

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

% **Date of decision: 7th February, 2018**

+ **CS(OS) 50/2018**

SUNITA

..... Plaintiff

Through: Mr. Manish Vashisht, Mr. Sameer
Vashisht and Mr. Manashwy Jha,
Advs.

Versus

LEKH RAJ ORS

..... Defendant

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has sued for partition of property No.W-121, Mayapuri Industrial Area, Phase-II, New Delhi-110065 impleading her brother Lekh Raj as defendant No.1, Nirmala Devi as defendant No.2, Gulshan Khanna as defendant No.3, Harish as defendant No.4 and Anoop as defendant No.5.

2. It is the case of the plaintiff (i) that the aforesaid property was owned by Bhagwan Dass who died on 1st January, 1987; (ii) that the plaintiff is the daughter of Om Prakash, brother of Bhagwan Dass; (iii) that Bhagwan Dass, besides the father of the plaintiff had three other brothers namely Ghamandi Lal, Harnam Dass and Ravi Prakash; (iv) that the defendant No.2 Nirmala Devi is the daughter of Ghamandi Lal; (v) that the other two brothers of Bhagwan Dass namely Harnam Dass and Ravi Prakash have also died and “as per the knowledge of the plaintiff, they are not survived by any legal heirs”; (vi) that the

defendant No.1, brother of the plaintiff, along with one Shyam Babu propounded a Will dated 18th October, 1985 of Bhagwan Dass and sought probate thereof and which was granted on 2nd August, 1988; (vii) that even before the grant of probate, the defendant No.1 and Shyam Babu sold the property to Shyam Lal being the predecessor of the defendants No.3 to 5 herein; (viii) that the defendant No.2 applied for revocation of the probate, claiming to be the adopted daughter of Bhagwan Dass and the application for revocation was allowed on 28th October, 1997 and the probate petition tried again and ultimately dismissed on 10th August, 2004.

3. It is the plea of the plaintiff that she is a Class II heir of Bhagwan Dass.

4. Under the Hindu Succession Act, 1956 which presumably applies to the parties, in the absence of Class I heirs of the male deceased, the property of the male deceased devolves firstly on his father and if there is no father also then on son's daughter's son, son's daughter's daughter, brother and sister. Thus, even if it were to be believed that Bhagwan Dass had no Class I heir and the father of Bhagwan Dass had also pre-deceased him, the estate of Bhagwan Dass should devolve upon his living brothers and sisters and not on the children of deceased brothers or sisters who are in the fourth entry and who succeed only if there is no brother, sister or heirs mentioned in the third entry.

5. The plaintiff, in the plaint has not given the date of demise of her father i.e. whether her father died before the demise of Bhagwan

Dass or after the demise of Bhagwan Dass. However, a perusal of para 2 of the judgment dated 10th August, 2004 supra of dismissal of probate petition discloses that the father of the plaintiff had pre-deceased Bhagwan Dass. If Bhagwan Dass, at the time of his demise had any living brothers or sisters then the estate of Bhagwan Dass would be inherited by his living brothers and sisters, even if they died subsequently and not by the plaintiff who claims to be the daughter of a pre-deceased brother of Bhagwan Dass.

6. The counsel for the plaintiff, in the plaint, has conveniently not pleaded the date of demise of other brothers and sisters of Bhagwan Dass. In fact, there is not even a statement whether Bhagwan Dass had any sisters or not. Even if all the brothers of Bhagwan Dass had pre-deceased him, as is being now sought to be orally contended, if any sisters of Bhagwan Dass were alive on the date of demise of Bhagwan Dass, then they in preference to the plaintiff, would inherit the estate of Bhagwan Dass.

7. Thus, on the plaint as existing, the plaintiff has no title to the property to claim any partition thereof.

8. I may at this stage also mention that the plaintiff has vaguely stated that the other brothers of Bhagwan Dass namely Harnam Dass and Ravi Prakash have also died and to the knowledge of the plaintiff have not left any heirs. No dates of their demise or of the names of their wives or their children or any particulars of the enquiries made by the plaintiff in this regard have been given. In a suit for partition, specially amongst family members, it is incumbent upon a plaintiff to

give all the said particulars and merely by making such vague statements about the family members who will admittedly have a share, they cannot be excluded from partition.

9. I may in this context also state that as per the plaintiff, the plaintiff, defendant No.1 and the defendant No.2 have $\frac{1}{3}^{\text{rd}}$ share each in the property. However, the plaintiff and the defendant No.1 are the children of the same brother of Bhagwan Dass and as per my understanding, even if the averments of the plaintiff were to be believed, the share of the plaintiff and her brother namely defendant No.1 together would be $\frac{1}{2}$ and the share of the defendant No.2 would be the other half. The counsel for the plaintiff is unable to state the law to be any different and has no explanation, on what basis the plaintiff has claimed $\frac{1}{3}^{\text{rd}}$ share in the property and valued the same. However need to conclusively decide the said aspect is not felt.

10. Though the plaintiff has conveniently concealed from the plaintiff but going through a few of the documents filed along with the plaint, reveals that the interest of the plaintiff and the defendant No.1 is the same and they have been working in cahoots with each other. A perusal of para 23 of the judgment dated 10th August, 2004 of dismissal of the probate petition, shows that the plaintiff, after the revocation of the probate earlier obtained and in the second round in the probate case, appeared as PW-5 in support of her brother defendant No.1. With respect to the testimony of the plaintiff, it is recorded in the said judgment which has attained finality, that she is an unreliable witness, her deposition was replete with inconsistency,

that she replied to the various questions as per what suited the defendant No.1, that she deposed about the facts claiming personal knowledge thereof, of a period prior to her birth.

