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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision : January 16, 2017

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RFA(OS) 41/2015

VIVEK KAUSHIK

..... Appellant

Represented by: Mr.Joydeep Sarma, Advocate

versus

VIKRAM KAUSHIK & ANR

..... Respondents

Represented by: Mr.Sunil Aggarwal, Advocate with
Mr.Arjun Mitra, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE YOGESH KHANNA

PRADEEP NANDRAJOG, J. (Oral)

1. Late Sh.Hem Chandra Kaushik was admittedly the owner of property bearing Municipal No.L-19, Lajpat Nagar-III, Delhi-110024. Flat No.1402, Marathon Galaxy-I, IBS Marg, Mulund Mumbai. Agricultural land ad-measuring about 10 acres in V&PO Shedawa District, Bulandshahar, UP. Ownership was reflected in the title document and revenue as well as municipal record.

2. It is the common case of parties that Hem Chandra Kaushik died intestate on August 10, 2008. His wife Late Smt.Mahalakshmi had pre-deceased him on November 15, 1997. His two sons Vikram and Vivek and daughter Jyotsana were his successor-in-interest.

3. In the year 2009 Vikram and Jyotsana sought partition of the 3 properties owned by their father.

4. Impleaded as the sole defendant, Vivek pleaded that two properties;

land ad-measuring 1069 square yards at Bareilly (U.P.) and a flat at Shivalik Co-operative Group Housing Society, Papankalan, Dwarka were also liable to be partitioned. He pleaded that these two properties were owned by the mother of the parties but entire consideration was paid by the father and therefore said two properties would comprise the estate of the father.

5. He pleaded an oral family settlement. As per him the house at Lajpat Nagar came to his share at the family settlement. The flat in Mumbai came to the share of his brother. As per him under the family settlement it was also agreed that the flat at Dwarka would remain with his brother. With respect to the property at Lajpat Nagar he pleaded that his brother was given an option to either take half share in the property at Bulandshahar or have right over the second floor of the property at Lajpat Nagar. He pleaded : *‘However, the plaintiff No.1 is yet to exercise the option and hence both the Lajpat Nagar property Bulandshahar property is currently under the possession of the defendant as defendant has been maintaining the properties on behalf of the deceased’*. No share being given to the sister was pleaded on the strength of the fact that when the sister was married the father gifted money to the daughter, utilizing which, Flat No.351, SFS Flats, Mukherjee Apartments was purchased.

6. Pleadings being hazy regarding the property at Bareilly, in the deposition of the parties common case which has emerged is that the mother was the owner of 1069 square yards land in Bareilly out of which about 200 square yards was sold. As per Vikram and Jyotsana they did not sue for partition of the land at Bareilly because it was worthless to do so inasmuch as the entire land was under encroachment.

7. The hazy pleadings qua the flat at Dwarka and Mukherjee Nagar got cleared from the evidence which evinces that the flat at Dwarka is in a Co-

operative group housing society. Initial membership whereof was in the name of Vivek, who transferred it to the mother and from the mother it got transferred to Vikram. There is no evidence how much money was paid to the society for construction of the flat. There is no evidence of any amount paid by the mother of the parties or Vivek to the society and thus the presumption would be in favour of Vikram to have paid money to the society for construction of the flat.

8. As regards the flat at Mukherjee Nagar, not only the pleadings but even the evidence continues to be vague, but learned counsel for the parties state at the Bar today that ownership of the flat is in the name of father-in-law of Jyotsana. To this extent there is an admission made by the appellant during his cross-examination conducted on May 08, 2012. On oath he has stated that the documents of Mukherjee Nagar property are in the name of Sukhdev Ranjan Luthra (father-in-law of Jyotsana) and that they are around the time of the marriage.

9. It is settled law that oral family settlements are accepted in equity as creating right, title and interest. It is equally settled law that conduct of the parties, in the absence of any written document, would guide the Court to determine whether oral family settlement has been arrived at.

10. The appellant has failed to establish any oral family settlement is the verdict returned by the learned Single Judge in the impugned judgment and decree dated February 10, 2015.

11. The appellant concedes, that as pleaded by him, the oral family settlement arrived at was given effect to during the lifetime of the father. The exact date when after discussion within the family the settlement was arrived at has not been pleaded in the written statement filed by the appellant. In the written statement filed, the appellant has not pleaded as to

when the discussion for a family settlement commenced. It has not been pleaded when the discussions culminated.

