

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

+ **RSA No. 32/2017**

% **18th August, 2017**

BRIJ MOHAN & ANR. Appellants

Through: Mr. Radhey Shyam, Advocate.

versus

RAM KISHAN & ORS. Respondents

Through: Mr. Saurabh Kansal, Advocate
for R-1.

Mr. David A, Advocate for Mr.
Yash Anand, Advocate for R-2.

Ms. Shalu and Ms. Manju,
Advocate for R-4.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiffs in the suit impugning the concurrent judgments of the courts below; of the trial court dated 29.10.2015 and the first appellate court dated 19.8.2016; by which the courts below have dismissed the suit for partition, etc. filed by the appellants/plaintiffs with respect to the suit property bearing no. 3, Bazar Lane, Jangpura, Bhogal, Delhi.

2. It is an undisputed case of both the parties that the suit property was owned by Sh. Niader Mal. It is also undisputed that plaintiffs in the suit as also defendant nos. 1 to 5 in the suit were the legal heirs of late Sh. Niader Mal. The appellants/plaintiffs were the sons and daughters of late Sh. Kamal Singh the son of Sh. Niader Mal and defendant nos. 1 to 4 were the sons of late Sh. Niader Mal and defendant no. 5 was the daughter of Sh. Niader Mal. Defendant no. 3 expired *pendente lite* and since he died as a bachelor his name was deleted from the array of defendants. Defendant no. 4 Sh. Raju, the son of Sh. Niader Mal died *pendente lite* and his legal heirs were substituted by the trial court by the order dated 19.4.2004 and who are respondent nos. 3(A) and 3(B) in this Court and were defendant nos. 4A and 4B in the trial court.

3. Defendant no. 1 in the suit, and respondent no. 1 herein Sh. Ram Kishan s/o Sh. Niader Mal, pleaded that Sh. Niader Mal died leaving behind in favour of respondent no.1/defendant no. 1 a registered Will. The date of this Will is not mentioned in the written statement however it is stated by counsel for the respondent no.

1/defendant no.1 that copy of this Will was filed before the trial court and the same is dated 25.5.1998.

4. After pleadings were complete the trial court framed the following issues:-

- “1. Whether the suit of the plaintiff is not maintainable in view of the preliminary objections raised on behalf of the deft no. 1? OPD
2. Whether the suit has not been properly valued for the purpose of court fees as well as jurisdiction? OPD
3. Whether the plaintiff's are entitled to seek partition of the property in question? OPP
4. If the answer to issue no. 3 is in affirmative then for what share the plaintiffs are entitled to? OPP
5. Whether the plaintiffs are entitled for the relief of Permanent injunction as prayed? OPP
6. Relief.

Additional issues were framed on 11.11.2008:-

- a) Whether late Sh. Niyader Mal had executed any Will? OPD
- b) If the answer of the aforesaid issue is in affirmative then whether the said will excludes the plaintiff from inheriting the suit property or from making any claim in respect to that? OPD.”

5. None of the parties led evidence and the courts below have dismissed the suit by holding that appellants/plaintiffs failed to prove his case that Sh. Niader Mal died intestate. The first appellate court has also observed that it was upon the appellants/plaintiffs to prove that Sh. Niader Mal died intestate and appellants/plaintiffs failed to do so and therefore the suit had to be dismissed.

6. For the disposal of this Regular Second Appeal the following substantial question of law is framed:-

Whether both the courts below have not committed a gross illegality and perversity in requiring intestacy of Sh. Niader Mal to be proved by the appellants/plaintiffs although actually it is a person who sets up a Will, being the respondent no. 1/defendant no. 1 in this case, who had to prove the Will to succeed in proving that Sh. Niader Mal did not die intestate?

7. The aforesaid substantial question of law has to be answered in favour of the appellants/plaintiffs and against the respondents/contesting defendants, inasmuch as, the suit property was admittedly owned by Sh. Niader Mal. Once respondent no. 1/defendant no. 1 failed to prove the Will set up by him and his evidence was closed, and which order has become final, the Will stands rejected and consequently Sh. Niader Mal is proved to have died intestate. Once Sh. Niader Mal dies intestate then his property will be succeeded in five parts with one part of one fifth going to appellants/plaintiffs who are children of late Sh. Kamal Singh s/o Sh. Niader Mal. Second part of 1/5th share will go to Sh. Ram Kishan.

Third part of $1/5^{\text{th}}$ share will go to Sh. Hira Lal and who since has expired his share will be inherited by his legal heirs who are respondent nos. 2(A) and 2(D) in this appeal. The fourth part of $1/5^{\text{th}}$ share will go to the legal heirs of deceased defendant no. 4 Sh. Raju and who are respondent nos. 3(A) and 3(B) in this Court. The fifth part of the $1/5^{\text{th}}$ share will go to the daughter of Sh. Niader Mal, namely, Smt. Bimla and who was defendant no. 5 in the trial court and is respondent no. 4 in this appeal. I note that the share of Sh. Niader Mal has to be divided in six parts but since one son of Sh. Niader Mal namely Sh. Billoo died as a bachelor and intestate his $1/6^{\text{th}}$ share will equally devolve on the five other children/their branches of late Sh. Niader Mal and hence the share of $1/6^{\text{th}}$ of these persons gets enhanced to $1/5^{\text{th}}$ each.

8. Accordingly, a preliminary decree of partition is passed with respect to the suit property bearing no. 3, Bazar Lane, Jangpura Bhogal, Delhi in terms of the shares of five persons/branches being $1/5^{\text{th}}$ each as stated in the above paragraph.

9. Let the parties appear before the District and Sessions Judge, South-East, Saket Courts, Delhi, on 19th September, 2017 and

the District and Sessions Judge will now mark the suit for disposal for passing of the final decree in accordance with law to a competent court.

AUGUST 18, 2017

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VALMIKI J. MEHTA, J

