

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

+ **RFA No. 408/2018**

% **14th May, 2018**

KULDEEP SHARMA & ORS. Appellants

Through: Mr. Rajeshwar Tyagi, Advocate.

versus

SURINDER KUMAR & ORS. Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 19822/2018 (for exemption)

1. Exemption allowed, subject to all just exceptions.

C.M. stands disposed of.

C.M. Appl. No. 19823/2018 (for delay)

2. For the reasons stated in this application, the delay of 3 days in re-filing the appeal is condoned, subject to just exceptions.

C.M. stands disposed of.

RFA No. 408/2018 and C.M. Appl. No. 19821/2018 (for stay)

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by three of the defendants in

the suit, impugning the judgment of the Trial Court dated 1.3.2018 whereby the trial court has decreed the suit filed by the plaintiffs for partition etc of the suit property being 1/3rd share comprised in Khasra no. 889/226 measuring 2 bighas and Khasra no. 891/227 measuring 2 bighas 1 biswas of land situated within the Abadi Deh of Village Haidarpur, Delhi. Plaintiffs are the legal heirs of the branch of Sh. Ram Kishan the son of Sh. Har Dutt Sharma the original owner of the property, and the defendants (including the three of the defendants being the appellants) were the legal heirs of Sh. Shiv Narain, the other son Sh. Har Dutt Sharma. I may note that there is no dispute that the subject suit property is also numbered as property no. 222, Village Haidarpur, Delhi.

4. For the reason that this appeal is being disposed of on the solitary point of *res-judicata*, I need not extensively refer, to the facts and suffice to state that admittedly the suit property belonged to Sh. Har Dutt Sharma who had two sons, namely, Sh. Ram Kishan and Sh. Shiv Narain. Plaintiffs in the suit were the legal heirs from the branch of the deceased Sh. Ram Kishan whereas the defendants, including the appellants, were the legal heirs of the branch of the

other deceased son Sh. Shiv Narain. The issue was that whether the suit property was already partitioned by late Sh. Har Dutt Sharma in his lifetime whereby as per the defendants in the suit (including the three appellants), the suit property was given to Sh. Shiv Narain the predecessor-in-interest of the defendants including the appellants.

5. Trial court has in this regard in para 36 of the impugned judgment held that this very issue was an issue between same parties in suit no. 7488/2016 which was filed by the father of the appellants/defendants. In this earlier decided suit, the father of the appellants/defendants had pleaded that the suit property was allotted to him on partition, but this case of the appellants/defendants was disbelieved and the suit filed by the father of the appellants/defendants seeking reliefs of mandatory and permanent injunction was dismissed. The relevant para 36 of the impugned judgment of the trial court in the present suit, holding that the appellants/defendants are prevented by the doctrine of *res judicata* in raising the same ground which has achieved finality against them in terms of the earlier judgment dated 26.9.2017, reads as under:-

“36. Further during the course of final arguments it was brought to the notice of the court that vide detail judgment dated 26.09.2017 suit

bearing no. 7488/16 filed by the father of the defendants was dismissed and copy of the said judgment was placed on record and Ld. Counsel for defendant fairly conceded during the course of the arguments that said judgment can be taken on record and considered by this court. It is also brought to the notice of the Court that no appeal has been preferred by the defendants against the said judgment and therefore, the findings recorded therein have attained finality. In the said judgment also defendant's contention that suit property was partitioned by Late Sh. Har Dutt Sharma during his lifetime was held to have been not proved therein. Similarly, Will was also held to have been not proved therein. Therefore, the present question as to whether the suit property was partitioned by the Late Sh. Har Dutt Sharma already stands decided against the defendants and therefore, the same is required to be held res judicata. Even otherwise in the present case also, on merits, defendants have failed to prove that partition had already taken place in the year 1978 during the life time of Late Sh. Har Dutt Sharma. Hence, issue No. 2 is decided against the defendants and in favor of the plaintiff."

