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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CS(OS) 585/2016 & IA No.14342/2016 (u/O XXXIX R-1&2 CPC)
RENU IDNANI Plaintiff
Through: Mr. Amit Bhagat, Adv.
Versus
SANJAY KESWANI & ANR Defendants
Through: Mr. Gurvehar S. Sistani, Adv. for D-1
Mr. Pulkit Gupta, Adv. for D-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **21.02.2017**

1. The counsel for the defendant No.2 states that the defendant No.2, instead of filing a written statement has filed a short affidavit to the effect that the plaintiff, defendant No.1 and the defendant No.2 each have 1/3rd undivided share in property bearing No.21, Mayfair Apartments, Mayfair Gardens, New Delhi and a preliminary decree for partition to the said effect be passed.
2. The counsel for the defendant No.1 states that the defendant No.1 is at Dubai and though a written statement was prepared and signed but could not be sent by him because he had suffered a fracture at Dubai and could not get affidavit accompanying the same attested.
3. The counsel for the defendant No.1 also on enquiry, whether the defendant No.1 is disputing the share of the plaintiff, defendant No.1 and defendant No.2 in the property, for partition of which the suit has been filed, as 1/3rd, states that there is no dispute in that respect. He however states that the need for written statement was/is felt to defend the claim in the plaint for CS(OS) 585/2016

recovery of *mesne* profits and damages.

4. The counsel for the plaintiff states that since both the defendants have not disputed the shares of the plaintiff and the two defendants in the property to be 1/3rd each, the plaintiff is not pressing for the said relief.

5. In the light of the above, a preliminary decree for partition is passed declaring the plaintiff Mrs. Renu Idnani, defendant No.1 Mr. Sanjay Keswani and defendant No.2 Mrs. Anjoo Keswani to be having 1/3rd share each in property No.21, Mayfair Apartments, Mayfair Gardens, New Delhi.

6. Decree sheet be drawn up.

7. The counsel for the defendant No.1 now states that the defendant No.1, besides filing a written statement, was also desirous of filing a counter-claim.

8. On enquiry, as to the nature of the counter-claim, it is stated that the same was for *mesne* profits for depriving the defendant No.1 of use of the property for the last three years.

9. The subject property was owned by the father of the plaintiff and the two defendants who was residing therein and who died on 30th March, 2014. It is not in dispute that since then the property is lying locked/unoccupied and none of the parties is in use and occupation thereof.

10. The counsel for the defendant No.1 however states that keys of the lock on the property are with the plaintiff and thus the plaintiff deprived the defendant No.1 from use of the property.

11. If that be so, then the defendant No.1 should have sued for partition.

12. On enquiry, the counsel for the defendant No.1 states that no claim also for partition was made by defendant no.1 at any time.

13. Without the defendant No.1 making any claim for partition and the same being denied, there can be no cause of action said to have accrued to the defendant no.1 for *mesne* profits / damages against the co-owners.

14. Be that as it may, the passing of the preliminary decree will not come in the way of the defendant No.1, if still desires to make a counter-claim, making such a claim (on enquiry, it is stated that court fees has not been purchased as yet) and as and when such a claim/counter-claim comes up, shall be considered on merits.

15. All counsels are *ad idem* that the property cannot be divided by metes and bounds and has to be sold. The counsels however state that option be given to the parties to, if either of the parties offers the highest price for the property or the price equivalent to the highest which is offered for the property, to purchase the same.

16. Accordingly, a final decree for partition is passed by sale of the property and distribution of the sale proceeds amongst the parties as per their shares declared in the preliminary decree for partition and further on the condition:

(I) that the parties, if unable to sell the property mutually or by *inter-se* bidding, the sale in execution of the decree, shall be by open bidding;

(II) that all the parties shall be entitled to participate in the sale by open bidding on the same terms and conditions as applicable to other purchaser;

(III) that the vacant, peaceful and physical possession of the property shall be delivered to the purchaser, even if be one of the

parties;

(IV) that the party/parties in the open bidding, even if not the highest bidder, shall be entitled to, if match the highest bid, purchase the property by payment of the share of the sale price to the other party/parties;

(V) that all the parties would be entitled to show the property to their respective prospective buyer/s and the plaintiff shall within 24 hours of a request in this regard from either of the defendants, arrange to open up of the property, so that inspection thereof can be given.

17. At this stage, it is agreed that the lock on the property shall be substituted with the lock, one key whereof shall be with each of the parties.

18. All the parties are however restrained from commencing use of the property for their own purpose or from allowing any person to use the property.

No costs.

19. A final decree for partition be drawn up.

Copy of this order be given *dasti* under the signatures of the Court Master.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 21, 2017

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