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

Reserved on : 5th February, 2018

Date of decision : 8th May, 2018

+ **RFA 571/2016 & CM APPLs. 28820/2016 (Stay), 4223/2018 (for waiving of costs)**

MANOJ KUMAR

..... Appellant

Through: Mr. Dinesh Garg, Advocate
(9811715205) Appellant in person.

versus

ASHOK KUMAR & ORS.

..... Respondents

Through: Mr. H.K. Dhariwal, Advocate for R-1
(M-9711763896).

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present appeal arises out of the judgment dated 21st March, 2016 by which the Trial Court has dismissed the suit for partition filed by the Plaintiff/Appellant (*hereinafter 'Plaintiff'*), Shri Manoj Kumar(PW-1). The Plaintiff is the real brother of Shri Ashok Kumar (DW-1). Defendant Nos.2,3 & 4 are the sisters of Defendant No.1. The instant suit for partition and injunction has been filed in respect of property bearing No. B-3, Village Gopal Pur, Delhi, measuring 90 sq. yards.

2. It is the case of the Plaintiff that Late Smt. Shanti Devi is the owner of the suit property. It is Plaintiff's further case that he used to reside in the suit property on the 1st floor with his family but after his marriage due to various differences and disputes which arose between the two brothers and their families, the plaintiff was forced to move out of the property and live with

his in-laws. Various police complaints etc. have been pleaded in the plaint to show the extent of the disputes between the two parties. In view of the fact that the brothers can no longer live together, the Plaintiff prays for the following reliefs:

“[i] pass a preliminary decree of Partition of the suit properties i.e. B-3, Village Gokalpur, Delhi ascertaining the 1/5th share of the plaintiff in the said suit property being the legal heir;

[ii] to effect the physical partition of the suit property, as shown in the Site plans Annexures A by dividing the same in FIVE equal shares;

[iii] to pass the final decree of the partition of the suit properties i.e. B-3, Village Gokalpur, Delhi

[iv] restrain the defendants, their successors, assignees, legal heirs, representatives etc. etc, from creating any third party interest, on the said suit property I.E. B-3, Village Gokalpur, Delhi in any manner, considering the above facts and circumstances of the case, in the interest of justice,”

3. In the written statement, the Defendant No.1 claims that the suit property is only 50 sq. yards and the remaining 40 sq. yards belonged to the father of the parties and that it was transferred in the name of the Plaintiff. It is stated in the Written Statement that he is not aware as to what the Plaintiff has done with the said property. The Defendant further pleads that he has purchased the 50 sq. yards portion of the property vide notarized General Power of Attorney, Agreement to Sell, Receipt and Will for a consideration of Rs.60,000 from his mother on 16th May 2002. The Defendant No.1 further pleads that the Plaintiff had filed an earlier suit for injunction which was dismissed in default after the Defendant had contested the matter. In

Rejoinder, the Plaintiff points that the father did not own any property and hence he has not obtained any property from the father. Further, the Plaintiff states that the documents which are relied upon by the Defendant No.1 are fake and forged. In support of this plea, the Plaintiff refers to the written statement filed by the Defendant No.1 in the earlier suit where the said Defendant had pleaded an oral sale from the mother. In view of the pleadings the following issues were framed.

“(1) Whether the area of the suit property is 90 sq. yards as claimed by the plaintiff or 50 sq. yards as claimed by defendant No.1? OPP

(ii) Whether the plaintiff is entitled to the preliminary decree for partition of 1/5th share in the suit property? OPP

(iii) Whether the plaintiff is entitled to the decree for permanent injunction as prayed for? OPP

(iv) Whether the defendant No.1 is the owner of the suit property? OPD1

(v) Relief.”