6. I would like to, at this stage, refer to certain paras of the earlier judgment dated 26.9.2017 passed by the Court of the Civil Judge, Delhi, since these paras will show that the very issue urged in the present suit of the defendants (including the appellants, being the legal heirs of Sh. Shiv Narain) that the suit property was allotted to Sh. Shiv Narain during his lifetime, was also very much in issue in the earlier litigation. These paras are paras 1, 2, 3, 22, 23 and 28, and the same read as under:-

"1. The case of plaintiff is that in the year 1978 Sh. Hardutt Sharma divided his property among his LRs including the sons of his pre-deceased son i.e. defendant no. 1 to 3 and one Sh. Vinod Kumar (since deceased), all sons of Late Sh. Ram Kishan and the plaintiff. According to the said agreement house no. 58 (known as house no. 75) situated in the inner part of village Haiderpur along with portion of property no. 222 consisting of seven quarters/rooms shown in the site plan in red colour

and some open portion in front thereof, besides the land on the side of canal (nahar) about 15 feet wide were given to the sons of late Sh. Ram Kishan (defendant). Plaintiff has submitted that he was given the remaining entire portion of plot no. 222 wherein 12/13 rooms were already constructed (shown in green colour at the site plan mark A) besides the six shops constructed on the roadside in the abovesaid property besides the remaining land adjoining the canal.

2. Plaintiff has pleaded that Late SH. Hardutt Sharma during his lifetime in the year 1978 himself divided the said portion among his sons and possession of respective shares were handed over to them. The electricity meter which was already installed in the name of Hardutt Sharma in the house no. 75 inside the village was transferred in the name of defendant no. 1 while the electricity meter in property no. 222 situated in khasra no. 226 and 227 installed in the portion of the share of defendants got transferred in the name of defendant no. 2 and the new electricity meter was installed in plaintiff name for the shops besides separate electricity meter for house no. 222 (portion occupied by plaintiff's family) was installed in the name of one of son's of plaintiff namely Narain Singh. However, in January, 1992 defendants demolished five rooms out of the seven rooms of their share and encroached upon plaintiff's land/share and constructed five rooms in the portion belonging to and occupied by him. The plaintiff has averred that he and his sons approached the local police number of times but police did not lodge their complaint as some close relative of defendants is in the Delhi Police. Plaintiff has alleged that defendant had constructed three rooms towards the south side of the plot, which is shown in the site plan mark B in red colour. In February, 1993 the defendants no. 1, 2 and 3 forcibly, maliciously and with dishonest intention broke open the lock of plaintiff's son upon one room and illegally and forcibly occupied it and about three months back the defendants had let out the said room shown specifically in the site plan mark B.

3. Plaintiff has pleaded that Sh. Haridutt Sharma died on 10.08.1981 and according to the agreement made by him, the parties had been using the property inherited by them and even the plaintiff occupied his share of the property mutated in the revenue record.

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22. The case of plaintiff is that there was an oral partition in the family wherein the house no. 58 situated in the inner part of village Haiderpur along with portion of property no. 222 consisting of seven rooms and some open portion in front thereof, besides the land on the side of canal about 15 feet wide where given to the defendant family and the plaintiff was given the remaining entire portion of plot no. 222 besides the remaining land adjoining the canal. It is claimed that in the year 1978 late Sh. Hardutt Sharma, the common ancestor of the parties

had effected the said portion and he gave aforesaid shares to the parties. It is further claimed that in January, 1992 the defendants demolished five rooms out of the seven room of their share and re-constructed the five rooms after encroaching into the share of plaintiff. Subsequently, defendants constructed three room towards the south side in the plot as shown in site plan mark B in red colour. In February, 1993 the defendant broke open the lock of plaintiff's son in one room and forcibly occupied it and subsequently let out the room. On the basis of said allegations, the relief sought by the plaintiff is the removal of five rooms and their reconstruction at the original place and directing the defendant to remove their lock from the shop forcibly possessed by them and had over its vacant possession. Thus, the plaintiff has the onus to prove the oral partition of the property thereby giving the allege portion to the plaintiff and further prove the construction of the rooms in the area falling under the share of plaintiff and the forcible possession by the defendants in one of the rooms falling in the share of plaintiff.

