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

Date of Decision: 4th May, 2018

+ **RFA 160/2007**

VEENA RANI & ANR. Appellants

Through: Mr. Jai Bansal, Advocate.

versus

VIDYA WATI @ VIDYA DEVI & ORS. Respondents

Through: Mr. A. N. Haksar, Senior Advocate
with Mr. Udayan Jain, Mr. Kamal
Sharma and Ms. Sitwat Nabi,
Advocates. (M:9810336364)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

RFA 160/2007 and CM No. /2018 (to be numbered)

1. Present appeal arises out of the judgment dated 22nd August, 2006 by which the suit for possession filed by the Appellants/Plaintiffs (*hereinafter*, 'Plaintiffs') was dismissed by the Trial Court.
2. In brief, the case of the Plaintiffs is that the husband of Plaintiff No.1 and father of Plaintiff No.2, Shri Sai Kiran Gaba is son of Shri Shyam Lal Gaba – Respondent No.2/Defendant No.2 (*hereinafter*, 'D2') and Smt. Vidya Wati – Respondent No.1/Defendant No.1 (*hereinafter*, 'D1'). The Plaintiffs claim rights in the property bearing no.C-70, Lajpat Nagar-II, New Delhi (*hereinafter*, 'suit property'), which was alleged to be the ancestral property of the family. Shri Sai Kiran Gaba passed away on 1st May, 2005.
3. It is the case of the Plaintiffs that they were dispossessed from the

ground floor of the suit property after the death of Shri Sai Kiran Gaba. They, accordingly, claimed co-ownership and filed the suit for possession seeking the following reliefs.

“a) pass a decree of Permanent Injunction in favour of the Plaintiff and against the defendants thereby restraining the defendants No.1 and 2 from transferring the possession of the Suit Property to any third person, creating any third party right in the Suit Property i.e. Property No.C-70, Lajpat Nagar-II, New Delhi-110024 (shown in Red Colour in the Site Plan).

b) to pass a decree of possession U/S 6 of Specific Relief Act, in favour of the Plaintiffs and against the defendants thereby restoring the possession of the Plaintiffs in the Suit Property.

c) pass a decree of Partition in favour of the Plaintiffs and against the defendants thereby partitioning the Suit Property among the Plaintiffs and the defendant No.1 to 4 by meets and bounds. This Hon'ble Court may appoint the Local Commissioner to execute the Partition and to hand over the possession of the portion/share of the Plaintiffs to the Plaintiffs.”

4. The suit was contested by the parents of Shri Sai Kiran Gaba and sisters, who were arrayed as the Defendants. Finally, after evidence was led in the matter, the Trial Court came to the conclusion that the suit property was a self-acquired property of Smt. Tirath Bai, mother of D2, which was gifted to D2 who is the father of the Shri Sai Kiran Gaba. The Trial Court held that Shri Sai Kiran Gaba had no right, title or interest in the suit property and the suit was, thereafter, dismissed with the following observations:

“28. In view of the reasons given above, I come to the conclusion that suit property was self acquired property of Smt. Tirath Bai. Even though the gift of the property made by her through registered gift, deed is hit by Section 122 of the Transfer of Property Act., nevertheless it was only the defendant No.2 Shyam Lal Gaba amongst the parties to the suit who is the heir capable of inheriting the property of Smt. Tirath Bai in view of Section 15 of Hindu Succession Act. Neither husband of the plaintiff Sai Kiran (son of defendant No 2) nor plaintiff No 2 was a heir of Smt. Tirath Bai U/s 15 of the Hindu Succession Act. When Sai Kiran Gaba was not a heir of Smt. Tirath Bai neither plaintiff No 1 as his widow nor plaintiff No. 2 as his son have a right to representation and consequently they have no right, in the suit, property. When the plaintiffs have no right, title or interest in the suit property, they have no right, to partition metes and bounds. These issues are accordingly decided.

*29. **Relief:-** In view of reasons given above, suit, of the plaintiff is liable to be dismissed. Before parting with the judgment, I may point out that husband of the plaintiff No.1 died was an unfortunate incident. If it has affected plaintiff No 1, it has equally affected defendant Nos. 1 & 2 also who have lost their only son. According to the document produced by the plaintiff herself, property in question was owned by Smt. Tirath Bai and according to the provisions of law plaintiffs have no right, title or interest in the suit, property. Defendant No 2 is 66 years of age and is an old man. The plaintiff No. 1 has set up a false plea that she has been dispossessed from the suit, property on 13.5.05 on the day of Tehravi ceremony of her husband. This plea has been*

found to be false on the basis of evidence produced by herself. This shows that, present suit, has been filed by the plaintiff to settle personal vendata against, the defendant Nos. 1 & 2 in their old age. Keeping in view the attendant circumstances of the case, I am of the view that. Court, will be failing in its duties to do justice if it ignores the depricable conduct, on the part, of plaintiff No. 1. I am of the view that, exemplary cost, should be imposed on plaintiff No 1. Accordingly suit, is dismissed with cost of Rs 5000 to be paid by plaintiff No.1. File be consigned to record room.”.

5. The present appeal against the impugned judgment dated 22nd August, 2006 was filed in March, 2007. Mediation was attempted between the parties which, however, failed. On 13th November, 2009 the appeal was admitted. On 29th January, 2018, the matter was called in the regular board and was, thereafter, heard from time to time. It has now transpired that during the pendency of the present appeal, D2 expired on 1st September, 2016. Accordingly, today an application has been moved by the Plaintiffs on the ground that the present appeal is liable to be allowed and the decree is liable to be passed, inasmuch as after the death of D2, the Plaintiffs who are his LRs, are entitled to a share in the suit property.

6. On the other hand, learned counsel for the Defendants submits that D2 did not die intestate and has, in fact, executed registered Will dated 25th July, 2005, a copy of which has been placed on record. According to the Defendants, as per the said Will, the suit property has been bequeathed in the following manner - life interest in the suit property has been given to the wife and thereafter, the property would be divided into three portions. One

portion each to two daughters and one portion to charity.

7. Mr. Bansal submits that this Will is not within his clients' knowledge and was never filed on the trial court record.

8. On the other hand, Mr. Haksar submits that the opportunity for filing the Will dated 25th July, 2005 never arose before the Trial Court as D2 was alive during the trial court proceedings and has passed away only in 2016.

9. At this stage, the Plaintiffs seek permission to withdraw the present application and appeal with liberty to avail of their legal remedies, if any, available in law. It is submitted that the Plaintiffs having had no knowledge of the Will, ought to be permitted to challenge the same.

10. In view of the submission on behalf of the Appellants, the present Appeal is dismissed as withdrawn with liberty to the Plaintiffs to avail of their legal remedies, if any available, in accordance with law.

MAY 04, 2018/dk

**PRATHIBA M. SINGH
JUDGE**