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

+ **FAO(OS) 641/2015**

RAJESH CHOPRA

..... Appellant

Represented by: Mr.Rakesh Tiku, Sr.Advocate
instructed by Mr.Sandeep Kumar,
Advocate

versus

S K CHOPRA & ORS

..... Respondents

Represented by: Mr.Lalit Gupta, Advocate with
Ms.Garima Goel, Advocate for R-1
Mr.Sunil Malhotra, Advocate with
Mr.Amit Sanduja, Advocate for R-2
and R-3

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER

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05.02.2016

FAO(OS) 641/2015

1. The impugned order reads as under:-

“The plaintiff filed the suit for partition and permanent injunction. The preliminary decree in the above said matter was passed on 6th April, 2015 in terms of para 13 of the said order which reads as under:-

“13. A preliminary decree is accordingly passed declaring that the plaintiff, the legal heirs of the deceased defendant No.1, i.e., defendant No.1(a) to (d) jointly and the legal heirs of late Brig. T.R. Chopra, i.e. defendants No.2 and 3 jointly shall be entitled to 1/3rd share each in the suit premises.

This leaves the issue with regard to the mode of partitioning the suit premises.”

Mr.Tiku, learned Senior counsel appearing on behalf of defendant No.1 submits that the Will of Late Sh.H.L.Chopra is to be interpreted by the Court. The said argument of Mr.Tiku is refuted by Mr.Gupta, learned counsel for the plaintiff who submits that a decree for partition is to be passed and the suit premises is to be partitioned by metes and bounds by assigning 1/3rd share to all the parties.

List on 6th November, 2015 for consideration.

In the meanwhile, as agreed, Ms.Kajal Chandra, Advocate (Mobile No.9810133536) is appointed as Local Commissioner to visit the suit property, i.e. C-204, Anand Vihar, Delhi and inform the Court as to whether the suit premises can be divided into three equal liveable units or not. The fee of the Local Commissioner is fixed at ₹75,000/- excluding expenses, which shall be paid by the parties, i.e. plaintiff, defendant No.1 and defendants No.2 to 4 to be shared in three equal proportions. The Local Commissioner shall file her report by the next date of hearing.

Copies of this order be given dasti to the learned counsel for the parties and a copy thereof be also communicated to the Local Commissioner forthwith.”

2. It was preceded by an earlier order dated April 06, 2015 which reads as under:-

“1. The plaintiff has instituted the present suit praying, inter alia, for passing a preliminary decree of partition in respect of property bearing No. C-204, Anand Vihar, Delhi, by declaring that he is entitled to 1/3rd share, followed by a final decree of partition. The plaintiff also seeks a decree of permanent injunction against the defendants, restraining them from selling, transferring or alienating the suit premises.

2. When the suit was initially instituted on 05.03.2012, the plaintiff had arrayed his brother, Sh. V.N. Chopra as defendant No.1 and the legal heirs of his deceased brother, Brig. T.R. Chopra as defendants No.2 to 4. During the pendency of the suit, Sh. V.N.Chopra had expired on 23.09.2013 and the said defendant was survived by his wife, a son and two daughters. As for defendant No.2, who was the wife of late Brig.T.R.Chopra, she had expired on 30.06.2012. Subsequently, an amended memo of parties has been filed by the plaintiff on 05.03.2015, wherein the legal heirs of late Sh.V.N.Chopra have been impleaded as defendants No.1(a) to (d) and the legal heirs of late Brig. T.R.Chopra have been arrayed as defendants No.2 and 3.

3. Learned counsel for the plaintiff draws the attention of the Court to order dated 29.08.2014. On the said date, after taking note of the fact that as per the plaintiff, Sh. H.L. Chopra, who was the owner of the suit property and the predecessor-in-interest of the parties to the present suit, had executed a will, whereunder he had bequeathed the said property in favour of the plaintiff and his two brothers, who had since expired, and he was relying on the said document for seeking partition of the suit property, the predecessor Bench had opined that there was no impediment in passing a preliminary decree in the suit.

4. On the said date, Mr. Rajesh Chopra, defendant No.1(b) was present in the Court and had stated that he and his deceased father had spent an amount of ₹3 lakhs on account of construction and maintenance charges incurred on the suit premises. In response, counsel for the plaintiff and defendants No.2 and 3 had stated that their clients would be ready to give a reasonable amount to the legal heirs of defendant No.1 towards the amount spent by them on the suit premises, though according to them, they were not entitled for the said amount because they had remained in exclusive possession of the suit property and were enjoying the same for the last several years.

