

by the trial court decreeing the suit for partition filed by the respondent nos. 1 and 2/plaintiffs. Partition was prayed and decreed with respect to two properties bearing nos.289/1, Punjabi Gali, Gurdwara Road, Kotla Mubarakpur, New Delhi and property no. F-563, Krishna Gali, Kotla Mubarakpur, New Delhi. The second property F-563 was sub-divided into plots with the second plot being given No. F-563/A.

3. The facts of the case are that admittedly both the properties situated on plots admeasuring 93 sq. yards and 111½ sq. yards were jointly purchased by the two brothers Sh. Surat Singh and Sh. Mahinder Singh. Sh. Mahinder Singh is the father of the respondent nos. 1 and 2/plaintiffs who died in January, 1964. The father/predecessor-in-interest of the appellants/defendants was Sh. Surat Singh who died in December, 1976. Pleading that there has been no partition between the properties of Sh. Mahinder Singh and Sh. Surat Singh, the subject suit for partition was filed.

4. Appellants/defendants contested the suit and pleaded two defences. The first defence was of an oral partition having taken place between Sh. Surat Singh and Sh. Mahinder Singh whereby Sh. Surat

Singh got the property bearing no. 289/1 and half of the property bearing no. F-563 (i.e it was pleaded that Sh. Surat Singh got out of two properties one and a half property) and Sh. Mahinder Singh received one half of the property bearing no. F-563. The second defence which was pleaded by the appellants/defendants was that they had become owners of the suit property by adverse possession.

5. After pleadings were complete trial court framed issues and which are as recorded in paras 5 to 7 of the impugned judgment and these paras read as under:-

“5. Upon completion of the pleadings, the following issues are framed on 05.09.2005:-

(1) Whether the properties bearing no. 298/1, Punjabi Gali Gurdwara Road, Kotla Mubarakpur, New Delhi, F-563, Krishna Gali, Kotla Mubarakpur, New Delhi and F-563/A, Krishna Gali, Kotla Mubarakpur, New Delhi, where were jointly owned and purchased in equal proportion by Sh. Surat Singh and Sh. Mahinder Singh both son of Late Sh. Natha Singh, were ever partitioned with metes and bounds and if so, to what effect? OPD

(2) Whether the plaintiffs are entitled to the relief of partition of the aforesaid properties, if so, in what proportion/share they are entitled? OPP

(3) Whether the properties bearing no. 289/1, Punjabi Gali, Gurdwara Road, Kotla Mubarakpur, New Delhi, F-563, Krishna Gali, Kotla Mubarakpur, New Delhi and F-563/A, Krishna Gali, Kotla Mubarakpur, New Delhi are ancestral properties as alleged in the written statement? OPD

(4) Relief.

6. The following additional issue was framed vide order dated 24.11.2006:

(IA): Whether the suit is not properly valued for the purpose of court fees and jurisdiction?

7. The following additional issues were framed vide order dated 30.08.2017:

(2A): Whether the plaintiffs are entitled to a preliminary decree of rendition of accounts in favour of the plaintiffs and against the defendants in respect of the rentals received by the defendants no. 6 & 8 from the several portions of the suit property by appointing a court commissioner for taking the accounts or any other manner? OPP.

Issue no. 2B

(2B) Whether the plaintiffs are entitled to a final decree of rendition of accounts thereby apportioning the share of the plaintiffs in the rent proceeds received by the defendants 6 and 8 in respect of the suit properties? OPP

Issue no. 3A

(3A) Whether the plaintiff is entitled to a decree of permanent injunction thereby restraining the defendants from creating any third party interest in the suit properties in any manner whatsoever?"

