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

+ CS(OS) 80/2016

OMWATI KOAK & ORS

..... Plaintiffs

Through: Mr. Shiv Charan Garg and Mr. Imran
Khan, Advs.

Versus

CHARAN PAL SINGH KOAK

..... Defendant

Through: Mr. Hitendra Kumar Nahata and Mr.
M.P.S. Kasana, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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10.12.2018

IA's No.13033/2018 (of Bhag Pal, Anand Pal, Chander Pal, Shanti Devi, Surender Pal Singh, Umesh Pal, Santosh, Deepak, Amar Pal and Ram Pal u/O I R-10 CPC), 13513/2018 (u/O IX R-13 CPC) & 13514/2018 (of defendant for condonation of delay of 274 days in filing the application u/O IX R-13 CPC)

1. The three plaintiffs, namely Omwati Koak, Yashwant Pal Singh Koak and Yoginder Pal Singh instituted this suit against the sole defendant namely Charan Pal Singh Koak, for partition of Khasra No.49/20, 1 Bigha 1 Biswas (1-1) & Khasra No.19/1, (0-10) (0-10), Khasra No.359 (2-2) (1-1), Killa No.3 (3-13) (2-1), measuring approximately 2600 sq. yds. situated in Village Brijwasan, Tehsil Vasant Vihar, New Delhi and for permanent injunction restraining the sole defendant from dealing with the said land.

2. The said sole defendant was proceeded against *ex-parte* in the suit and vide *ex-parte* judgment and decree date 24th November, 2017, a preliminary decree for partition declaring the plaintiffs together to be having one half share in the property aforesaid and declaring the defendant to be having the

remaining one half share in the property was passed, and the defendant restrained from dealing with the property till the passing of the final decree for partition. The suit was listed for the plaintiffs to suggest the mode of partition.

3. These applications have been filed, (a) by the defendant for setting aside of the *ex-parte* decree and for condonation of delay in applying therefor; and, (b) by Bhag Pal, Anand Pal, Chander Pal, Shanti Devi, Surender Pal Singh, Umesh Pal, Santosh, Deepak, Amar Pal and Ram Pal, for impleadment in the suit.

4. The counsel for the plaintiffs appears on advance notice. The counsel for the defendant, who is also the counsel for the applicants, and the counsel for the plaintiffs have been heard.

5. The counsel for the defendant and the applicants has argued, (a) that as per the Sale Deed of the property, Uday Ram and Jai Singh were the owners of the property, having 50% undivided share therein; (b) that Uday Ram died, leaving a Will bequeathing his 50% share in the name of the defendant; (c) that Jai Singh, being the predecessor of the plaintiffs, executed a General Power of Attorney (GPA) dated 10th February, 1970 in favour of Randhir Singh; (d) that Randhir Singh has died, leaving besides the defendant, applicants also as his heirs; (e) that the plaintiffs intentionally impleaded only one of the heirs of Randhir Singh as defendant in the suit and did not implead the other heirs of Randhir Singh as defendant in the suit; (f) that the plaintiffs, inspite of knowing the current address of the defendant, gave the old address of the old house of defendant, which is now locked and on the basis of said old address, manipulated the order of

proceeding ex-parte against the defendant and has obtained the ex-parte preliminary decree.

6. The counsel for the plaintiffs states, that as per own averment of the defendant and the applicants, the defendant as well as the applicants claim through Randhir Singh, who admittedly was the owner of only half share in the property with other half being owned by Jai Singh being the predecessor of the plaintiffs. He thus contends that there is no need for setting aside of the ex-parte preliminary decree and/or for impleadment of the applicants, inasmuch as even on the averments of the defendant and the applicants, no error is found in the preliminary decree for partition. It is contended that according to the plaintiffs, Randhir Singh has left a Will with respect to his share in the property in favour of the defendant alone.

7. The counsel for the plaintiffs also states, that the GPA claimed to have been executed by Jai Singh, being the predecessor of the plaintiffs, in favour of Randhir Singh, is only for conducting the Court cases and there is no power of sale of the property.

