

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

+ **RFA No. 642/2018**

% **10th August, 2018**

GIRDHAR TULANI & ANR. Appellants

Through: Mr. Ashok Kriplani, Advocate.

versus

KANTA HIRANANDANI & ANR. 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. 31984/2018 (for exemption)

1. Exemption allowed subject to just exceptions.

CM stands disposed of.

C.M. Appl. No. 31983/2018 (delay in filing)

2. For the reasons stated in the application, delay in filing is condoned, subject to just exceptions.

CM stands disposed of.

RFA No.642/2018 and C.M. Appl. Nos. 31981/2018 (for stay), 31982/2018 (under Order XLI Rule 27 CPC)

3. This Regular First Appeal under Section 96 of the Code Civil Procedure, 1908 (CPC) is filed by the defendants in the suit impugning the Judgment of the Trial Court dated 8.3.2018 by which the trial court has decreed the suit for partition filed by the respondents/plaintiffs with respect to the property bearing no. B-125-126, Double Storey, Ramesh Nagar, New Delhi, being the property owned by the father of the parties namely Sh. Arjun Dass, and who admittedly died *intestate*.

4. The facts of the case are that the respondents/plaintiffs pleaded that the respondents/plaintiffs are the two real sisters of the appellant no. 1/defendant no. 1 and the defendant nos. 2 and 3 in the suit were the wife and son of another deceased brother of the respondents/plaintiffs, namely one Sh. Gul Kumar Tulani. The father of the parties was Sh. Arjun Dass and whose father was Sh. Leela Ram. Sh. Leela Ram was the owner of various properties including the suit property. On the death of Sh. Leela Ram the children of Sh. Leela Ram, being his three sons and two daughters, divided *inter-se* all the properties inherited from Sh. Leela Ram pursuant to a settlement, and the suit property fell to the share of the father of the parties Sh. Arjun Dass. The legal heirs of late Sh. Leela Ram are

stated in para 3 of the impugned judgment and which parareads as under:-

“3. The case of the plaintiffs is that their grand father late Sh. Leela Ram was the owner of the suit property who died intestate leaving behind the following Legal Heirs (LRs):-

- | | | | |
|-------|---------------------------------------|---|-----------|
| (i) | Sh. Arjun Dass | - | Son |
| (ii) | Smt. Kalawanti
W/o Sh. Sunder Dass | - | Daughter |
| (iii) | Sh. Hundal Dass | - | Son |
| (iv) | Sh. Kishan Chand | - | Son |
| (v) | Smt. Kanta
W/o Wadhu Mal | - | Daughter” |

5. Respondents/plaintiffs pleaded that since their father Sh. Arjun Dass died *intestate* on 21.12.1987, therefore, the suit property had to be divided in four parts with two shares of 1/4th each going to the two respondents/plaintiffs and one share of 1/4th each going to the two brothers Sh. Girdhar Tulani and Sh. Gul Kumar Tulani. Hence the partition suit was prayed to be decreed.

6. Appellants/defendants admitted the relationship between the parties and also that their father Sh. Arjun Dass died *intestate*. Appellants/defendants however contended that Sh. Leela Ram left behind many properties and partition cannot be sought of only one of the property of Sh. Leela Ram. Suit was prayed to be dismissed as all the legal heirs of Sh. Leela Ram were not added as parties to the suit.

7. After pleadings were complete the trial court framed issues and parties led evidence, and which aspects are recorded in paras 9-12 of the impugned judgment, and which paras read as under:-

“9. After completion of the pleadings, vide order dated 20.09.2012, the following issues were framed:-

1. Whether the suit is bad for non-joinder of legal heirs of late Sh. Leela Ram? OPD.
2. Whether late Sh. Leela Ram owned properties other than the suit property and if so whether the suit seeking partial partition is not maintainable, as alleged in the written statement? OPD.
3. Whether the suit is properly valued for the purpose of court fee and jurisdiction? OPP.
4. Relief.

