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

+ CS(OS) 1289/2006

ASHOK ALAGH

..... Plaintiff

Through: Ms. Shantha Devi Raman and Mr.
Arbaaz Hussain, Advs.

Versus

NEELAM ALAGH AND ORS

..... Defendants

Through: Mr. Tarique Siddiqui, Mr. Tanveer
Ahmad and Ms. Reetika Gupta, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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28.03.2017

1. This order is in continuation of the earlier order dated 16th March, 2017.
2. The counsel for the defendants today also seeks adjournment to file a Special Leave Petition to the Supreme Court against the judgment of the Division Bench.
3. The said request has already been declined on 16th March, 2017 and cannot be entertained again.
4. The counsel for the defendants, on enquiry, whether the ground floor of property No.N-215, Greater Kailash-I, New Delhi is divisible by metes and bounds, states it is not so divisible.
5. The counsel for the plaintiff on similar enquiry states otherwise. She has drawn attention to the site plan Ex.P-1 and states that the total frontage

of 28 feet 2 inches can be divided with each portion having frontage of 14 feet 1 inch and by making additions and alterations on the ground floor.

6. The counsel for the defendants draws attention to the fact that there is only one kitchen and all the toilets on the ground floor as depicted in the site plan Ex.P-1 are on one side only.

7. The counsel for the plaintiff states that kitchen and toilets on the side where they are not existing can be constructed.

8. In my view, the said ground floor, as evident from the site plan Ex.P-1, has been sanctioned for construction as a single residential unit and cannot be partitioned by metes and bounds to carve out two residential units therefrom. Needless to state that division by metes and bounds cannot be permitted, if results in violation of the Building Bye-laws. Even otherwise, once partition by metes and bounds suggested by one of the parties cannot be carried out / implemented, even according to that party without carrying out major works of additions and alterations and about which there is no consensus, the same cannot be permitted.

9. No purpose will thus be served in even appointing a Court Commissioner and exploring the possibility of division by metes and bounds.

10. Once, division by metes and bounds is not possible, the only option is to pass a final decree for partition by sale of the said ground floor by open auction and distribution of sale proceeds as per the shares declared in the preliminary decree and which as per the order dated 16th March, 2017 have been found to be 50% of the plaintiff on the one hand and 50% of the four defendants together on the other hand.

11. Accordingly, a final decree for partition of ground floor of property No.N-215, Greater Kailash-I, New Delhi by sale thereof by open auction and by distribution of the sale proceeds equally between the plaintiff on the one hand and the four defendants on the other hand and subject to the following terms is passed:

(I) Both the parties shall be entitled to participate in the sale and if either of them is the highest bidder would be bound by the terms of the open auction;

(II) The defendants who are reported to be in possession of the property will deliver vacant, peaceful and physical possession of the entire ground floor to the purchaser, even if the purchaser be the plaintiff and if fail to do so, shall be liable to be evicted therefrom as under a decree for possession of immovable property.

12. The parties are left to bear their own costs. Decree sheet be drawn up.

13. The counsel for the plaintiff also seeks appointment of a Court Commissioner to hold an enquiry into the *mesne* profits due from the defendants to the plaintiff with effect from the date of institution of the suit i.e. 1st June, 2006 till the date of delivery of possession by the defendants.

14. Accordingly, Mr. Girish Agarwal, Advocate (Mob.9811114489), Chamber No.301, Old Chamber Block, High Court of Delhi is appointed as the Court Commissioner to hold an enquiry into the *mesne* profits.

15. The defendants to file affidavit by way of evidence duly supported by documents of the monies earned by them from the said ground floor of property No.N-215, Greater Kailash-I, New Delhi for the said period within

four weeks.

16. The Registry is directed to send the file of the suit at the place and time fixed by the Court Commissioner.

17. The parties to appear before the Court Commissioner on or about 1st May, 2017 with prior appointment.

18. After the witnesses of the defendants have been cross-examined by the counsel for the plaintiff, the plaintiff if so desires, can lead his evidence on the aspect of *mesne* profits.

19. The Court Commissioner to, on the basis of the accounts so rendered submit a report of the monies, if any due from the defendants to the plaintiff for the aforesaid period.

20. The fee of the Court Commissioner is tentatively fixed at Rs.1,50,000/- to be borne equally by the plaintiff on the one hand and the defendants on the other hand, besides out of pocket expenses.

21. To be listed after the report of the commission is received.

RAJIV SAHAI ENDLAW, J.

MARCH 28, 2017

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