4. The Plaintiff and Defendant No.1 appeared as PW-1 and DW-1. The Plaintiff also led the evidence of the police officials and the record keeper of the GTB hospital to prove the various complaints. Two further important witnesses who deposed in favour of the Plaintiff are the two sisters –Smt. Saroj (PW-6) and Mrs. Neetu (PW-7) both of whom testified that they had no objection if a decree for partition was passed. They also denied the suggestion that the property is only of 50 sq. yards. They categorically stated that the property is of 90 sq. yards. From the Defendant’s side Defendant No.1 appeared as DW-1 and led his evidence. The Trial Court dismissed the suit for partition.

5. The approach of the Trial Court in this case is quite surprising inasmuch as the Trial Court holds that the documents, which are relied upon by the Defendant No.1 to plead the title in the property, are not registered and hence there can be no legal effect given to the said documents in view of the Supreme Court judgment in ***Suraj Lamp & Industries Pvt. Ltd. v. State of Haryana; AIR 2012 SC 206*** but on other hand, the Trial Court holds that the Plaintiff was unable to prove that the property was measuring 90 Sq. yards and the dismissal of the earlier suit renders the present suit barred under Order II Rule 2. By holding against the Plaintiff and the Defendant no.1, the suit for partition is dismissed.

6. Before this Court, the submission of the Plaintiff is that the mother died intestate. It is further submitted that the Trial Court holds that the area of the land was not proved but this is incorrect as right from beginning, as captured in the legal notice, the Plaintiff's stand has been that the property measures 90 sq. yards. It is further submitted by the Plaintiff that on the issue where the Court holds that the Defendant's ownership cannot be recognised, there is no cross objection by the Defendant. It is further submitted that since the earlier suit for injunction was dismissed in default, the present suit is not barred under Order II Rule 2 CPC.

7. On the other hand, learned counsel for the Defendant submits that the issuance of the legal notice is not admitted by the Defendant. Moreover, the Defendant has acquired the title through various documents including the irrevocable GPA dated 6th May, 1974 by which Smt. Shanti Devi became the owner of the property and thereafter on 16th May, 2002 when Smt. Shanti Devi issued a GPA in favour of the Defendant. It is further claimed by the Defendant that the 40 Sq. yards was transferred by Shri Prem Chand in

favour of the Defendant vide a GPA and Agreement to Sell dated 14th July, 1993. In this manner, the Defendant claims to be the owner of the suit property which is of 50 sq. yards as also the owner of the property which is of 40 sq. yards.

8. When the suit was filed before the Trial Court, the Defendant Nos.2 and 4 were proceeded ex-parte on 6th March, 2013. During the pendency of the suit on 28th May, 2013, the Trial Court found that the Plaintiff had established a prima facie case in his favour and accordingly restrained the Defendants from creating any third-party interest in the suit property. An application was also filed for appointment of a Local Commissioner which was dismissed on 13th May 2014.

Analysis and Findings

9. A perusal of the pleadings and documents reveals that both the parties claim their rights through their mother Smt. Shanti Devi. So far there is no dispute. What is however disputed is the area of the suit property and the Defendant's title to the suit property as it is claimed by the Defendant that he purchased 50 sq. yards from his mother.

10. Coming to the issue as to the area of the property, there are two sets of documents on record. The first set of documents relates to 40 sq. yards dated 14th July, 1993 executed by Shri Prem Chand in favour of Shri Ashok Kumar viz., the GPA, agreement to sell, receipt and the Will. These have been exhibited as **Ex.DW1/X1 to X4**. In all these four documents the property number is not mentioned. It is also not clear as to in what manner Shri Prem Chand i.e. father of the parties acquired any title in respect of the 40 sq. yards. All these documents are unregistered. No one has proved the signatures of either Shri Prem Chand or of the witnesses in the said

documents. They are merely notarized. The two witnesses in the documents are Mr. Jeewan Dass and Mr. Ramesh Vashist, Advocate. Neither of them has testified that these documents are genuine. In his evidence, the Defendant does not produce these documents in his affidavit in chief but produced it during cross examination. Through these documents he seeks to prove that the 40 sq. yards were purchased by him. This is in complete contrast to Para 3 of the written statement where he pleaded as under:

“3. That it is pertinent to mention here that the plaintiff was the owner of another immovable property adjacent to the suit property which was in the name of the father of the plaintiff and before the death of the father, the said property was transferred by him in the name of the plaintiff. Now what the plaintiff has done to the said property is without the knowledge of the answering defendant as there was no interference by the answering defendant in the life and liberty of the plaintiff.”