PLAINTIFF'S EVIDENCE

10. The plaintiffs filed two affidavits in their evidence in which they have reiterated and reaffirmed the same facts as stated by them in their plaint. One of the affidavit was of the plaintiff no. 1 Smt. Kanta Hira Nandani and the other affidavit was of plaintiff no. 2 Smt. Ritu Paul. After filing the affidavit in evidence, PW-1 did not appear for her cross examination, therefore, vide order dated 12.05.2016, the Ld. Predecessor observed that the affidavit of PW-1 shall not be read in evidence. Plaintiff no. 2/PW-2 was extensively cross by the defendants' side. Plaintiffs have not relied upon any documents in their evidence.

DEFENDANT'S EVIDENCE

11. The defendants have filed the affidavits of 3 witnesses i.e. defendant no. 1, who is examined, cross examined as DW-1, affidavit of defendant no. 2 who was examined and cross examined as DW-2. The defendants also filed the affidavit of defendant no. 3, however, he did not appear in the witness box, therefore, his evidence cannot be read in evidence. The defendants have reiterated and reaffirmed the same facts as stated by them in their written statement.

12. I have heard counsels for the parties as well as the written arguments filed by them.

My issue-wise findings are as follows:-

Issue no. 1 Whether the suit is bad for non-joinder of legal heirs of late Sh. Leela Ram? OPD.

&

Issue no. 2. Whether late Sh. Leela Ram owned properties other than the suit property and if so whether the suit seeking partial partition is not maintainable, as alleged in the written statement? OPD.”

8. The first aspect to be examined is as to whether the suit is bad for non-joinder of the other children of Sh. Leela Ram being the brothers and sisters of late Sh. Arjun Dass/the father of the parties. Related with this issue is the issue as to whether the subject suit for partition was not maintainable because partition was not sought of all the properties of Sh. Leela Ram, but only one of the properties being the suit property. Since both these issues are related, I will take up discussion on both these issues together.

9. The suit property was only one of the properties of late Sh. Leela Ram/the father of Sh. Arjun Dass, but if there was a family settlement between the legal heirs of Sh. Leela Ram, being his three sons and two daughters as stated in para 3 of the impugned judgment, whereby the properties of Sh. Leela Ram were divided by his children

and the suit property fell to the share of Sh. Arjun Dass (one of the son of Sh. Leela Ram) in such circumstances the subject suit will not be hit by non-joinder of necessary parties and also that it will not be a case of partial partition as partition is of the property of Sh. Arjun Dass and in between the legal heirs of Sh. Arjun Dass. In any case the concept of partial partition only applies to Hindu Undivided Family properties whereas admittedly there is no pleading that any Hindu Undivided Family existed in this case, and therefore the suit for one of the properties of Sh. Leela Ram, was rightly filed, even assuming that there was no family settlement, though in reality the factum of the family settlement stands established on record as discussed below.

10. As per the cross-examination of DW-1 Sh. Girdhar Tulani, appellant no.1, conducted on 4.10.2016, the grandfather Sh. Leela Ram died in the year of 1965. The son of Sh. Leela Ram, Sh. Arjun Dass, the father of the parties to the present suit died on 21.12.1987. Trial court has therefore held that if for four decades i.e. after the year 1965 and till the filing of the suit on 1.2.2012, none of the other legal heirs of late Sh. Leela Ram claimed any right in the suit property against Sh. Arjun Dass, and which Sh. Arjun Dass was occupying the suit property along with his family members immediately after the

death of Sh. Leela Ram in the year of 1965 on account of a family settlement between all the legal heirs of Sh. Leela Ram including Sh. Arjun Dass, had acted as owner by letting out the property to tenants and then getting the property vacated from the tenants, it has to be held that there did take place a family settlement/arrangement between the legal heirs of Sh. Leela Ram, being his three sons and two daughters including one son Sh. Arjun Dass, whereby the suit property fell to the exclusive share of Sh. Arjun Dass, the father of the parties. I may only add that admittedly till date none of the other legal heirs of Sh. Leela Ram who were alive on the date of filing of the subject suit, or if they were dead then legal heirs of the legal heirs of the said Sh. Leela Ram, ever claimed any right in the suit property. Trial court therefore, in my opinion, rightly decided this issue that the suit property fell to the share of Sh. Arjun Dass as per the settlement between all the children of Sh. Leela Ram by observing as under:-

