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

+ **CS(OS) 27/2017**

NARESH RANI AGGARWAL Plaintiff

Through: **Mr. Shiv Charan Garg, Adv.**

Versus

KAMLESH AGGARWAL Defendant

Through: **None.**

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **20.01.2017**

IA No.823/2017 (for exemption)

1. Allowed, subject to just exceptions.

2. The application is disposed of.

CS(OS) No.27/2017 & IA No.822/2017 (u/O XXXIX R-1&2 CPC)

3. The plaintiff has instituted this suit for partition of property No.302, Deepali, Pitampura, Delhi in terms of the oral partition already arrived at between the plaintiff and the defendant. Relief of declaration is also claimed that the plaintiff is the absolute and exclusive owner of first floor and above of the said property as per the oral partition. Injunction restraining the defendant from interfering with the plaintiff's possession of the said portion is also claimed.

4. It is the case of the plaintiff that the plaintiff and the defendant had equally contributed to the price for purchase of the land underneath the property and to the costs of construction thereon and the plaintiff and defendant have throughout been treating the property as property of the
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plaintiff and the defendant and had orally partitioned the same between themselves, with the plaintiff occupying the first floor and above and the defendant occupying the ground floor of the property.

5. The plaintiff has however not filed any document of purchase of the property. Though it is stated that the purchase is vide agreement to sell, power of attorney and Will but no copy of any of the said documents have been filed. It is the case of the plaintiff that the originals are in possession of the defendant.

6. Even if the originals are in possession of the defendant, the plaintiff as owner would certainly be in possession of copies thereof.

7. Thus, as of today, there is nothing to show that the plaintiff is the owner of the property, to claim reliefs sought with respect thereto.

8. Upon the same being put to the counsel for the plaintiff, he states that the case of the plaintiff is of oral partition.

9. For a plea of oral partition to be entertained, the plaintiff has to first show ownership rights in the property. Ownership rights cannot be created for the first time by partition. For a plea of oral partition to be taken, proof of ownership is essential.

10. The defendant, prior to the institution of this suit, has admittedly filed a suit *inter alia* for recovery of possession of the portion of the property in possession of the plaintiff, claiming to be the sole owner of the property. The said suit is pending before the Court of the Additional District Judge.

11. The plaintiff along with the documents, has filed the plaint in the said suit and the copy of the power of attorney filed with that plaint executed by the recorded owner of the property in favour of the plaintiff.

12. I have enquired from the counsel for the plaintiff, whether the defendant along with her suit has also filed a copy of the agreement to sell and Will.

13. The counsel for the plaintiff states that copy of agreement to sell and receipt of consideration has been filed but he is not aware whether the Will has been filed or not. On enquiry, it is further informed that the agreement to sell is in the name of the defendant only.

14. The counsel however states that the original agreement to sell was in the name of the plaintiff as well as the defendant and the photocopy filed by the defendant has been fabricated.

15. The same is the position with respect to the receipt.

16. On enquiry from the counsel for the plaintiff, whether the erstwhile owner had executed and registered a Will (the General Power of Attorney is registered), the counsel for the plaintiff states that he is not aware.

17. It is surprising that if the plaintiff is owner, the plaintiff would not know whether any Will was obtained or not.

18. The plaintiff, though has filed the plaint in the suit filed by the defendant and the power of attorney filed therewith, has chosen not to file the other documents which go against the plaintiff and the non-filing of such documents has to be deprecated.

19. On enquiry, it is further informed that written statement has been filed by the plaintiff in the suit filed by the defendant, taking the same pleas as taken herein.

20. It appears that this suit is filed only to retain possession of the property and /or to delay the disposal of the suit for possession which is

likely to be adjudicated much faster before the learned Additional District Judge than this suit, if put to trial, would take.

21. Even otherwise, once it is the case of the plaintiff that the property already stands partitioned and the plaintiff is wanting declaration thereof, as are the prayers in the plaint, it is not understandable as to how a suit for partition lies. The suit as filed for mere declaration has to be valued for the purposes of the court fees at the same valuation as for the purpose of jurisdiction. The plaintiff though has valued the suit for the purposes of jurisdiction at Rs.5 crores stating the same to be the value of the property but has valued it for declaration at Rs.200/- only. If the property has already been partitioned, the relief of partition in terms of the settlement is misconceived and the suit has to be treated as for declaration only and the plaintiff has to either pay court fees on Rs.5 crores or to take the suit before the Court which would have pecuniary jurisdiction to entertain the suit for valuation of Rs.200/-.

22. The counsel for the plaintiff also agrees that this is a suit for declaration and not a suit for partition.

23. The counsel for the plaintiff withdraws the suit with liberty to either approach the Court of appropriate pecuniary jurisdiction for the relief of declaration or to contest the suit filed by the defendant against the plaintiff on the same pleas as taken by the plaintiff in this suit.

24. Dismissed as withdrawn with liberty aforesaid.

No costs.

RAJIV SAHAI ENDLAW, J.

JANUARY 20, 2017/bs..
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