

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

+ **RFA No. 823/2005**

% 4th July, 2018

KAMLA Appellant

Through: None.

versus

SANTOSH DEVI & ORS. Respondents

Through: Mr. Sunil Aggarwal, Advocate.

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 defendant no.6 in the suit impugning the judgment of the trial court dated 10.8.2005, by which the trial court has passed a preliminary decree of partition of the suit property bearing No. 19/29/1, West Moti Bagh, Sarai Rohilla, Delhi (as shown in the site plan Ex.PW1/2) determining the shares of the plaintiffs together as 1/3rd jointly and shares of the defendant nos. 1 and 2 as 1/3rd each. appellant/defendant no.6 has been denied any right, title and interest in the suit property.

2. At the outset I may note that all the parties to the suit have not been made parties to the present appeal. Only the plaintiffs have been made as respondents in this appeal and are represented through Advocate but this will have no bearing for the allowing of this appeal as discussed hereinafter. There were a total of six defendants in the suit with defendant nos. 1 and 2 being the sons of late Smt. Sarti Devi who owned the suit property. Defendant nos. 3,4 and 5 were the daughters of late Smt. Sarti Devi. Appellant/defendant no.6 was not originally impleaded as party to the suit but she was impleaded subsequently by allowing of an application filed by her under Order I Rule 10 CPC as she claimed to be the daughter of Sh. Ram Dhari the pre-deceased son of Smt. Sarti Devi.

3. It is seen that three shares have been granted, in the suit property, being $1/3^{\text{rd}}$ each to the three sons of late Smt. Sarti Devi with respondents/plaintiffs representing branch of one son Sh. Om Prakash and the other two sons being the defendant nos. 1 and 2 namely Sh. Jagdish Chand and Sh. Shyam Lal. Sh. Jagdish Chand did not appear in the suit did not contest the same and was proceeded *Ex-parte*. Suit was also not contested by defendant nos. 3 to 5 being the daughters of

late Smt. Sarti Devi ie the daughters claimed no rights in the suit property and which is because the plaintiffs/respondents in suit plaint had pleaded that the daughters of Smt. Sarati Devi, being defendants Nos. 3 to 5 in the suit, had by virtue of family settlement of August/September,1999 relinquished their shares in favour of respondents/plaintiffs and the defendants Nos.1 and 2 being the three sons/branches of Smt. Sarati Devi. Affidavits, proved as Ex Ex.PW 1/3 to Ex.PW1/5, were accordingly executed in terms of the family settlement. Defendant nos. 2 and 6 filed a joint written statement and defendant no.2 has admitted to the rights of appellant/defendant no.6 as the daughter of the pre-deceased son Sh. Ram Dhari who was the son of Smt. Sarti Devi.

4. Ordinarily, all parties to the suit for partition had to be made parties to this appeal but in the present case this appeal can be disposed of without defendants Nos. 1 to 5 in the suit being made parties to this appeal because by the impugned judgment and decree the suit property has been divided in three shares being the three sons of Smt. Sarti Devi ie Sh. Om Prakash (now represented by respondents/plaintiffs), Sh. Jagdish Chand/defendant no.1 and Sh.

Shyam Lal/defendant no.2 and thus the only persons therefore who could have objection in case appellant/defendant no.6 got a right in the suit property to the extent of 1/4th was either the respondents/plaintiffs or the defendant no.1 or the defendant no.2, and each of whom have got a 1/3rd share in the suit property. Counsel for the respondents/plaintiffs does not dispute before this Court the right of appellant/defendant no.6 in the suit property to the extent of 1/4th because appellant/defendant no.6 is the daughter of one pre-deceased son of Smt. Sarti Devi namely Sh. Ram Dhari. Defendant no.2 the other son in fact filed a joint written statement with appellant/defendant no.6 admitting to the right of appellant/defendant no.6 in the suit property whereas Defendant no.1 the other son did not appear in the suit and did not contest the suit and was in fact proceeded *ex parte* as is noted in the internal page 10 of the impugned judgment.

5. In view of the aforesaid position since the effective contesting parties to the suit are respondents/plaintiffs, defendant no.1/Sh. Jagdish Chand and Sh. Shyam Lal/defendant no.2, and each of whom have got 1/3rd undivided interest in the suit property, and

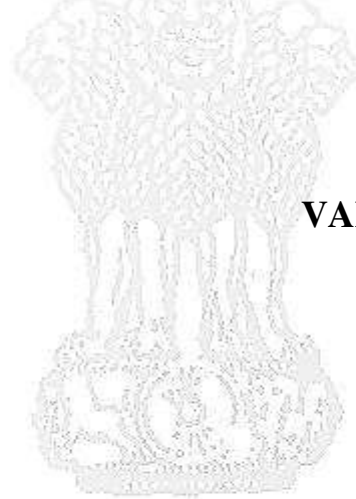
therefore since now the respondents/plaintiffs agree that appellant/defendant no.6 be given 1/4th share in the suit property, accordingly this appeal is allowed and the impugned judgment and decree dated 10.8.2005 is set aside by granting the appellant/defendant no.6 one fourth right in the suit property. The effect would be that there would be four shares in the suit property bearing No. 19/29/1, West Moti Bagh, Sarai Rohilla, Delhi with 1/4th share going to the respondents/plaintiffs being the members of the branch of late Sh. Om Prakash the late son of Smt. Sarti Devi, 1/4th share will go to defendant no.1/Sh. Jagdish Chand, 1/4th share will go to the defendant no. 2/Sh. Shyam Lal and 1/4th share will go to the appellant/defendant no.6. Decree is accordingly passed. This appeal is accordingly disposed of by passing the aforesaid preliminary decree. I may note that since after passing of the preliminary decree a final decree was passed and as stated by the counsel for respondent/plaintiffs, since however now the preliminary decree is modified, the final decree will therefore have to be and is accordingly set aside and therefore it is directed that a fresh final decree will now have to be passed.

6. Parties to appear before the District and Sessions Judge (Central) Tis Hazari Courts on 3.8.2018 and the District and Sessions Judge will now mark the suit to a competent court for disposal in accordance with law for passing a final decree with respect to the suit property.

7. The appeal is accordingly allowed and disposed of, leaving the parties to bear their own costs.

JULY 04, 2018/ib

VALMIKI J. MEHTA, J



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