“13. Both these issues are interconnected, therefore, taken up together for consideration. The case of the plaintiffs is that their grandfather late Sh. Leela Ram was the owner of the suit property. Late Sh. Leela Ram died intestate leaving behind 5 LRs as mentioned in para no. 3 of this order. After the death of late Sh. Leela Ram all his LRs mutually agreed and divided all the properties left by him. In pursuance of the family settlement, the suit property devolved upon the plaintiffs father Late Sh. Arjun Dass. Sh. Arjun Dass also died on 21.12.1987 leaving behind 5 LRs i.e. his wife, both the plaintiffs herein and defendant no. 1 and Sh. Gul Kumar Tulani (deceased son of late Sh. Arjun Dass).

Plaintiffs' mother died in the year-2011, thereafter, parties to the suit became the co-owner of the suit property. The plaintiffs have stated that late Sh. Arjun Dass had died intestate, therefore, all his LRs are entitled for 1/4th share each in the suit property.

14. The first objection of the defendants is on the maintainability of the suit on the ground that late Sh. Leela Ram was the owner of several properties as mentioned in para no. 5 of this order but the plaintiffs have sought the partition of only one property of late Sh. Leela Ram but not of all the properties, therefore, the suit seeking partition of one of the property of late Sh. Leela Ram is not maintainable. They have also resisted the suit of the plaintiffs on the ground that all the LRs of late Sh. Leela Ram have not been impleaded in the suit. In response to both these objections of defendants, the plaintiffs have averred that after the death of late Sh. Leela Ram a family settlement reached between the parties and as per the said settlement all the properties left behind by late Sh. Leela Ram were divided amongst his LRs and in pursuance of that settlement, the suit property fell into the share of plaintiffs' father late Sh. Arjun Dass, therefore, neither other legal heirs of late Sh. Leela Ram are necessary parties in this suit nor the partition of all the properties except the suit property left by late Sh. Leela Ram is required to be sought by the plaintiffs in the suit. In order to decide the issues in hand, the moot point to be considered by the court is “whether any oral family settlement reached amongst the LRs of late Sh. Leela Ram or not”? The plaintiffs are relying upon the oral family settlement reached amongst the LRs of late Sh. Leela Ram. The defendants have denied the said oral family settlement allegedly entered amongst the family members of late Sh. Leela Ram after his death. It is trite law that the oral family settlement is neither required to be in writing nor it requires to be registered. From the material on record, it is amply clear that the family settlement regarding various properties at Gujrat including the suit property left by late Sh. Leela Ram amongst his LRs has taken place more than 4 decades ago and the suit property in that family settlement had fallen in the share of plaintiffs' father late Sh. Arjun Dass, who throughout was in possession of the suit property. During the cross examination of DW-1, a specific question was asked from him “whether any family settlement was reached amongst the LRs of late Sh. Leela Ram”. Defendant no. 1/DW-1 did not give any specific answer to this question but he gave the evasive reply by saying that “he does not know whether there was a family settlement between the LRs of Late Sh.

Leela Ram regarding the properties left by him or that the suit property was given to his father in that settlement”.