23. As far as the oral partition is concerned, it is to be noted that no specific date of the said partition has been given. In the plaint it has been mentioned in para no. 2 that the partition was done in 1978. However, in his affidavit PW1 stated that the said partition was done in the year 1981. Further, it is nowhere specifically stated as to what was the extent of total area (in square meters/yards/feet) from the plot no. 222 which came in the possession of plaintiff and the area which came in the share of defendant. It is to be noted that plaintiff has pleaded that the electricity meter in the property no. 222 installed in the share of defendant was transferred in the name of defendant no. 2 and new electricity meter was installed in the name of the plaintiff for the shops besides separate electricity meter for house no. 222 was installed in the name of one of the sons namely Narayan Singh of the plaintiff. However, no such electricity bill has been proved by the plaintiff throughout the trial.

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28. The defence of defendant is that plaintiff and defendant got equal shares in property in question and both of them got other houses also i.e. defendant got one house in village Haiderpur and plaintiff got one house in village Bawana. Thus, defendant has pleaded equitable distribution of properties of their ancestor. On the other hand, plaintiff has claimed lion's share in the property in question by asserting that defendant got another house was given to the plaintiff at village Bawana and the same have been disposed off by the plaintiff to meet expenses of his daughter's marriage. In support of the said plea, the defendant has examined DW2. Said witness has claimed to have purchased the said house from the plaintiff. However, the Counsel for plaintiff has submitted that said witness has failed to prove a single document regarding the alleged purchase and therefore said pleading of the defendant is unsubstantiated.

I have considered said submissions. It is to be noted that in his replication the plaintiff has pleaded that late Sh. Hardutt Sharma during his lifetime had sold the said house of Bawana and the plaintiff was never in possession thereof and that expenses of marriage of plaintiff's daughter were borne by late Hardutt Sharma himself. On the contrary, PW1 i.e. son of plaintiff has deposed that he had no knowledge if Hardutt Sharma had agriculture property as well as house in village Bawana. Accordingly, the LR of plaintiff has deposed even against the contents of replication itself. Thus, the credibility of PW1 is further diminished as it appears that he has tried to avoid answering about property of his ancestor at village Bawana. As far as testimony of DW2 is concerned, it is to be noted that he has given the details of the plot at Bawana and its owner. He has mentioned that Hardutt Sharma and his brothers Lekh Ram and Prabhu Dayal were the owners of plot no. 372, which was in three parts and he has purchased each of them. Though he has claimed that he purchased the property without any documents and therefore his evidence is very weak, however, the plaintiff gains no advantage due to failure on part of defendant to set up his defence. From the part admissions of defendants and lack of evidence in support of pleas of defendant, at maximum it can be inferred that there was some sort of arrangement or partition in the family but it cannot be concluded as to whether the property in question (plot no. 222) was partitioned in the manner alleged by plaintiff or was partitioned otherwise. It cannot be concluded as to which party got what share in plot no. 222 and in which portion thereof. Thus, on the basis of aforesaid discussion, both issues no. 1 and 2 are decided against the plaintiff." (underlining added)

7. Since admittedly the earlier judgment passed between the parties dated 26.9.2017 has become final as it was not appealed from, the issues decided therein would operate as *res judicata* between the parties, including the issue that Sh. Shiv Narain (and now represented by his legal heirs being the defendants/appellants) was held not to be the owner of the suit property allegedly on account of the suit property falling to the share of Sh. Shiv Narain because of

partition effected by Sh. Har Dutt Sharma the father of Sh. Shiv Narain and Sh. Ram Kishan.

8. In view of the aforesaid discussion, I do not find any merit in the appeal and the same is hereby dismissed.

MAY 14, 2018

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VALMIKI J. MEHTA, J