8. The counsel for the defendant and the applicants admits so. He however states that Jai Singh and Randhir Singh were members of a family and the execution of GPA was a family affair and since then the defendant and the applicants only have been in possession of the property and have raised construction thereon and more than 50 years have passed, the plaintiffs have no share.

9. I have enquired from the counsel for the defendant and the applicants, that once they admit 50% share of Jai Singh and after him of the plaintiffs, in the property, how would it stand extinguished, even if the defendant and

the applicants are in exclusive possession of the property as is claimed.

10. As far as the plea of family affair is concerned, I may record that as per the family tree furnished by the counsel for the defendant and the applicants themselves, Jai Singh was one of the sons of the brother of Randhir Singh. Randhir Singh had no other interest or share in the property till the execution of the GPA. Uday Ram was one of the sons of another brother of Randhir Singh. The Sale Deed of the subject property is in favour of Jai Singh and Uday Ram. It is not the case that there was any other property which exchanged hands. In the said circumstances, there could be no transfer of right by way of family settlement between Jai Singh and Randhir Singh, of the admitted 50% share of Jai Singh in the property.

11. Moreover, in this suit for partition, the claims, if any of defendant and the applicants of acquisition of title of Jai Singh in the property cannot be adjudicated. As of today, the legal position is that the plaintiffs, being the heirs of Jai Singh, as per the defendant and the applicants also, are 50% owner of the property.

12. Merit is thus found in the contention of the counsel for the plaintiffs that no purpose would be served by setting aside of the *ex-parte* decree and/or by impleadment of the applicants, inasmuch on the own pleas of the defendant and the applicants, the share of the defendant and the applicants is not more than 50% and the remaining share is of the plaintiffs. Rather, according to the plaintiffs, 50% share of Uday Ram is of the defendant only and not of the applicants. Since the defendant and the applicants have engaged the same counsel, it is upto the defendant to, if so desires, share his

50% share in the property under the preliminary decree for partition with the applicants.

13. The counsel for the defendant and the applicants then states that the plaintiffs in the plaint have also sought the relief of possession consequent to partition.

14. Once, a preliminary decree for partition declaring the plaintiffs to be having 50% share in the property has been passed, the plaintiffs as a consequence thereof would also be entitled to possession.

15. No case for setting aside of the *ex-parte* preliminary decree and/or for impleadment of the applicants is thus made out.

16. The applications are dismissed.

CS(OS) 80/2016

17. The counsel for the plaintiffs states that the property is not divisible by metes and bounds and a final decree for partition by sale thereof be passed.

18. The counsel for the defendant and the applicants though states that the entire property is built up and there is not a single inch of open land, but when asked whether the property is divisible by metes and bounds, states that he has to seek instructions.

19. The counsel cannot stall the proceedings of the Court on each and every date of hearing by taking adjournment on the ground of seeking instructions. A counsel, when appears before the Court, is expected to appear with all the instructions and if is unable to make the necessary queries from his client, should be always accompanied with the client, so that instructions can be received on the spot.

20. I may however record that the Commissioner appointed in this suit has reported that the property is divisible by metes and bounds.

21. The Commissioner, along with his report has filed a site plan of the property which has been perused. A perusal of the site plan shows the construction of the property to be such so as to make the same indivisible by metes and bounds. The Commissioner has also given no cogent reason or proposal for division of the property by metes and bounds, save for opining so in abstract. Such commissions do not serve the purpose for which they are issued.

22. Be that as it may, a final decree for partition of Khasra No.49/20, 1 Bigha 1 Biswas (1-1) & Khasra No.19/1, (0-10) (0-10), Khasra No.359 (2-2) (1-1), Killa No.3 (3-13) (2-1), measuring approximately 2600 sq. yds. situated in Village Brijwasan, Tehsil Vasant Vihar, New Delhi is passed, of sale thereof and of distribution of sale proceeds as per the shares declared in the preliminary decree for partition dated 24th November, 2017 and if the defendant so desires in terms hereinabove.

23. It is made clear that whichever party is in possession of whichever portion of the property shall be liable to deliver vacant peaceful physical possession to the purchaser and if fails to do so, shall be liable to be dispossessed therefrom, as if in pursuance to a decree for possession.

24. Subject to the requisite court fees/stamp duty being paid, decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

DECEMBER 10, 2018

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