlesh, Sudarshan, wife and daughters of Sushil executed a deed of partition, which has been duly registered.

6. At the time of partition, the property consisted of a ground floor only. The ground floor which had been built up was vertically divided, right down the middle, from the main road abutting in the front till the service lane at the rear. The portion shown in red in the site plan was assigned to Kamlesh and the portion shown in green to the wife and four daughters of Sushil. The terrace was likewise divided between Kailash and Sudarshan. The site plan showing the partition would be as under:-

PLAN OF HOUSE NO. 31 ROAD NO. 54 AT PUNJABI BAGH, DELHI





7. At the time of partition, as per the legend which we have super imposed on the site plan, there existed a staircase leading upwards from the ground floor at the middle of the property. The situs whereof has been shown in the site plan at the time of partition. It was a common area, and had to be so, because this was the access to the terrace above the

ground floor and had a door leading into the portion allotted, on partition, to Kamlesh.

8. Kamlesh instituted the suit, pleading aforementioned facts and specifically referring to the deed of partition executed on March 21, 1995. Seeking a declaration in terms of the deed of partition she claimed 1/4th share in the terrace above the first floor which was constructed after the partition deed was executed. She also claimed an injunction against the defendants not to interfere with her right to access the portion of the ground floor which fell to her share at the time of partition.

9. In the written statement filed by the defendants, the deed of partition executed between the parties was not denied.

10. It therefore became a simple issue. Whether the terrace which came into existence after the first floor was constructed above the roof of the existing ground floor, was liable to be partitioned. No evidence was warranted. The suit could have been decided, and should have been decided, on the existing pleadings. But it could not be because the parties filed a flurry of applications. We list the same. (1) IA No.2368/2010; (2) IA No.17673/2010; (3) IA No.3620/2011; (4) IA No.18217/2011; (5) IA No.13178/2012; (6) IA No.10892/2014; (7) IA No.8265/205; (8) IA No.8268/2015; and (9) IA No.8559/2015.

11. It would be useless to note the prayers made in the various applications and would suffice to bring out that Kamlesh Bhalla made a grievance before the learned Single Judge that in her absence the defendants had encroached upon a part of the open varandah in front of

her drawing room and a part of the drawing room, to erect a staircase leading up to the first floor. Her grievance resulted in two orders being passed, the first on March 26, 2015 and the second on September 03, 2015.

12. Vide order dated March 26, 2015, noting Kamlesh's grievance of the main door of her house being locked up, it was resolved by permitting her to erect a wall separating her half assigned portion on the ground floor. Vide order dated September 03, 2015 the Court refused to modify the order dated March 26, 2015.

13. There is no need to note the contentions of the appellants, which we even otherwise would be handicapped in recording because except yelling in Court learned counsel for the appellants is unable to formulate any submission.

14. The deed of partition executed between the parties on March 21, 1995, not being in dispute and the partition delineated in a plan, which we have reproduced hereinabove, makes it plain clear that the portion shown in red on the ground floor belongs to Kamlesh and the staircase illegally constructed and as shown in the legend by us by super imposing the same on the site plan at the time of partition would require the said staircase to be removed. The defendants cannot encroach upon the portion of the property assigned to her at the time of partition.

15. But since a family is in litigation, Kamlesh has to be recompensed. This can only be done by permitting her to use half portion of the common area wherefrom the staircase leading up to the terrace above the

ground floor existed at the time of partition. The defendants cannot have two staircases leading up from the ground floor to the first floor now constructed.

16. We therefore dispose of the appeal directing that the defendants in the suit should elect whether to have the staircase as it existed at the time of partition or they would prefer to have the staircase illegally constructed by trespassing and encroaching upon part of the property which fell to the share of Kamlesh at the time of partition. If they chose to elect the staircase as existed at the time of partition, Kamlesh Bhalla would then be entitled to demolish the landing of the staircase illegally erected by encroaching upon the portion assigned to her at the time of partition and have a door as per the place of her choice to enter the portion of the building on the ground floor which fell to her share. If the defendants elect to have the staircase now which has been constructed illegally, Kamlesh Bhalla would be entitled to extend the wall which separates her half share in the ground floor to the balcony in front and demolish the existing staircase landing so that she is recompensed for what she has lost due to the defendants electing. She would be entitled to have a door leading to her built up portion in said eventuality also.

17. The defendants shall intimate their election in writing to Kamlesh by sending the same by regd.A.D.post and filing an affidavit in the suit.

18. We would request the learned Single Judge to decide whether parties have 1/4th share each in the terrace which has now come into existence after the first floor was constructed. No evidence would be

required to decide said issue.

19. No costs.

CM No.22449/2015

Dismissed as infructuous.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

FEBRUARY 10, 2016

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