11. It is rather strange that having pleaded that the father had transferred the 40 sq. yards in favour of Plaintiff, in his oral evidence he produced a set of documents claiming as under:

“I have brought the documents pertaining no. (blanked) measuring area 40 sq., yards, Gokal Puri, Delhi. Documents contains GPA which is EX. DW-1/X-1, Agreement to sell which is EX. DW-1/X-2, receipt which is EX. DW-1/X-3 and will which is EX. DW-1/X-4 dt. 14.07.1993 duly attested by notary public. I am 12th passed. I can read English a little bit.

It is correct that the documents above mentioned do not bear the property no. It is correct that the in the boundary as stated in the

above documents no no. of property adjacent to the said plots have been mentioned nor the name of their occupants. I have purchased the said property for the amount of Rs. 45000/-. Some amount was arranged by me out of my savings and some amount was borrowed from my relatives. I arranged Rs. 20000/- from my savings and Rs. 15000 were borrowed from my father-in-law, Ramesh chand and Rs. 10000 was borrowed by me from Sushil Kumar. No document was prepared for borrowing the said amount. The amount of Rs. 20000/- was lying with me at my him and not in any Bank. Vol. Till today I have no bank account. I repaid the said loan amount in 2-3 years to Ramesh Chand and Sushil Kumar and no document was prepared to this effect.

The said property was purchased by me from my father. I was not the Income-Tax assessee at that time and till today. I am not aware regarding Income-Tax Laws. The property measuring 40 sq yards was behind the plot measuring 50 sq yards which was purchased from my mother. My father was studied upto 1st or 2nd standard. It is wrong to suggest that my father used to put thumb impression and never signed. It is wrong to suggest that document EX. DW-1/X-1 to DW-1/X-4 are false and fabricated documents. It is wrong to suggest that my father never sold the property measuring 40 sq yards to me at any point of time. It is wrong to suggest that I am deposing falsely in this regard.”

12. These two stands are completely contradictory to each other. Moreover, there is nothing on record to show how Shri Prem Chand acquired rights in the 40 sq. yards of property. In his cross examination, the Defendant clearly admits that there is a common gate for B-3 and B-3/1. On this aspect, he deposed as under:

“Property No.B-3 measuring 50 sq. yards is exclusively in the name of my mother and I am not the joint owner with my mother in the same. (Controverted with the written statement). It is wrong to suggest that both the houses B-3 and B-3/1 are constructed together. Presently there is common gate of B-3 and B-3/1 with jointly measures 90 sq. yards. Common gate was constructed after the year 2002.”

These documents, therefore, cannot be believed and they can also not confer any right in favour of Shri Ashok Kumar in respect of 40 sq. Yards.

13. Now coming to the 2nd set of documents relied upon by the Defendant, one is an irrevocable GPA dated 12th May 1974 by Shri Fattan to Smt. Shanti Devi where again the property number is not mentioned except that it is 50 sq. yards. In the GPA executed by Smt. Shanti Devi in favour of the Defendant, the property is mentioned as B-3/1 and this position is replicated in the agreement to sell, receipt and the deed of will. Both these sets of documents are unregistered and are not proved in accordance with law and in any case do not confer any title. In his cross examination, the Defendant has admitted that there is a common gate and the property jointly measures 90 sq. yards. From the evidence on record it is clear that there is only one property bearing B-3, measuring 90 sq. yards.

