

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

+ **RFA No.1051/2017**

% **18th December, 2017**

KULDIP SINGH

..... Appellant
Through: Mr. Murari Kumar,
Mr. Aman Jha, Advocates

versus

KISHAN KUMAR (DECEASED) THROUGH LRS. & ORS.
..... Respondents

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No.46126/2017(exemption)

Allowed, subject to all just exceptions.

CM stands disposed of.

RFA No.1051/2017 & CM No. 46127/2017 (stay)

1. This Regular First Appeal under Section 96 of Civil Procedure Code, 1908 (CPC) is filed by the defendant no.1(a) in the suit, and who is one of the legal heirs of the original defendant no.1 Sh. Pratap Singh, impugning the judgment of the trial court dated 04.09.2017 by which the trial court has decreed the suit filed by the

plaintiffs/respondent nos. 1(a) to 1(e) herein, for partition with respect to property bearing no.212, Humanyun Pur, Sardarjung, New Delhi on a plot admeasuring approximately 236 sq.yds.

2. The suit property bearing no. 212, Humanyun Pur, Sardarjung, New Delhi was originally owned by Sh. Harchand Sejwal, father of the original parties to the suit. Sh. Harchand Sejwal died in the year 1972 leaving behind 9 legal heirs, being six sons, i.e. plaintiff, defendant nos. 1 to 4 and Sh. Ram Narain; represented by defendant nos. 5(a) to 5(f) in the suit, and three daughters namely defendant nos. 6 to 8 in the suit. Therefore share of each of the son and daughter of late Sh. Harchand Sejwal was $1/9^{\text{th}}$ in the suit property. Plaintiffs/respondent nos. 1(a) to 1(e) pleaded that appellant/defendant no.1(a) and other legal heirs of Sh. Pratap Singh had taken more than their share in the suit plot by recently constructing on a land area of around 44 sq.yds. out of the total plot area of approximately 235 sq. yds. It was pleaded by the plaintiffs/respondent nos. 1(a) to 1(e) in the suit that there was no partition effected of the suit property between the children of Sh. Harchand Sejwal and therefore partition be done of

the suit property and the plaintiffs/respondent nos. 1(a) to 1(e) be given their 1/9th share in the suit property.

3. On behalf of the legal heirs of the original defendant no.1 including the appellant, there is no dispute that late Sh. Harchand Sejwal died leaving behind 9 legal heirs and, therefore each of the legal heir of Sh. Harchand Sejwal, including the defendant no.1 whose one legal heir is the appellant, would receive 1/9th share in the suit property.

4. The only issue before the trial court was that whether the total area of the suit property is 235.91 sq.yds. as was the case of the plaintiffs/respondent nos. 1(a) to 1(e) or that the suit plot comprised of a larger area. The case of the plaintiffs/respondent nos. 1(a) to 1(e) was that the total area of the property no.212, Humanyun Pur, Sardarjung, New Delhi is 235.91 sq.yds. and out of this property, an area of about 44 sq.yds. has been taken by the appellant and other legal heirs of the original deceased defendant no.1 and a new construction has been completed just two-three days back, and which could not have been done without partition and that too for an area greater than the 1/9th share falling to the defendant no.1.

5. After pleadings were completed, trial court framed the following issues:-

- “(1) Whether this court has no territorial jurisdiction to try this suit? OPD
- (2) Whether the plaint is liable to be rejected under Order 7 Rule 11 of CPC? OPD
- (3) Whether the suit is bad for mis joinder of parties? If so, its effect. OPD
- (4) Whether the suit is bad for non-joinder of necessary parties? OPD
- (5) Whether the Plaintiff is entitled for decree and preliminary decree for partition in respect of suit property? OPP
- (6) Whether the plaintiff is entitled for decree of permanent injunction in respect of suit property? OPP
- (7) Relief.”

6. The main issues to be decided by the trial court, as also by this Court, are issues nos.5 and 6, and in this regard, I completely agree with the findings and conclusions of the trial court by referring to the report of the Local Commissioner dated 24.11.2006 proved as Ex.DW-2/1 and which report stated that total area of two plots, i.e 212, Humanyun Pur, Sardarjung, New Delhi and 212-A, Humanyun Pur, Sardarjung, New Delhi (carved out of original plot no.212) is 235.91 sq.yds. and meaning thereby that plot no.212-A was carved out of the original plot no.212 which comprised of 235.91 sq.yds. Thus, plot no.212-A, Humanyun Pur, Sardarjung, New Delhi had an area of approximately 44.44 sq.yds. and which area would be in excess of the 1/9th share of each of the legal heir in the suit property since 1/9th share

would be approximately 26 sq.yds. Accordingly, trial court held that the legal heirs of the deceased defendant no.1 including the appellant has not made valid claim to the entire area of 44.44 sq.yds. much less without mutual partition having been effected. The relevant observations of the trial court in this regard are contained in paras 17 to 19 of the impugned judgment and these paras read as under:-