12. Even in the affidavit by way of evidence filed by the appellant said dates have not emerged. However, during cross-examination, appellant threw some light on this aspect and we quote:-

“On the day of Diwali 2003 or thereabout, I told my father that I wanted to reconstruct the Lajpat Nagar house. He told me that he will first partition the house so that I can put my money and it does not go waste. Again said, money and time. He then went to Bombay and discussed with Plaintiff No.1 and with Plaintiff No.2 on phone from Bombay. It was decided while my father was in Bombay that the Lajpat Nagar house and half of Bullandshahar Land will come to my share, half of Bullandshahar land and Mumbai Flat and Dwarka flat will go to Plaintiff No.1, Mukherjee Nagar Flat and Barreli property will go to Plaintiff No.2. Then Plaintiff No.1 called me on phone and said he was not interested in retaining Bullandshahar land and asked me to dispose, it off. Vol. On 24th of December, 2003 when Plaintiff No.2 was at Lajpat Nagar and my father was still in Bombay, I received a call from Bombay and the above mentioned arrangement was confirmed. Around Holi of 2004, my father had come to Delhi and he told me that he agricultural land at Bullandshahar should not be sold. It was decided that I will keep the entire Bullandshahar land and second floor of Lajpat Nagar house without the roof rights will be given to Plaintiff No.1. My father however, said that this floor may be given to Plaintiff No.1 only after his death. Again said, the Plaintiff No.1 accepted that he will either take the Second Floor or half of the Bullandshahar land but the land will not be sold.”

13. Relevant would it be to highlight that in his cross-examination the appellant claimed that around Diwali or near about he wanted to reconstruct the house at Lajpat Nagar. He expresses a desire to his father, who told him that he would first like to partition his estate. As per the appellant, the father went to Bombay to discuss the matter with Vikram. The father

discussed it with Jyotsana over the telephone when the father was at Bombay. He claimed that when the father was still in Bombay an agreement was arrived at that Lajpat Nagar house and half share in the land at Bulandshahar would be his. The flat at Mumbai, the Dwarka flat and half share in the land at Bulandshahar would be that of Vikram. The property at Bareilly would be that of Jyotsana. Appellant then claims that Vikram told him that he was not interested in retaining the land at Bulandshahar. On December 24, 2003 when Jyotsana was with him and father was at Mumbai he received a call from Mumbai (name not given as to who called up) and the arrangement was confirmed. Around Holi of 2004 the father came to Delhi and said that the land at Bulandshahar would not be sold. It was then decided that he would keep the entire land at Bulandshahar and the second floor of the house at Lajpat Nagar would be given to Vikram. As per him, the father said that the second floor would be given to Vikram after the father died. He then went on to say that Vikram accepted that he would either take the second floor at Lajpat Nagar or half of the Bulandshahar land.

14. From the aforesaid testimony of the appellant a grave doubt arises whether at all the family was able to crystallize any settlement. The statements aforesaid during cross-examination show that the discussions remained inchoate.

15. Since a doubt arises, it is our duty to look further evidence led by the parties to see whether the doubt remains or is removed.

16. The appellant, besides examining himself has examined the paternal aunt of the parties named Chhaya Sharma. One Ashok Kaushik, a cousin of the father who also owns some agricultural land in Bulandshahar. One Deepak Chopra, a neighbour. One Gaurav Varmani, an architect One Pawan Gupta a hardware merchant; and one Shiv Kumar Pathak, a family friend.

17. Supporting the case of the appellant, Chhaya Sharma the paternal aunt of the parties, in her affidavit by way of evidence deposed that her brother used to discuss his family matters with her such as mundan, engagement, marriage, education, namkaran and career of his children. She deposed that her brother discussed with her the matter relating to settling his properties. But we find her testimony in examination-in-chief to be demolished on cross-examination concerning family matters. She admitted that engagement of Jyotsana was without consulting her. She could not remember when the mundan ceremony of her nephew was performed. She could not tell with certainty where her nephew Vikram was working. She said that perhaps he worked in the Customs Department. She could not recollect when she had visited his brother's house in Lajpat Nagar. She has not even stated a rough date when her brother consulted her regarding the oral family settlement.

18. In this connection the period during which discussions took place, as claimed by the appellant during his cross-examination assumes importance. If we reflect upon the part of the testimony which we have reproduced hereinabove, it emerges that he initiated the issue of his father's settling his estate during the life time of the father around Diwali 2003, when he desired that the house at Lajpat Nagar be reconstructed and the father said that he would like to first effect a family settlement. As per him, the father proceeded to Mumbai to discuss the inheritance issue and when the father was at Mumbai over the telephone he spoke to his brother Vikram. When the father was still in Mumbai and Jyotsana was with him in Lajpat Nagar, on December 24, 2003, a call was received from Mumbai and the terms of the family arrangement were settled.

19. If this be so, any consultation by the father of the parties with Chhaya

Sharma is completely ruled out and this dents the credibility of her version that her brother had consulted her on the family matter regarding settling his estate on his children.

20. The testimony of Ashok Kaushik, Deepak Chopra, Gaurav Varmani and Pawan Gupta does not help the appellant in any manner. Ashok Kaushik, a cousin of the parties deposed in the affirmative that he was aware of the day-to-day activities of the deceased concerning the land at Bulandshahar. He deposed that the deceased told him that he had partitioned his estate.

