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

+ **FAO(OS) No. 355/2016**

Date of decision: 16th May, 2017

RENU BHANDARI & ANR. Appellant
Through Mr. Akhil Sibal, Sr. Advocate alongwith
Mr. Gaurav Bhardwaj, Advocate.

versus

CHANDER SHEKHAR & ORS. Respondents
Through Mr. Jitender Chaudhary, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MS. JUSTICE PRATHIBA M. SINGH

SANJIV KHANNA, J. (ORAL):

The dispute *inter se* parties relates to property No. 12B, Rajendra Park, New Delhi admeasuring 1250 square yards.

2. This property was owned by late Narain Das and Chetan Das, each being 50% owner. They had entered into a Memorandum of Understanding dated 21st March, 1988.

3. Late Chetan Das sold his 50% undivided share in the property to the appellants, namely, Renu Bhandari and Suman Bhandari vide registered deed executed on 3rd day of April, 1998 and registered on 7th April, 1998.

4. The legal heirs of Narain Das sold their 25% share in the property in

favour of Ashok Garg, respondent No. 9 vide sale deed dated 26th November, 2010.

5. The appellants, i.e., Renu Bhandari and Suman Bhandari instituted CS(OS) No. 273/2011 seeking partition of the property against the legal heirs of Narain Das and the ninth respondent.

6. By order dated 4th September, 2013, a preliminary decree of partition was passed in CS(OS) No. 273/2011. Paragraphs 10 to 13 of the said order read as under:-

“10. Accordingly, a preliminary decree is passed declaring the undivided half share of both the Plaintiffs (625 sq. yards), the undivided 1/4th share of Defendant Nos. 6 and 7 (312.5 sq. yards) and the undivided 1/4th share of Defendant No.9 (312.5 sq. yards) in the suit property at 12-B, Rajindra Park, New Delhi 110 060.

11. As regards the transaction between Defendants 6, 7 and Defendant No. 9, learned counsel for the Defendant Nos. 6 and 7 states that they should be permitted to execute a sale deed for the remaining undivided 1/4th share of the suit property in favour of Defendant No. 9, which is equivalent to 312.5 sq. yards. Learned counsel for the Plaintiffs states that the Plaintiffs would like to see the draft sale deed that is proposed to be executed before agreeing to the above submission of learned counsel for Defendant Nos. 6 and 7.

12. It is directed that learned counsel for Defendant Nos. 6 and 7 will serve upon learned counsel for the

Plaintiffs a copy of the draft sale deed proposed to be executed in favour of Defendant No.9 within one week from today. Within one week thereafter learned counsel for the Plaintiffs will inform learned counsel for Defendant Nos. 6 and 7 of the changes if any required to be made to the draft sale deed. If the Plaintiffs are agreeable to the draft sale deed the Defendant Nos. 6 and 7 are permitted to proceed to execute the sale deed as per the agreed draft in favour of Defendant No. 9 in respect of their 1/4th share of the suit property (312.5 sq. yards). In that event, a copy of the sale deed so executed shall be placed on record by the Defendant Nos. 6 and 7 before the next date of hearing.

13. The Plaintiffs, and Defendants 6, 7 and 9 shall before the next date file their respective proposals as regards the division of the suit property by metes and bounds.”

7. After preliminary decree of partition, the defendant Nos. 6 and 7 referred to in the afore-quoted portion, sold their remaining 1/4th share in the suit property in terms of permission granted by the Court in favour of the ninth respondent. The effect thereof was that the ninth respondent became 50% owner of the suit property and the appellants herein became 50% owner of the suit property.

8. Attempts to resolve the matter and amicably partition the property between appellants and the ninth respondent did not fructify and materialize due to differences and lack of consensus.

9. By order dated 18th July, 2014, a Local Commissioner was appointed by the Court to suggest modes of partition. This order records that the appellants were 50% owners of the suit property and the ninth respondent was 50% owner of the suit property, that has to be divided equally between them. Ms. Amita Sehgal, Advocate was appointed as the Local Commissioner to suggest modes of partition. She was entitled to take services of a draftsman and an architect.