14. Both the parties admit that their mother is the owner of the property and in the absence of anything to the contrary and owing to the fact that the Defendant has admittedly been in possession of the property for many years, this Court is left with no option but to proceed further on this basis. Moreover, two of the daughters have also appeared and deposed that the property is of 90 sq. yards and that it is in the name of their mother Smt.

Shanti Devi. Both the daughters mentioned the number of the property as B-3, Village Gopal Pur admeasuring 90 sq. yards. Thus, the overwhelming evidence is that the property in question is B-3,Village Gopal Pur, the owner of which was Smt. Shanti Devi and that the property is of 90 sq.yards.

15. Having come to the above conclusions, the question now remains as to whether the Plaintiff is entitled to partition. Admittedly, none of the documents by which the Defendant claims title are registered. Apart from that, the Defendant has also been blowing hot and cold in this matter. He has pleaded that he acquired ownership from his father for 40 sq. yards and from his mother for 50 sq. yards but in his written statement he had initially stated that the adjacent property had been transferred by the father to the Plaintiff. A perusal of the documents placed on record executed in the Defendant's favour -Ex.DW-1/2, shows that they were allegedly drafted by lawyers - none of whom have been produced to establish the authenticity. Even the witnesses to these documents have not been produced. Thus, this Court comes to the conclusion that the documents relied by the Defendant are not valid and not in accordance with law. They do not confer any title upon the Defendant.

16. Coming to the final submission that the Plaintiff had earlier filed a suit for injunction which was dismissed in default, it is the settled position that dismissal in default does not constitute *res judicata* as held by the Supreme Court in ***Shivashankar Prasad Shah and Ors. v. Baikunth Nath Singh and Ors*** *Air 1969 SC 971*. An injunction suit also does not bar a subsequent suit for partition. The credibility of the Defendant is very much in doubt considering the manner in which contradictory stands have been taken by the Defendant. This Court has not considered any of the criminal

cases or complaints pending between the parties and has purely considered the matter from the point of view of the documents and evidence placed on record. The legal notice issued by the Plaintiff has gone un-replied. The Defendant had also pleaded in the written statement filed in the earlier suit that he had acquired rights to the property from his mother by way of an oral agreement. This even allures to the fact that the documents relied upon by the Defendant in these proceedings may be fabricated.

17. In view of all of the above facts, circumstances and evidence placed on record, it is held that the property bearing No.B-3, Village Gopal Pur, Delhi is 90 sq. Yards and the owner of the same was Smt. Shanti Devi. The documents relied upon by the Defendant, purportedly executed by Smt. Shanti Devi in respect of 50 sq. yards are not valid and do not confer any title on the Defendant. It is further held that the five legal heirs of Smt. Shanti Devi are entitled to 1/5th share each in the said property. A preliminary decree of partition is, accordingly, passed declaring the Plaintiff and Defendant Nos.1 to 4 as the owners of 1/5th share each of the suit property bearing No.B-3, Gopal Pur, Delhi admeasuring 90 sq. yards.

18. The Trial Court judgment is set aside to the extent that it rejected the relief of partition in favour of the Plaintiff. The Trial Court rightly held that the documents relied upon by the Defendant do not confer any title upon the Defendant.

19. The matter is sent back to the Trial Court to effect the physical partition of the property by metes and bounds or take further steps for auctioning of the property if physical partition is found to be not feasible.

20. In the present case, the Plaintiff had filed an application for appointment of a Local Commissioner which ought to have been allowed by

the Trial Court. There was a serious dispute as to the measurement of the suit property which could have been easily solved by appointing a Local Commissioner.

21. The Trial Court, in order to effect the preliminary decree of partition passed above, may appoint a Local Commissioner taking such further steps as may be needed in accordance with law.

22. Appeal is allowed in the above terms. Miscellaneous applications also stand disposed of. Trial Court record be sent back.

MAY 08, 2018/dk

**PRATHIBA M. SINGH
JUDGE**