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

+ **RSA 401/2015**

**Date of Decision: 18.01.2016**

**MANGE RAM**

..... Appellant

Through: Mr. P.C. Sharma & Ms. Vinnie  
Sharma, Advs.

versus

**RATTAN SINGH & ORS**

..... Respondents

Through: Mr. Virendra Kr. Singh, Adv. for R-1  
to R-5, R-6A, R-6B, R-10A to R-  
10D, 11A to 11C, R-12 to R-15, R-  
17, R-18, R-19A, R-23 & R-24  
Mr. D.S. Patial and Mr. Rohit Kataria,  
Advs.

**CORAM:**

**HON'BLE MR. JUSTICE ASHUTOSH KUMAR**

**ASHUTOSH KUMAR, J. (ORAL)**

1. The present second appeal is directed against the judgment passed in RCA 9/10 by the ADJ – 06 (Central), Delhi, whereby the judgment delivered by the Trial Court in Suit No. 300/02/01 was affirmed. Suit No. 300/02/01 was a suit for partition and permanent injunction filed by the appellant against the defendants.

2. The case of the appellant/plaintiff is that he and the Respondents/defendant nos. 1 to 28 are co- owners and in joint possession of

Khasra No.I/etc/652(1-0) situated in revenue estate of village Shahabad Mohammed Pur, Delhi. Since no legal partition by metes and bounds had taken place, therefore, the property was being possessed in the light of the family arrangements. The cause for filing the suit for Partition and Injunction arose when the defendants made attempts to raise construction in the contiguous land over which the appellant/plaintiff had constructed his house in an area of 150 Sq. Yards. When a request was made to the defendants to stop construction, the appellant was threatened that property would be transferred to a third party. Under the aforesaid circumstances, the appellant/plaintiff preferred the suit primarily on the ground that the defendants had no right, title or interest to part with the possession or transfer the property. Even the demand of partition was wrongly refused by the respondents/defendants.

3. The defendant nos.7, 9, 13, 17, 20, 23, 24 filed their written statement contending that there is no cause of action as they were residing on suit property after a proper partition by the forefathers about 50 years ago. The grounds taken by the answering defendants was that the suit was barred by limitation. The defendants denied about any joint possession in Khasra No.652. In support of such contention, it was canvassed that the appellant has sold his house to one Khachera.

4. Defendant nos.26 to 28 filed separate written statement contending that the property already stood divided and after the partition, they had constructed their respective houses, on the plots which came to their share. The suit was stated to be barred by limitation as more than three years had passed after the plaintiff had attained majority and the suit was not filed. It

was contended that the father of the appellant, by way of family arrangement, had been given a house in old Lal Dora of the village which was sold by the appellant and the proceeds were appropriated by him.

5. The other defendants did not join the suit.

6. Replication to the above written statements of the defendants was filed by the appellant denying their contentions.

7. The Trial court framed the following issues in 21.07.2003:

*“(1) Whether the plaintiff is entitled to the relief of partition of the suit property as prayed in the plaint? (OPP)*

*(2) Whether the plaintiff is entitled to the relief of permanent injunction as prayed in the plaint? (OPP)*

*(3) Relief.”*

8. Three prosecution witnesses were examined on behalf of the plaintiff/appellant namely, the appellant/plaintiff as PW.1 and Tara Chand and Ved Singh as PWs. 2 and 3.

9. During trial of the suit, certified copies of Aks-Sizra (Ex. PW1/1), certified copy of Khatoni (Ex. PW1/2 & PW1/3) and site plan (Ex. PW1/4) was referred for demonstrating that the appellant did not get his 1/6<sup>th</sup> share in Khasra nos.652 and 546, and therefore, there was no partition.

10. On behalf of the defendants, Keval Das and Ved Singh were examined as DW.1 and DW.2 respectively. Both the defence witnesses deposed that there was partition of joint property and only after the partition, the plaintiff and the defendants had constructed their respective houses over

their respective shares. They have also testified to the fact that the appellant had sold his house to one Khacheru Mal and had constructed another house on a land within the Lal Dora of village.

11. The Trial Court decided both the issues, namely the entitlement of the appellant/plaintiff to the relief of partition of the suit property and consequently the relief of permanent injunction, against the appellant/plaintiff.