10. It took nearly a year for the Local Commissioner to submit her report dated 4th March, 2015. She had interacted with the appellants and the ninth respondent to ascertain their wishes and find a solution. Her report refers to four options or modes of partition of the suit property. Obviously, the parties were unable to accept one mode to affect partition. The aforesaid modes of partition were put forth after hearing and taking suggestions from both sides. For the sake of convenience, we reproduce below, the four modes suggested by her:-

“A. Option I (Annexure LC-5):-

A second gate and entrance can be created on the front side facing the main road on the extreme south-west portion on the suit property. This gate and entrance can be used for access to the rear portion of the suit property. This option would require demolition of construction on the front south-western

side of the suit property, which is anyway the area which should be left unconstructed as per law, as the setback area. A separate staircase can be constructed on the southern side to the rear portion of the suit property. This option can be used, without demolishing the major portion of existing structure, except the construction on the south-western side, area adjoining plot no. 13B. In this way, one party would get the front portion, the other would get the rear portion, but both the parties would get a separate entrance with access from the front main road of the suit property. The front and the rear portion can be divided by way of a 9 inch wall. The sewer, electricity and other facilities will remain common and in case of any difficulty, both parties will have to co-operate with each other. This option gives both the parties their independent access from the rear end of the suit property, as well as, to the common sewer and electricity lines.

B. Option II (Annexure LC-6):-

The suit property can be divided into two halves vertically from the front to back, i.e. from west to east, with 625 sq. yds., on each side. In this option both the parties would get separate entrances from the west side, i.e. main road. For executing this option, the property will have to be reconstructed as per the present policies, bye laws and guidelines. As per the bye laws, the parties are bound to leave a setback area of 20 ft. in the front and 10 ft. at the back and 10 ft. on left and right sides of the suit property. Since the setback has to be left unconstructed, both parties can have their separate access/entrances from the front main road, on the extreme left and extreme right side of the suit property, respectively. By way of this option, both the parties would get equal market value of their respective shares in the suit property, at all

times.

C. Option III (Annexure LC-7):-

The suit property can be divided into two halves horizontally, i.e. from north to south, by construing a 9 inch wall in between. There is presently a common gate and passage from the front side of the suit property, which can be used as a common access for both the parties to their respective front and rear portions. There is a common door which connects the common passage to the constructed portion of the suit property and thereafter a common staircase exists which is common for both the parties for their ingress and egress to their respective occupied portions in the suit property. A separate new entrance and a new staircase can be constructed/created after the 9 inch dividing wall for access to the rear portion of the suit property. In this option, only the gate and the passage would remain common for both the parties. Both the parties will get access to their respective portion by way of separate entrance and staircase, however the access into the suit property shall remain common. The entrance to the rear portion from the service lane is not feasible and appropriate. In this option, the passage and the driveway will remain common with plaintiff and defendant no. 9 and they will have to consent to allow each other to share this area to park their respective vehicles. If the parties do not agree to the common usage of driveway, then there is no drive way or parking space which will be available for defendant no. 9. In this option, minimum demolition is required to be carried out, i.e., of the edged corner, which is blocking the driveway and the said option can be exercised in the existing structure in suit property. However, since the front portion is constructed and the plaintiff is residing therein, which consumes major FAR of the entire plot, it results into availability of

proportionately lesser FAR for the construction of the rear portion. Thus, defendant no. 9 shall not get FAR, proportionate to his ownership in the half undivided share of the suit property.

D. Option IV:

The partition can be carried out by dividing separate floors on the plot. As per the present bye laws a stilt parking can be constructed, which can be used by both the parties to park their respective vehicles. Thereafter four floors can be constructed on the said plot with stilt parking on the ground floor. Both the parties can have two floors each with ample space for parking their vehicles. Considering the big size of the plot, i.e. 1250 sq. yds., two separate entrances from the northern and southern side, independent passages and separate access to the respective floors can be constructed. By way of this option, both the parties can use entire size of the plot and get the advantage of the entire front/face of the plot, which is 61.10 feet. In new construction, the utilities of the property i.e. sewer, electricity, water etc. can also be segregated, thus putting an end to the possibility of disputes on these grounds, in future. Both the parties, in this option shall utilize ample FAR provided on each floor having spacious area.”

