

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

+ **RFA No.362/2018**

% **21st August, 2018**

HITESH KAKKAR Appellant

Through: Mr. A.K. Mishra, Advocate
with Mr. Amit Kumar Pandey,
Advocate (M. No.9650732474).

versus

SANJAY KAKKAR & ANR. Respondents

Through:

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 7.12.2017 by which trial court has dismissed the suit for partition, possession, rendition of accounts and injunction filed by the appellant/plaintiff with respect to the suit property being plot no.49, Block-A, part of Killa No.10, Rect. No.35 situated in the abadi known as Radhey Sham Park Extn. of village Khureji Khas, Shahdara, Delhi-110051 (admeasuring 100 sq

yds.). The appellant/plaintiff is the nephew of two defendants in the suit i.e the two defendants in the suit are the brothers of late father of the appellant/plaintiff and who was Sh. Tilak Raj Kakkar.

2. At the outset, I may note that the defendants appeared in the suit originally after service but thereafter they failed to appear and hence were proceeded exparte. This is recorded in para 4 of the impugned judgment and which para 4 reads as under:-

“4. Summons of the suit were issued to the defendants. Vakalatnama filed on behalf of D-1 on 15.10.2008. D-2 was served on 15.04.2009 and again on 22.05.2011. On 19.11.2008 counsel for the plaintiff was appeared and on 18.08.2011 counsel for defendant no.2 was appeared. Thereafter, none appeared on behalf of defendants. Hence, defendants were proceeded exparte vide order dated 21.03.2013. Thereafter, matter was listed for exparte evidence.”

3. The case of the appellant/plaintiff was that his father Sh. Tilak Raj Kakkar alongwith the two defendants/respondents purchased the suit property in terms of the usual documentation dated 9.2.1987 being the Agreement to Sell, Power of Attorney, Affidavit etc. These documents clearly show joint ownership of the father of the appellant/plaintiff Sh. Tilak Raj Kakkar with two defendants being Sh. Sanjay Kumar Kakkar and Sh. Sushil Kumar Kakkar. In the plaint it is contended that after death of the father of the appellant/plaintiff, his

mother remarried and the appellant/plaintiff was thereafter living with his maternal grandparents. The appellant/plaintiff asked the respondents/defendants to partition the suit property but they failed to do so and hence the subject suit came to be filed.

4. The appellant/plaintiff appeared in the witness box as PW-1 and proved his case as also documents and the exhibited documents are those which are stated in para 6 of the impugned judgment and this para 6 reads as under:-

“6. The plaintiff/PW-1 has relied upon the following documents:-

1. Certificate of 10th as Ex PW1/1
2. Site plan as Ex PW1/2
3. Agreement deed dated 09th February 1987 mentioned in affidavit as (Ex PW1/3, de-exhibited) is Mark A
4. Affidavit dated 09.02.1987 as (Ex PW1/4, de-exhibited) Mark B
5. GPA dated 09.02.1987 as (Ex PW1/5, de-exhibited) Mark
6. Ceremony receipt as (Ex PW1/7, de-exhibited) Mark D
7. Electricity bill is exhibited as Ex PW1/8 is Ex PW1/3
8. Water connection bill as Ex PW1/9 is Ex PW1/4
9. Ex PW1/10 is Ex PW1/5 (colly)
10. Ex PW1/11 is Ex PW1/6
11. GPA dated 20.07.1979 (Ex PW1/12 colly de-exhibited) is Mark E (colly)
12. GPA dated 20.09.1985 (Ex.PW1/13 (colly) de-exhibited) is Mark F (colly)

13. Agreement deed dated 20.09.1985 (Ex PW1/14 de-exhibited) is Mark G

Thereafter, the plaintiff closed his evidence and the matter was fixed for ex-parte arguments.”

5. Trial court has dismissed the suit by simply observing that appellant/plaintiff has filed only photocopies however this conclusion of the trial court is illegal for two reasons. Firstly the case of the appellant/plaintiff was that the original papers of the suit property were with the respondents/defendants and consequently once the respondents/defendants did not appear in the suit the original documentation dated 9.2.1987 could not be produced by the appellant/plaintiff by summoning the same from the respondents/defendants. Also, any objection as to the documents being photocopies, and could not be exhibited, could only be considered if such an objection is raised at the time of exhibition of the documents in view of the judgment of the Supreme Court in the case of ***R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple & Anr., (2003) 8 SCC 752.*** Since the respondents/defendants were exparte, therefore, the documents were exhibited without any objection and therefore the trial court for this reason was also

unjustified in rejecting the documents of the appellant/plaintiff as only being photocopies and consequently thereby dismissing the suit.

6. In view of the above discussion, this appeal is allowed. Impugned Judgment of the Trial Court dated 7.12.2017 is set aside. Suit of the appellant/plaintiff is decreed by passing a preliminary decree declaring the appellant/plaintiff to be 1/3rd owner of the suit property being plot no.49, Block-A, part of Killa No.10, Rect. No.35 situated in the abadi known as Radhey Sham Park Extn., of village Khureji Khas, Shahdara, Delhi-110051 (admeasuring 100 sq yds). However, it is clarified that for the present entire 1/3rd share will go to the appellant/plaintiff, but to the extent of share of his mother Smt. Poonam Kakkar out of the total of 1/3rd share, such 1/2 of 1/3rd share of Smt. Poonam Kakkar will be in trust with the appellant/plaintiff. Respondents/defendants are also directed to render accounts with respect to any income which they have from the suit property from the period of three years prior to filing the subject suit. Now proceedings will go on before the trial court for passing a final decree in accordance with law.

7. Parties to appear before the District & Sessions Judge, Shahdara, Karkardooma Courts, Delhi on 28th September, 2018 and the District & Sessions Judge will mark the suit for final decree proceedings in accordance with law to a competent court.

8. Appeal is disposed of in terms of aforesaid observations.

AUGUST 21, 2018
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VALMIKI J. MEHTA, J