15. This evasive reply regarding the family settlement from the mouth of DW-1 is clearly indicative that he avoided to give specific answer regarding the family settlement reached amongst the LRs of late Sh. Leela Ram. Not only this, DW-1 during his cross examination was asked whether he can tell that his all siblings have become the coowners of the suit property after the death of his parents. This question was also not clearly answered by DW-1 as in answer to this question, he said that “he cannot tell whether after the death of his parents all his brothers and sisters have become the co-owners of the suit property”. The defendants specifically took the defence in their written statement that no family settlement reached between the parties but when defendant no. 1 (DW-1) came into the witness box for his cross examination and was making statement under oath, he could not stand by his own defence that no settlement reached amongst the LRs of late Sh. Leela Ram. The defendants' witnesses have made several other admissions in their respective cross examination which clearly proves the oral family settlement amongst the LRs of late Sh. Leela Ram. During cross examination, DW-1 has stated that his grand father late Sh. Leela Ram expired in the year 1965 and in the year 1972 his father alongwith his family shifted in the suit property. He also admitted that his father i.e. late Sh. Arjun Dass got vacated the first floor of the suit property from one tenant prior to 1972. In the year 1984 again, the ground floor of the suit property was got vacated by late Sh. Arjun Dass. His mother also got vacated some of the portion of the ground floor of the suit property during her lifetime. Thereafter, DW-1 further admitted that the entire suit property remained in the possession of his mother. DW-1 has further admitted that house tax of the suit property is in his name and prior to this, it was in the name of his mother. He also admitted that rent from the suit property used to be collected by his mother and after her death, the same is collected by him. This witness admitted that all the properties owned by late Sh. Leela Ram at Gujrat are in possession of his uncles and he does not have any document of the said properties situated at Gujrat, however, he is in possession of the documents of the suit property and prior to that the said documents were in the possession of his parents. Furthermore, DW-2 in her cross examination has stated that she got married with late Sh. Gul

Kumar Tulani in the year 1991. She has also admitted in her cross examination that after the death of late Sh. Leela Ram, Sh. Arjun Dass and his family have only resided in the suit property and not any other LR of late Sh. Leela Ram has ever resided there. **All these admissions by both the DWs clearly indicates that late Sh. Arjun Dass and family is in actual physical possession of the suit property from last more than 45 years and the said possession of family of late Sh. Arjun Dass is without any interference by any other LRs of late Sh. Leela Ram. Hence, it is proved on record that the oral family settlement took place amongst the LRs of late Sh. Leela Ram and in the said settlement, the suit property fell into the share of plaintiffs' father.**

16. The plaintiffs have proved on record the oral family settlement amongst the LRs of late Sh. Leela Ram, consequent to which the suit property fell into the share of late Sh. Arjun Dass, who after the settlement became the absolute owner of the suit property. In view of proving of oral settlement amongst the LRs of late Sh. Leela Ram, his other LRs are neither necessary nor proper party in the suit, hence, the suit of the plaintiffs is bad for mis-joinder or non-joinder of the parties."

(emphasis is mine)

11. In my opinion, therefore trial court was justified in returning the finding that the suit property was of Sh. Arjun Dass, and once Sh. Arjun Dass died *intestate*, the suit property had to be divided in four shares in between the two sons (defendant no.1 and predecessors of defendant nos.2 and 3) and two daughters/respondents/plaintiffs, of late Sh. Arjun Dass.

12(i). Learned counsel for the appellants/defendants argued that in the cross-examination of PW-2/Ms. Ritu Paul/plaintiff no. 2, it was conceded by her that settlement between the legal heirs of Sh. Leela

Ram was in writing but this settlement was not filed and therefore it should be held that there did not take place any settlement/arrangement between the legal heirs of Sh. Leela Ram including Sh. Arjun Dass whereby the suit property fell to the share of Sh. Arjun Dass.

(ii) I cannot agree with this argument firstly because PW-2/Ms. Ritu Paul immediately after stating that family settlement was in writing stated that the copy of the settlement was with defendants ie the appellants are not deliberately filing the settlement. Secondly nothing will turn on the fact that the settlement between the legal heirs of Sh. Leela Ram was in writing or was only oral in the facts of the present case, inasmuch as, trial court has rightly held that if for four decades Sh. Arjun Dass and thereafter his children, being the parties to the suit, have been living in the suit property, and no right to the suit property has been claimed by the other children/legal heirs of Sh. Leela Ram, obviously this would be because there was a settlement entered into between the legal heirs of Sh. Leela Ram four decades back and which should not be disturbed. In fact, I would like to note that I am surprised to note the unfortunate stand taken by the appellants/defendants which is to their own detriment that the suit

property did not fall to the ownership of their father/Sh. Arjun Dass. By taking such a stand effectively the appellants/defendants want to maliciously contest the suit and also impugn the judgment now passed by the trial court, but obviously being a stand without any basis whatsoever, the same has to be rejected by this Court, and which was also rightly rejected by the trial court.

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

AUGUST 10, 2018

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VALMIKI J. MEHTA, J