“17. Both these issues are inter-connected. One of the important aspect of the case is the area of the suit property. In this regard, report of the Ld. Local Commissioner is very relevant. This report remained unchallenged and was exhibited by the Local Commissioner as Ex.DW2/1. He was directed to give report about exact area of property No.212 and whether there are two separate properties known as 212 and 212-A. The Local Commissioner has stated that the exact area of 212 is 235.91 sq.yds and property No.212-A is a newly constructed property where construction has been furnished just 2-3 days back and some pieces of marble stones, bricks, raw material, and steels were existing on the terrace. He also states that during the life of Shri Harchand Sejwal, property now bearing No.212-A was used as a common family room – Baithak and thereafter, defendant No.2 started living on the ground floor and the first floor was used by defendant No.4. He states that the total area of both the premises i.e. 212 and 212-A is 235.91 sq.yds. This report is not challenged by any concern and it shows that property No.212 and 212-A are part of property No.212 having a total area of 236 sq.yds approximately. In this regard, the cross-examination of Defendant No.2, who appeared as DW1 is also important. He admits that property No.212 is measuring 235 sq.yds. The Local Commissioner found the total cumulative area of both the properties as 235.91 sq.yds., which means that property No.212-A was carved out from property No.212 itself. DW1 further admits that property coming to his share from father was given by him to his sons by virtue of a sale deed which they have now mutated in their names. He further states that out of property No.212, he has taken his share measuring 40 sq. yards. He denied the suggestion that there was never any partition amongst the six brothers of property No.212. In his cross-examination, Defendant No.2 has taken contradictory stand from the one taken in the written statement.

18. As a matter of fact, except of Defendant No.1, no other party of this suit in their pleadings, claim that there was a partition amongst the brothers during the life of their father or after his death. Defendant No.1

did not step in the witness box to prove the partition. Defendant No.2 even in his examination in-chief did not make a whisper about the alleged partition amongst the brothers. Defendant No.2, therefore, cannot be believed to the fact that there was partition amongst the brothers and he took 40 sq.yds in the partition and his share is now known as property 212-A.

19. Defendants No.2 to 8 never pleaded any oral partition and cannot be permitted to led evidence to this effect that too in their cross-examination. Defendant No.2 has placed on record the copy of the sale deed executed by him in favour of his sons in respect of property No.212A, measuring 52.7 sq.yds. This sale deed is silent as to how Defendant No.2 became the owner of property No.212-A and further the Local Commissioner has observed that the area of property No.212-A is only 44.44 sq.yds., which is unchallenged and as such, this sale deed has no sanctity in the eyes of law. Defendant No.2 cannot sell what he himself does own. He could have sold only his 1/9th undivided share in property No.212 as on 15.06.2006 when this sale deed was executed. The sisters did not executed the relinquishment deed in favour of Defendant No.2, as on 15.06.2006 they did on 17.08.2006. In facts, this sale-deed is of no consequence. Otherwise also, as per sale deed, the total area of 212-A is 52.7 sq.yds. As per Local Commissioner, the total area of 212-A is 44.44 sq.yds. There is no challenge to this report. What happened to alleged remaining area of 212-A is unexplained. Defendants No.2 to 8 never pleaded nor have proved that there was any partition amongst the brothers and further it is proved that there does not exist any property bearing No.212-A, which in fact is a part of property No.212 itself.”

7. I completely agree with the aforesaid reasoning and conclusion of the trial court inasmuch as admittedly no objections were filed by the appellant or other legal heirs of the deceased defendant no.1 to the report of the Local Commissioner Ex.DW-2/1. Once there is no dispute to the report of the Local Commissioner showing the total area of the original suit plot no.212, Humanyun Pur, Sardarjung, New Delhi being 235.91 sq.yds. and the property no.212 and the newly carved out plot no.212-A totally making an area of

235.91 sq.yds., then consequently the area of plot no.212-A of 44.44 sq.yds. would stand carved out of the total area of 235.91 sq.yds. of the property as original existed on plot no.212. Appellant and other legal heirs of deceased defendant no.1 failed to prove any partition already having taken place and therefore trial court was justified in decreeing the suit for partition giving each legal heir $1/9^{\text{th}}$ share in the suit property.

8. Learned counsel for the appellant argued that there was one other report of the Local Commissioner dated 30.10.2017 which gave the total area of the plot nos.212 and 212-A as 244.70 sq.yds. and therefore, it is argued that the report of the Local Commissioner Ex.DW-2/1 dated 24.11.2006 cannot be relied upon. However this argument is misconceived because even if we take the area of original plot no.212 plus the area of plot no.212-A as around 245 sq.yds. as stated in the report of the Local Commissioner dated 30.10.2017, even in such a situation, the $1/9^{\text{th}}$ share of the deceased defendant no.1 would be about 27 sq.yds. and the appellant with other legal heirs of the deceased defendant no.1 in fact have in their possession 44.44

sq.yds., i.e. much larger area than their 1/9th share in the suit property.

This argument of the appellant is therefore misconceived and rejected.

9. In view of the aforesaid discussion, I do not find any merit in the appeal. Dismissed.

DECEMBER 18, 2017

VALMIKI J. MEHTA, J

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