5. As the counsel for defendant No.1 was unavailable on 29.08.2014, the case was adjourned to 11.09.2014, whereafter no effective orders were passed. Counsel for the parties explain that in the interregnum they had tried to resolve the issue through an out of court settlement that had not materialised.

6. Today, Mr.Tiku, learned Senior Advocate who appears on behalf of the legal heirs of the deceased defendant No.1 states that none of them wish to press the defence taken in the written statement filed by the deceased defendant No.1, as set out in paras 3, 4, 5 and 6 of the preliminary objections, insofar as it relates to the plea of adverse possession qua the remaining parties to the suit as also the plea that the entire cost of acquisition and construction of the suit premises had been borne by the deceased defendant No.1 and his son, defendant No.1(b).

7. Learned counsel for the plaintiff submits that to bind the legal heirs of defendant No.1 to the aforesaid statement, it would be appropriate if each of them is directed to file their respective affidavits, affirming the said position.

8. The aforesaid request seems reasonable, particularly, since counsel for defendant No.1 has not filed his power of attorney on behalf of all the legal heirs of the defendant No.1 till date and even today, defendant No.1(b) alone is present in Court. Accordingly, all the legal heirs of the defendant No.1 shall file separate affidavits giving up their defence as taken on the aforesaid lines and set out in the written statement filed by the defendant No.1 during his life time.

9. Further, Mr. Tiku, learned Senior Advocate states that his clients accept that late Shri H.L.Chopra had executed a will dated 19.01.1993 and states that there is no dispute with regard to the suit premises devolving upon the plaintiff, the

legal heirs of the defendant No.1 and the defendants No.2 and 3 jointly to the extent of 1/3rd share. He submits that his clients have no objection to the last will and testament of Sh.H.L.Chopra, as expressed in the document dated 19.01.1993, filed by the plaintiff under Index dated 18.12.2013, being given effect to.

10. The will dated 19.01.1993, executed by Sh.H.L.Chopra deals with the devolution of the suit property in para 4(b) and (c), in the following manner:-

“4(b) I have obtained Plot No.C 204, Anand Vihar from the Railway Board Employees Co-operative Housing Society Ltd, Anand Vihar, Delhi 92. The entire cost of land and Development Charges have been paid by me from my savings and income. I have constructed one storey house at the said plot. After my death, my wife Shrimati Inder Rani will be the sole owner of the house with full authority to dispose off the same at her own will, to rent it or dispose of the same at her own thinking. However my son Shri Vishwa Nath Chopra and his son Rajesh Chopra will be entitled to stay in this house during their life time free of Rent during their life time. All kind of taxes and expenses for maintaining the house in good order i.e. repairs etc. would be paid in equal proportion by all my three sons viz. Brig. Dr.T.R.Chopra, V.N.Chopra and Dr.S.K.Chopra.

In case House is given on Rent partially or wholly, then the payment of above Taxes or Repair etc. will be the 1 st charge.

(c) After the death of myself and my wife, my three sons viz. Brig. (Dr) Tilak Raj Chopra and Vishwa Nath Chopra and Dr.Surrinder Kumar Chopra would be the sole proprietor of my said house.

In case my wife dies in my life time or after my death the house will be disposed of in the following manner:-

(a) I have obtained the following amount from my children (interest free) loan for the construction of the house:-

i) Shri V.N.Chopra ₹1,47,000/- (One lac forty seven thousand).

ii) Dr. S.K.Chopra ₹1,00,000/- (One lac only).

iii) Brig.(Dr.)T.R.Chopra ₹10,000/- (Ten Thousand Only).

iv) Shri Rajesh Chopra (my grand-son) ₹8000/- (eight thousand only).

(b) When myself and my wife are not in the scene, then my son Shri Vishwa Nath Chopra and his son Rajesh Chopra with their families will be entitled to stay in this house for ever without payment of any rent.

b) In case the house is sold (only with the concurrence of all my three sons), viz. Brig.(Dr.)T.R.Chopra, Shri V.N.Chopra and Dr.S.K.Chopra, then the payment of above loan of my children will be the first charge and should be paid to them. However, after the payment of the above loan, the remaining amount will be paid to all my three sons in equal proportion. In case it is not sold the ownership of the house will be of all three sons in equal proportion.

(c) Myself and my wife will have the absolute right

to make any addition and alteration to the house. After my death, addition and alteration to the house will be made on consultation of all my three sons.

Special para.

It is my ferment desire and will and wish that all my three sons have the same love and affection, which they have at present. After when we are not in the show, my sons (Dr.) Brig.T.R.Chopra and Dr.S.K.Chopra with their families will have full assess in the house and the room occupied by us will be at their disposal and can stay therein when ever they desire.”