12. The Trial Court was of the view that the exhibits were not proved in accordance with law and that if one ancestral house was sold and the proceeds were appropriated, it tantamounted to the admission of the share of the appellant/plaintiff having been demarcated. It also proved the fact that the parties were in settled possession of their respective portions in the suit property since the time of their forefathers. In the absence of any partition, the ancestral house could not have been sold by the appellant/plaintiff. The father of the appellant/plaintiff died in 1982 and, therefore, the suit was only intended for reopening the settlement of a long antiquity. The suit was filed in the year 2001 i.e. almost after 19 years after the death of the father of the appellant. There is an admission of the appellant that his residential house was constructed on the suit property, which had fallen in the share of his father. It was also admitted by the appellant that the house which has been sold to Khacheru fell in the share of his father. Thus, what stood proved was that the father of the appellant was granted his share. Therefore, all the issues were decided against the appellant/plaintiff.

13. The Appellate Court also agreed with the findings of the Trial Court.

14. During the prosecution of the appeal, some of the respondents had filed an application under Order 41 Rule 24 CPC seeking to bring on record an affidavit that one Om Prakash, son of Sukkhan Singh, had been withholding extra land which perhaps belonged to the appellant. It was submitted that father of Om Prakash, Ved Singh and Kishan were given 333 Sq. Yards in Khasra Nos.652 and 546 in the extended Lal Dora and, therefore, Om Prakash was in illegal possession of 165 yards of land which belonged to the appellant. The aforesaid application was allowed and the affidavit was taken on record. The aforesaid application, though, was filed under Order 41 Rule 24 of the CPC, but in fact it was an application under Order 41 Rule 27 CPC seeking the acceptance on record of the affidavit of the respondents.

15. Additional evidence in the Appellate Court could be permitted only if the same has been wrongly refused to be admitted by the Trial Court or if the same could not be obtained despite due diligence or the Appellate Court required such document to be produced to enable it to pronounce the judgment or for any other substantial cause. The reason assigned by the Appellate Court for accepting the affidavit was that there was no objection on the part of the appellant on it being taken on record. This is not a correct reason for the admission of a document as Clause 2 of Rule 27 of Order XLI specifically states that when additional evidence is allowed by the Appellate Court, reasons have to be recorded for the same.

16. However, after analyzing the document, the Appellate Court was of the opinion that in view of the consistent case of the respondents that the property had been partitioned during the time of the forefathers, such an

affidavit could not be taken to be an admission of the respondents that the appellate/plaintiff was not in possession of his 1/6<sup>th</sup> share in the family property. The Appellate Court took note of the fact that in the plaint, there was no reference of another house which was sold by the appellant/plaintiff which fell in old Lal Dora Abadi. When the aforesaid fact was brought on record by the defendants in their written statement, the appellant did not choose to controvert it in his replication. Thus, the Appellate Court was of the view that without the partition, the father of the appellant could not have been given a house with the authority to sell it and appropriate the proceeds. Though the appellant had stated before the Trial court under order 10 CPC that he had not sold his share on partition which is the subject matter of the suit but later admitted the fact that the house which was sold to Khacheru was different and did not fall in the suit property. If that property was also an ancestral property, then it is a foregone conclusion that the ancestral property had been partitioned and the parties were happily enjoying the possession of their respective shares of the property. Without carving out a specific share to the appellant, he would not have been permitted to construct his house over 150 sq. yards of the suit property. The fact that there was no effort of the respondents/defendants to prevent or obstruct the construction of the house by the appellant/plaintiff is an assertion of the fact that the property was partitioned.

17. PW.2 has also stated that the house was constructed in the specific share of the appellant.

18. Both the courts below have taken the view that the exhibits were not proved in accordance with law as they were certified copies obtained from

the original records and could not have been offered as secondary evidence, for, the original documents are not public documents as defined under the Indian Evidence Act. The aforesaid view of both the courts is not correct. The public officers as defined under section 2 (17) of the CPC includes revenue authorities and the aforesaid documents are therefore public documents of which certified copies could be offered as secondary evidence.

19. However any wrong finding on that score would not affect the case of the parties.

20. The documents offered by the appellant would not be a proof of there being no partition of the suit property. Thus even if those documents would have been taken into account, the case of the appellant would not have changed.

21. Thus there is no reason for this court to differ with the concurrent findings on fact. No substantial question of law has been raised in the appeal.

22. This appeal is, therefore, dismissed.

**ASHUTOSH KUMAR, J**

**JANUARY 18, 2016**

**ns**