

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

+ **RFA No. 856/2017**

% **11th October, 2017**

VIRENDER & ORS. Appellants

Through: Mr. Puneet Jaiswal, Mr.
Bhuvan Chand and Mr. Nakul
Chaudhary, Advocates.

versus

KRISHNA & ORS. Respondents

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the contesting defendants in the suit, impugning the judgment of the trial court dated 21.3.2017 by which the trial court has decreed the suit of the respondents/plaintiffs and directed partition of the suit properties which belonged to the father of the parties late Sh. Jugti Ram. Respondents/plaintiffs have been granted 1/8th share each in the suit properties inasmuch as the deceased Sh. Jugti Ram and his widow Smt. Murti Devi died leaving

behind eight children i.e four daughters and four sons. Three plaintiffs in the suit and the defendant no.5 Smt. Rajwati were the four daughters and the four sons were the defendant nos. 1 to 4 in the suit. Appellants are defendant nos. 1 to 3 in the suit. Reference to these defendants would include reference to their legal heirs inasmuch as the defendant nos. 2 and 3 had died *pendente lite* and are thus now represented by their legal heirs.

2. The facts of the case are that the father of the parties Sh. Jugti Ram was the owner of the three suit properties. These properties were X-83 and property no. 1375 situated in the Revenue Estate of Village Chhawla, Delhi and another property being land admeasuring 2416.5 sq. yds. in Khasra No. 273 of Village Chhawla, Delhi. The suit properties existed in the name of Sh. Jugti Ram in the revenue record and who died intestate in the year 1991. His widow Smt. Murti Devi, i.e mother of the parties also died intestate in the year 1991. All the aforesaid facts are undisputed facts. In view of the aforesaid factual position once a Hindu dies intestate, his property will equally devolve amongst his children, and therefore, the suit for partition has rightly been decreed in favour of the three daughters by the trial court.

3. Before the trial court the appellants had contended that the property situated in Khasra No. 273 was sold out, and in this regard the trial court has found that it was only a portion of Khasra No. 273 which was sold out, but the balance area of 900 sq. yds. remained. Trial court for this purpose relies upon the report produced by the revenue official being the Patwari Ex.CW1/A and also the relevant extract of the Khatoni Ex.CW1/B and both of which documents showed that the suit property has continued to be shown in the name of, and hence ownership of, Sh. Jugti Ram and was hence available to the children of Sh. Jugti Ram and Smt. Murti Devi for partition in terms of the rights inherited as per the Hindu Succession Act.

4. Trial court has also disbelieved the case of the appellants that there was an oral partition as regards property X-83 because no evidence whatsoever was led of partition that the property bearing no. X-83 on partition had fallen to the share of Sh. Dilbagh/defendant no.2/appellant no.2.

5. Trial court also notes that one legal heir of the original defendant no.3/appellant no.3/Sh. Pritam took a plea that the Will was

executed by his father Sh. Pritam in favour of appellant no.2/defendant no.2 but no such Will was filed and accordingly such plea was rejected.

6. The relevant observations of the trial court decreeing the suit for partition are contained in paras 8, 9, 15 to 18 of the impugned judgment and these paras read as under:-

“8. I have heard detailed arguments and gone through the record of the case. The Plaintiff/PW1 Smt. Krishna is examined as only witness on behalf of Plaintiff and deposed by way of PW1 by way of her affidavit Ex.PW1/A. In the said affidavit, she more or less reiterated the contentions of the plaint and exhibited the site plan of the suit property as Ex.PW1/1 to Ex.PW1/3.

9. Defendant Virender, on the other hand deposed as DW1 by way of his affidavit Ex.DW1/A. In the course of proceedings, the court also summoned Tehsildar in whose place CW1 Sh. Bijender Singh, Patwari from the office SDM, Kapashera, Delhi who appeared and submitted his report in terms of order dated 22.08.2016. He deposed that as per revenue record Khasra No.273 of village Chhawla, New Delhi is in the name of Jugti S/o Bhuru R/o village Chhawla, New Delhi. He also deposed that suit land has not been acquired so far and that the suit properties are existing in village Chhawla, which is rural village and there is no question of any notification of authorizing/urbanization of the area of the suit properties. The report produced by him is Ex.CW1/A and bears signatures of concerned Tehsildar, Kapashera. The copy of relevant extract of the Khatoni produced by him is exhibited as Ex.CW1/B.