11. It is an undisputed position that Sh.H.L.Chopra had expired on 08.04.1993 and his wife, Smt.Inder Rani Chopra had expired on 17/18.01.2000. The deceased father has clearly stated in his will that upon his demise and that of his wife, Sh.V.N.Chopra (deceased defendant No.1) and his son, Rajesh Chopra (defendant No.1(b)) with their family will be entitled to a right of residence in the suit premises, without payment of any rent. He has also specified the exact amounts loaned by the plaintiff, deceased defendant No.1, Brig.T.R.Chopra (father of defendants No.2 and 3) and the defendant No.1(b) to him for undertaking construction of the suit premises.

12. Sh.H.L.Chopra has further clarified that in case the suit premises is sold with the concurrence of all the three sons, then after repaying the loan amount to them from the sale proceeds, the balance amount would be divided in equal proportion amongst the three sons and if the suit premises is not sold, then the same will devolve in equal share amongst his three sons. In other words, the will clearly states that 1/3rd share will devolve on the three sons of late Sh. H.L. Chopra, namely, the plaintiff herein, the legal heirs of the

deceased defendant No.1 jointly and the legal heirs of late Brig. T.R.Chopra, i.e., defendants No.2 and 3 jointly.

13. A preliminary decree is accordingly passed declaring that the plaintiff, the legal heirs of the deceased defendant No.1, i.e., defendant No.1(a) to (d) jointly and the legal heirs of late Brig.T.R.Chopra i.e., defendants No.2 and 3 jointly shall be entitled to 1/3rd share each in the suit premises. This leaves the issue with regard to the mode of partitioning the suit premises.

14. Mr.Tiku, learned Senior Advocate appearing for the LRs of the defendant No.1 submits that the will of Sh.H.L.Chopra is crystal clear insofar as the devolution of the suit premises is concerned and it cannot be partitioned by metes and bounds in view of the fact that the deceased had desired that only if all the three sons give their concurrence, will the suit premises be sold and there is no concurrence from his clients.

15. Mr.Gupta, learned counsel appearing for the plaintiff disputes the aforesaid submission and states that even if the legal heirs of deceased defendant No.1 have been granted permission by the deceased to reside in the suit premises, the same shall still have to be partitioned by metes and bounds by assigning 1/3rd undivided share to all the parties and that intention has been unequivocally expressed in the will. He states that he will make good the said submission by referring to the relevant case law. He further states that as there is no dispute with regard to the legality and validity of the will dated 19.01.1993 executed by late Sh.H.L.Chopra, the only issue that would survive for adjudication is the effect of the said will for which no evidence is required to be led as it is purely a matter of interpretation of the will.

16. Learned counsel for the defendants No.1(a) to (d) states that before an issue is framed as suggested by the counsel for the plaintiff, the Court may peruse the affidavits directed

to be filed by the legal heirs of the deceased defendant No.1.

17. The aforesaid request made by counsel for the plaintiff shall be considered on the next date.

18. The legal heirs of the deceased defendant No.1 shall file their affidavits, as directed above, within two weeks with copies to the other side. Learned counsel for the defendant No.1 shall also ensure that his power of attorney is filed within the same time.

19. List on 28.09.2015.”

3. It is the compulsion of learned counsel for respondent No.1 to concede to the point that what was noted in paragraph 15 of the order dated April 06, 2015 warranted a decision concerning the interpretation of the will dated January 19, 1993 executed by Late Sh.H.L.Chopra for the reason depending upon the interpretation would arise the next question of how 1/3rd share of the parties bequeathed under the will could be given effect to. We note that as per the appellant though the bequest of 1/3rd share to the three siblings was in presenti the enjoyment qua the siblings was ostensibly postponed, as claimed by the appellant, till the life of V.N.Chopra and the appellant who is the son of V.N.Chopra.

4. Thus, with consent we set aside the impugned order dated September 28, 2015 with a direction that the learned Single Judge would proceed ahead from what was deferred to be considered as per the order dated April 06, 2015. Whether or not physical partition of the property or its partition by sale has to be postponed till the life of the appellant has to be decided by giving an interpretation to the will. Further, whether the will contemplates a mode of partition would also be gone into. Application of the provisions of

the Partition Act, 1893 would also be gone into.

5. No costs.

CM No.27782/2015

Dismissed as infructuous.

PRADEEP NANDRAJOG, J.

MUKTA GUPTA, J.

FEBRUARY 05, 2016

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