21. But when we peruse the testimony of Ashok Kaushik we find that he was hardly at Bulandshahar. He admits that he had let-out his land to local farmers. He could not state what crops were grown by Hem Chandra Kaushik on the land. In a wavering manner he claimed during cross-examination that probably Hem Chandra Kaushik consulted him only once or twice.

22. The testimony of Deepak Chopra is to the effect that he saw the appellant supervise the demolition and reconstruction of the property at Lajpat Nagar. The testimony of Gaurav Varmani is that he was the architect engaged by the appellant for purpose of reconstruction of the property at Lajpat Nagar. Testimony of Pawan Gupta is that he sold some hardware material to the appellant.

23. The learned Single Judge has appraised the testimony of the said four witnesses to return a finding, and in our opinion correct, that residing with the father, the appellant obviously was looking after the construction on account of the age of the father and this explains the testimony of Gaurav Varmani and Pawan Gupta as simply indicative of said fact and not an assertion of ownership right of the appellant.

24. The appellant has led no evidence of having spent any money on the reconstruction of the house at Lajpat Nagar.

25. In his affidavit by way of examination-in-chief appellant claims that since 1993 he started working in Moscow and he used the money earned there to reconstruct the property at Lajpat Nagar.

26. During cross-examination he admitted that he was paying income tax since 1990 and that he had not been showing income from commission in his income tax returns. He claimed that he used to bring money in cash from Moscow and had lent ₹20,00,000/- to Ravinder Kumar Tiwari and ₹15,00,000/- to one Ravinder Mamgain who returned him ₹27,00,000/- and ₹20,00,000/- respectively which he spent on reconstructing the property at Lajpat Nagar. No documents to establish any lending or return of money has been proved. Neither Ravinder Kumar Tiwari nor Ravinder Mamgain have been examined.

27. Since appellant claimed oral family settlement having taken place during the lifetime of the father and he having acquired ownership right in the property at Lajpat Nagar during the lifetime of the father, faced with the first floor and the second floor being let-out after the property was reconstructed, appellant claimed that his father was receiving the rent because being a senior citizen he would have got a tax benefit. He claimed that after the father received the rent he would hand over the same to him in cash.

28. This version of the appellant is belied from the bank statement of account Ex.DW-1/6.

29. It pertains to the bank of account of Hem Chandra Kaushik for the period April 01, 2007 till September 03, 2009. It is replete with two monthly deposits in sum of ₹18,000/- and ₹30,000/- respectively which

parties concede was the rent received for the first floor and the second floor. We do not find any monthly, bi-monthly, tri-monthly or even four-monthly withdrawals of the rent deposited. In fact we find transfers in the name of one Siddharth in sum of ₹4,00,000/-. A solitary payment of ₹55,000/- is made to the appellant. This belies the appellant's version that his father used to pass on the rent to him. Ex.DW-1/6 demolishes the case of the appellant that his father was withdrawing the rent after it was deposited and was thereafter giving it to him.

30. The conduct of the parties does not evince any family settlement. Highlighting once again that as per the appellant the settlement took place and was implemented during the lifetime of the father we find that the father has continued to exercise right as owner of the properties during his lifetime. Nobody applied for mutation in the municipal records to pay property tax.

31. Absence of any will executed by the father is also an indication of no such family settlement having taken place. Had a family settlement taken place the natural conduct of the father would have been to execute a will affirming said fact.

32. We find that the learned Single Judge has appraised the evidence correctly. The onus was on the appellant. The only manner in which the appellant could have discharged the onus was from the conduct of the parties.

33. The flat at Dwarka is pursuant to a membership which was transferred in the name of Vikram after the mother of the parties transferred the membership to him. The allotment of the flat is to Vikram. The flat at Mukherjee Nagar being concededly purchased in the name of the father-in-law of Jyotsana and there being no evidence that the father of the parties paid any money to Jyotsana or her father-in-law would require it to be held

that said flat could not be put in the basket for purposes of the family settlement.

34. Regarding the land at Bareilly, concededly its recorded owner is the mother of the parties and appellant has led no evidence that the father of the parties paid the money when the mother acquire ownership of the land at Bareilly. The said land would be the estate of the mother and a separate suit for partition would lie if any party decides to separate.

35. The property at Bareilly is under encroachment and we find that the stand taken by the respondents that it would not be worthwhile to spend money litigating on a property which cannot be retrieved from trespassers is a plausible stand not to waste money seeking partition of the property.

36. The appeal fails and is hereby dismissed.

37. No order as to costs.

(PRADEEP NANDRAJOG)

JUDGE

(YOGESH KHANNA)

JUDGE

JANUARY 16, 2017

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