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15. The Plaintiffs have claimed partition of the suit properties has also been opposed by Defendant No.1 to 4 on the ground that land measuring 120 sq. yards in possession of Defendant No.2 and 4 has already been sold and transferred to other persons and the suit property is not in their possession. It is also stated that after the demise of Sh. Jugti Ram ½ share of land following in Khasra No.273, Village Chhawla, Delhi was sold to Master Khazan Singh and thus Plaintiffs have not right, title or interest in the said land partitioned.

16. It is however, noteworthy that in entire cross-examination of PW1, not even a single suggestion was put to the Plaintiff by the Defendant with

regard to alleged sale of the aforesaid properties, as claimed by then in the written statement. Even when Defendant No.1 stepped into the witness box as DW1, he merely deposed by way of his affidavit that land measuring 120 sq. yards which was in possession of Defendant No.2 and 4 has already been sold to Defendant No.6 and hence, no question arise of the partition of the said land. However, neither Defendant No.1/DW1 brought on record any documentary evidence with regard to alleged sale of the said land nor Defendant No.2 and 4 stepped into the witness box in the entire course of trial to prove that land in question has been sold. This contention thus remains unsubstantiated for want of necessary documents in this regard and must, therefore, be rejected outrightly. It is also noteworthy that in his cross-examination, DW1 categorically deposed that he has not sold this property to anybody. He further deposed that his father had sold portion out of the land falling in Khasra No.273, Village Chhawla, Delhi. However, the remaining land measuring 900 sq. yards still remains.

17. Though DW1 further deposed that suit property has already been partitioned, however, in the name breath, he also deposed that it was verbal partition. He further deposed that property bearing No.X-83, Village Chhawla, Delhi has already been partitioned and fallen in the share of Sh. Dilbagh Singh during the lifetime of his father. However, no evidence with regard to any such partition was led and the remaining Defendants even did not step into the witness box to prove this plea of any alleged partition of the suit property by the parents of the parties. Accordingly, this plea being devoid of merits and apparently being an afterthought must also be rejected.

18. It may also be mentioned at this juncture that by way of his written statement, Defendant No.7, Sh. Jitender Kumar, has raised a new plea of there being a Will executed by his father late Sh. Pritam Singh in favour of Defendant No.2. However, no evidence whatsoever was led in this regard and even the said alleged Will did not see the light of the day during the entire course of trial.” (underlining added)

7. In my opinion, therefore, the trial court has committed no error in decreeing the suit for partition and ordering that the three plaintiffs will have 1/8th share each in the suit properties which belonged to their father Sh. Jugti Ram who had died intestate.

8.(i) Learned counsel for the appellants argued that the suit for partition was not maintainable because daughters did not have a right to seek partition in view of Section 23 of the Hindu Succession Act inasmuch as the father died in the year 1991 and Section 23 was existing then and was only repealed w.e.f 9.9.2005 by amendment to the Hindu Succession Act by Act 39 of 2005.

(ii) This argument of bar of the suit on account of then existing Section 23 of the Hindu Succession Act is a misconceived argument for various reasons. Firstly, the appellants raised no such plea in the written statement and no such issue was got framed. Therefore, once an issue is not pleaded and asserted before the trial court, such issue is to be taken to have been waived. Appellants therefore cannot argue this issue before this Court. Secondly, the argument that the father died in the year 1991 when Section 23 of the Hindu Succession Act was operative, and which therefore bars the subject suit, is a misconceived argument because the suit was filed in the year 2007. Once the suit is filed in the year 2007 and after repeal of Section 23 of the Hindu Succession Act when the bar of Section 23 of the Hindu Succession Act stood already removed, and therefore I fail to

understand as to how the suit for partition is not maintainable because at one point of time there existed a bar on the daughters to seek partition of the family residential house. Bar is a bar only till the bar exists and once the bar is removed the fact that there was such a bar at one point of time earlier would not mean that bar still exists, and the suit filed after removing of the bar can be said to be barred by law. Another reason for rejecting the argument is that the bar under Section 23 of the Hindu Succession Act only applies to dwelling house occupied by the family members. This is a factual plea. This factual plea admittedly has not been raised that the properties in question are dwelling houses where the family members are residing, and therefore, such a plea is again not available to the appellants.

9. In view of the above, there is no merit in the appeal, and the same is therefore dismissed.

OCTOBER 11, 2017/ib

VALMIKI J. MEHTA, J