6. Parties led evidence and these facts of leading of evidence are recorded in paras 3 and 4 of the impugned judgment and these paras read as under:-

"3. The plaintiff no. 1(as per amended memo of parties filed on 21.7.2004) namely Sh. Gurdeep Singh is examined as PW1. PW1 along with his affidavit in evidence has tendered into evidence copy of notice dated 3.3.2005 as Ex.PW1/1 and affidavit in response as PW1/2; certified copy of sale deed dated 22.3.1950 as Ex.P1; certified copy of sale deed dated 23.2.1953 as Ex.P-2, site plan as Ex.PW1/3 and Ex.PW1/4. The plaintiff no. 2 is examined as PW2. PW3 Sh. Trilok Singh, is an acquaintance of the plaintiffs.

4. In defendants evidence the defendant no. 8 has stepped into the witness box as DW-1 and defendant no. 6 is examined as DW-2. DW-1 besides the affidavit in evidence tendered as exhibit DW-1/A has relied upon GPA dated 07.12.2001 executed by defendant nos. 1 to 5. The DW2 has tendered into evidence his affidavit and the documents referred to as DW6/A and DW6/B is tendered on the record as Ex.DW1/P1 colly."

7. Trial court has disbelieved the defences of the appellants/defendants of oral partition as also of adverse possession. I completely agree with the findings and conclusions of the trial court. The reasons are stated hereinafter.

8. The case of the appellants/defendants as per their pleadings was that oral partition between Sh. Mahinder Singh and Sh. Surat Singh took place in the year 1958-59, however, in the evidence a new case was taken up by the appellants/defendants when the defendant no. 6 deposing as DW-2 contended that partition was actually made in the year 1953-54. Also, the case of the appellants/defendants of oral partition having taken place cannot be believed, even assuming there is no inconsistency, inasmuch as, the case of the appellants/defendants was that a lesser share was given to Sh. Mahinder Singh because Sh. Mahinder Singh was not financially well off and consequently Sh. Surat Singh constructed the property on the plot which fell to the share of Sh. Mahinder Singh, however there is not a shred of documentary evidence on the record to show that the construction was made by Sh. Surat Singh with his moneys on the half plot which allegedly fell to the share of Sh. Mahinder Singh. This

aspect of lack of any evidence whatsoever filed on behalf of the appellants/defendants of Sh. Surat Singh making construction for Sh. Mahinder Singh has to be taken with the fact that the best proof of partition taking place is by parties acting upon the partition and which in this case would have been if parties would have got the properties mutated in their names from the year 1953-54 or 1958-59 in the municipal records, but admittedly till date in the municipal records, and as conceded before this Court, properties have remained in the joint names of Sh. Surat Singh and Sh. Mahinder Singh.

9(i). Learned senior counsel for the appellants/defendants argued that appellants/defendants should be held to have proved oral partition because not only the appellants/defendants are in possession of their share since 1950s but also that one shop was let out by DW-2 who had received the rent and no portion of the rent was paid to Sh. Mahinder Singh or his successors-in-interest.

(ii) I however cannot agree with this argument for the reason that before partition, depending on the circumstances, one or more co-owners can stay in possession of the joint properties, but mere possession will not prove existence of partition, more so when trial

court has rightly observed and held that the partition is clearly inequitable because out of two properties jointly owned by Sh. Surat Singh and Sh. Mahinder Singh, Sh. Surat Singh cannot claim to have become owner of one and a half share of the two properties. Also trial court has also observed that one lone fact of receiving rent of one shop is not enough to hold that partition had taken place in the fifties, and that too an unequal and inequitable partition, where the predecessor-in-interest of the appellants/defendants (Sh. Surat Singh) received 75% of the two properties and the predecessor-in-interest of respondent nos. 1 and 2/plaintiffs received only 25% share when admittedly both Sh. Surat Singh and Sh. Mahinder Singh had 50% share each.

10. At this stage, learned senior counsel for the appellants/defendants very fairly does not press the issue of the claim of title on the basis of adverse possession.

11. In view of the aforesaid discussion, I do not find any merit in the appeal. Dismissed.

APRIL 20, 2018/AK

VALMIKI J. MEHTA, J