11. The report also records that the ninth respondent had given the option/proposal to the appellants to explore possibility of buying each other's share by having *inter se* bidding. Parties could not reach consensus even on the said proposal.

12. The issue remained pending before the single Judge thereafter for

nearly two years. Attempts, it is apparent, were made to resolve the issue of division of the property by metes and bounds.

13. The difficulty in the matter is that the appellants are in possession of the front portion of the property, which has a substantially higher market value. They want to retain possession of the front portion. On this position, their stand and stance is clear and categorical. This is unacceptable to the ninth respondent. Thus, it is not possible to have a consensus.

14. Counsel for the appellants submits that the appellant should be allowed to retain the front portion and they are ready and willing to compensate the ninth respondent. The submission is that this would be just, fair and equitable for the appellants have been in use and occupation of the front portion since 1998. Reference is also made to the Memorandum of Understanding between the erstwhile owners pursuant to which legal heirs of Chetan Das were permitted to use the front portion. It is submitted that the second option, which is acceptable to the ninth respondent is unworkable for it requires division across the property from the front to the back. It is submitted that the front width of the property is 18.852 metres.

15. In these circumstances, learned counsel for the appellants submits that the impugned order passed by the single Judge dated 24th October, 2016

directing public auction should be set aside. Further, as the ninth respondent had given the proposal for public auction, Section 3 of the Partition Act, 1893 is applicable and the appellants have the right to purchase the share of the ninth respondent on the basis of valuation.

16. Counsel for the ninth respondent, however, submits that the appellants are not being just, fair and reasonable. The Memorandum of Understanding relied upon by them was for only use and occupation and this is the reason why the appellants had filed the suit for partition. Thus, the appellants are oscillating and cannot, on the basis of Memorandum of Understanding claim any equity and right to front portion of the property, which is valuable and commands a high market value. The back portion obviously does not command the same premium as the front. Market value of the property is calculated on the basis of market price of the land and not on the basis of construction existing on the land. The ninth respondent is being denied use and right to use his portion and share by the appellants, who are using the front portion. Preliminary decree of partition was passed more than three years back and the report of the Local Commissioner was submitted more than two years back. Attempt of the appellants is to delay and stall further steps to effectuate the preliminary decree.

17. Having heard learned counsel for the parties, we do not think the appellants have been able to make out any case in equity to claim right to the front portion of the property. Accepting the said claim of the appellants, would obviously deny and deprive the ninth respondent of his equal share, meaning equal share in the property on the basis of its commercial market value and not merely equal share in area. A just and equitable division is one which is fair to both sides. We also find that the appellants had themselves suggested public auction, rejecting the offer of the ninth respondent that there should be *inter se* bidding between the parties. This is specifically recorded in paragraph 7 of the impugned order. In these circumstances, reliance placed by the appellants on Section 3 of the Partition Act is misconceived.

18. A reading of the impugned order passed by the single Judge would show that repeated and numerous attempts were made to enable the parties to arrive at a settlement or consensus as to the mode of partition. This has not been possible. The wait cannot be endless and adjournments cannot be given at will, so as to enable a party to dominate. The single Judge had considered and applied mind to ascertain whether the property could be divided by any of the modes suggested by the Local Commissioner or any

other mode. Site plan of the property indicates that the plot is rectangular, but the front width is rather narrow and merely is 18.853 metres long. The back width is 26.987 metres in length. The appellants have rejected the request for vertical division of the property. None of the other modes of partition suggested by the Local Commissioner are acceptable to both parties. What is acceptable to one is unacceptable to the other.

19. After the preliminary decree is passed, we cannot let the issue linger and allow the case to continue in the Court. In the given situation, with the parties stuck to their stand and no possibility of consensus, there is no other option but to direct what the single Judge has directed.

20. In view of the aforesaid discussion, we do not find any merit in the present appeal which is dismissed with no order as to costs.

SANJIV KHANNA, J.

PRATHIBA M. SINGH, J.

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