11. Para 25 of the aforesaid judgment, with respect to the conduct of the plaintiff, her brother defendant No.1 and their mother Raj Wati records that Shyam Babu, who along with defendant No.1 had applied for probate which was granted, revoked and then refused, was a tenant in the property under Bhagwan Dass, that the said Shyam Babu relinquished his rights in the property in favour of the defendant No.1 and Raj Wati, mother of the plaintiff and defendant No.1, even prior to the initial grant of probate and without obtaining permission under Section 8 of the Hindu Minority and Guardianship Act, 1956, vide Agreement to Sell, General Power of Attorney etc. on behalf of defendant No.1 who was then a minor, transferred the property to the predecessor of defendants No.3 to 5.

12. The aforesaid shows not only the plaintiff and the defendant No.1 but their mother as well has been abusing the process of the Court since the year 1987, first by within a few days of the demise of Bhagwan Dass, fabricating his Will in collusion with Shyam Babu aforesaid and obtaining *ex-parte* probate thereof, without even disclosing the particulars of all the natural heirs of the deceased and without even impleading as party thereto defendant No.2 who now is admitted to be an heir of Bhagwan Dass. The plaintiff, who as aforesaid is in collusion with her brother, at that time did not claim any right or share in the property and when at the instance of

defendant No.2 the probate earlier granted was revoked and the probate petition again tried, still supported her brother defendant No.1 and did not claim any share in the property. I may also record that the plaintiff and the defendant No.1 even at that stage did not make any claim to the property on the basis of being the natural heirs of Bhagwan Dass.

13. Not only so, the plaintiff is found to have in para 10 of the plaint claimed to be in constructive possession of the property “as the Defendants No.3 to 5 are claiming possession from Defendant No.2”. It is nowhere the case of the plaintiff that it is the defendant No.2 who has sold the property to the predecessor of defendants No.3 to 5. Rather, from the documents, it becomes clear that it is the mother of the plaintiff who has sold the property to the predecessor of defendants No.3 to 5.

14. The counsel for the plaintiff has no explanation as to on what basis, it is pleaded in para 10 that the defendants No.3 to 5 are claiming possession from defendant No.2.

15. Further, the plaintiff has valued the property arbitrarily for the purpose of jurisdiction at Rs.2 crores and claiming her share to be $\frac{1}{3}^{\text{rd}}$ has paid court fees on $\frac{1}{3}^{\text{rd}}$ of Rs.2 crores i.e. on Rs.67 lakhs. However, as aforesaid, the shares are different and possession of the defendants No.3 to 5 of the property is hostile to the plaintiff and the plaintiff has not properly valued the suit for the relief of recovery of possession.

16. On enquiry, it is stated that the mother namely Raj Wati of the plaintiff has died.

17. I have enquired from the counsel for the plaintiff, as to how the plaintiff, being a natural heir of her mother, can seek partition from defendants No.3 to 5 who/whose predecessor-in-interest have been put in possession by the mother of the plaintiff. The explanation of the counsel that the mother of the plaintiff had sold the property on the basis of the Will which was ultimately found to be not of Bhagwan Dass, is not found to be satisfactory. It is the defendants No. 3 to 5 only who since prior to 1988 are in possession of the property. Though the defendant No.2 was earlier claiming right in the property, adversely to defendants No.3 to 5 / their predecessor, but has failed therein. The claim of the plaintiff in this suit is thus effectively against defendants No. 3 to 5 only. However, defendants No. 3 to 5 / their predecessor-in-interest have been put into possession as purchaser/owner of property, for consideration, by none other than mother of plaintiff. The plaintiff, as an heir of her mother is not entitled to now say that the title sold is defective and it is the plaintiff and defendant no. 1 who are the owners of the property along with defendant no. 2 and defendants no. 3 to 5 are not the owners. Section 43 of the Transfer of Property Act, 1882 which provides as under:

“43. Transfer by unauthorised person who subsequently acquires interest in property transferred
Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the

transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration

A, a Hindu who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorised to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

is attracted.

18. All that can be observed is that the present suit was yet another attempt, though a good one, of the plaintiff to again take the Courts for a ride, as the plaintiff, her brother and her mother have been doing for the last over 30 years.

19. Such litigants have to be dealt with strictly and unless this Court invokes Section 340 of the Code of Criminal Procedure, 1973 against such litigants, the time of the Court will continue to be abused and wasted by such litigants.

20. I have offered to the counsel for the plaintiff to either face prosecution under Section 340 of Cr.P.C. or to deposit exemplary costs.

21. Costs of Rs.2 lakhs have been proposed. However, on request of the counsel for the plaintiff for leniency, while dismissing the suit,

the plaintiff is directed to deposit costs of Rs.50,000/- with the Delhi High Court Library Fund within four weeks of today.

22. If proof of deposit of costs is not furnished within four weeks, the Registry to list the suit for further orders.

The suit is dismissed with costs aforesaid.

Decree sheet be prepared.

FEBRUARY 07, 2018

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RAJIV SAHAI ENDLAW, J.