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

+ **RFA(OS) 129/2015**

Date of decision: 25th September, 2017

PAWAN VASHISHT Appellant
Through Mr. D.K. Rustagi, Ms. Anuradha
Vashist and Mr. Mayank Rustagi, Advocates.

Versus

SUSHIL VASHISHT & ORS Respondent
Through Respondent No.1 in person.
Ms. Varsha Baxi, Advocate for R-3, Rajesh
Vashist.
Mr. O.N. Sharma, Advocate for R-5.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J. (ORAL)

This intra-Court appeal by Pawan Vashist, who is defendant No.3 in CS (OS) No.1623/2007, impugns order dated 21st May, 2015 passed by the learned single Judge. The said order reads as under:-

“The preliminary decree passed on 15th May, 2014 was recalled on 9th October, 2014 on the ground that counsel for defendant No.3 was not present in Court on 15th May, 2014.

Today, learned counsel for defendant No.3 states that though she has no objection to a preliminary decree being passed quantifying the share of each of the parties as 1/5th in properties No. A, B and

C, yet she wants that other properties be also included.

However, a perusal of the paper book reveals that no counter claim has been filed by defendant No.3. Even no prayer has been made seeking partition of any other property in the defendant No.3's written statement.

Consequently, after granting liberty to defendant No.3 to file a counter claim and to agitate its grievance with regard to any other property, a preliminary decree is passed defining the shares of the plaintiff and defendants No.1 to 4 as 1/5th each in property No.A, B and C i.e.33, Bazar Lane Bhogal, Delhi, built up property on DDA leasehold plot No.671, measuring 265 sq. yards; 118, Hari Nagar Ashram, Mathura Road, New Delhi, built up house on an area of 78 sq. yards; House No.207/44, Prakash Mohalla, Jharia Maria, Village Garhi, New Delhi, built up on an area of 200 sq. yards.

The parties are given liberty to divide the aforesaid properties within a period of six weeks. In case, they cannot agree on a division, this Court would direct auction of the same after appointing a valuer.

Today, plaintiff, defendant No.1 as well as defendant No.4 state that they are ready to take good care of defendant No.2, who is of unsound mind.

Mr. Janardan Tripathi, Joint Registrar is directed to visit the suit property namely 33, Bazar Lane, Jangpura, Bhogal, Delhi on 1st June, 2015 at 12.00 p.m.

The Joint Registrar shall submit his report to the Court on the reopening.

List before Court on 16th July, 2015.

Mr. Balwant Rai Bansal, ADJ is directed to expeditiously dispose of guardianship petition bearing No. 02/2014 titled as Sushil Vashisht vs. State preferably within a period of four months.”

2. The appellant has also impugned order dated 11th August, 2015, by which Review Petition No. 366/2015 and I.A. No. 15946/2015 were dismissed for the reason that no ground for review was made out.

3. With regard to property No.33, Bazar Lane, Jangpura, Bhogal, New Delhi, admeasuring 265 square yards counsel for the appellant on instructions from the appellant, who is present in person, states that the appellant accepts that the said property is owned by him and respondents-Sushil Vashist, Umanandan Vashist, Rajesh Vashist and Shasibala Vashist. Counsel appearing for the said respondents accept this position. Counsel appearing for respondent No.5, Ravinder Vashist has stated that the said respondent does not claim any right, title or interest in property No.33, Bazar Lane, Jangpura, Bhogal, New Delhi admeasuring 265 square yards. It may be recorded here that a portion of this property under the purported family settlement dated 9th June, 1985, admeasuring 77 square yards as demarcated had fallen to the share of Suraj Narain. To this extent, no dispute has been raised in the plaint or in the present appeal. Suraj Narain is not a party to the suit or the present appeal.

4. With regard to property No.118, Hari Nagar Ashram, New Delhi admeasuring 78 square yards and House No.207/44, Prakash Mohalla, Jharia Maria, Village Garhi, New Delhi admeasuring 200

square yards, the appellant has claimed and has relied upon an oral family settlement in the year 2001. The respondents are disputing the said family settlement.

5. The appellant has also submitted that there were two more properties which belonged to the mother and have been sold by the respondent No.3 i.e. the plaintiff and the sale proceeds have been appropriated by him. This is disputed by the counsel for the respondent No.3 i.e. the plaintiff. The first respondent supports the appellant, on the said issue.

6. Be that as it may, we do not think that a preliminary decree of partition could have been passed in respect of the three properties on the basis of the statement made by the counsel for the appellant i.e. defendant No.3 as recorded in the order dated 21st May, 2015. Counsel for the appellant had then stated she had no objection to a preliminary decree being passed quantifying the share of each of the parties in the three properties if other properties were also included. The said statement was a conditional one and not absolute. The appellant had claimed rights under the purported oral family settlement with regard to property No.118, Hari Nagar Ashram, New Delhi and House No.207/44, Prakash Mohalla, Jharla Maria, Village Garhi, New Delhi. The said claim and plea had to be decided.

7. The appellant in the written statement had also referred to Plot No. D-53, Sector 41, NOIDA and Plot No.400, Sector-8, Faridabad, Haryana, which were in the name of the mother and it was claimed that these plots were sold during the lifetime of the mother by the

respondent No.3, i.e., the plaintiff and the sale proceeds were appropriated towards purchase of Flat No.19, Jangpura Road, Bhogal Lane, New Delhi and another property in the name of the third respondent's wife. These, we observed, are factual disputes, which require examination and decision.

8. In view of the aforesaid position, the appeal is allowed and the preliminary decree of partition in respect of property No.33, Bazar Lane, Jangpura, Bhogal, New Delhi admeasuring 265 square yards, property No.118, Hari Nagar Ashram, New Delhi admeasuring 78 square yards and House No.207/44, Prakash Mohalla, Jharia Maria, Village Garhi, New Delhi admeasuring 200 square yards is set aside. However, we would clarify that the appellant and the respondents would be bound by the statement that the appellant and respondent Nos.1 to 4 have $1/5^{\text{th}}$ share each in property No.33, Bazar Lane, Jangpura, Bhogal, New Delhi. To this extent, we do not interfere with the impugned order passed by the single Judge.

9. It is stated that the next date of hearing before the single Judge is 1st November, 2017. There would not be any order as to costs.

SANJIV KHANNA, J.

NAVIN CHAWLA, J.

SEPTEMBER 25, 2017
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