

\$~

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

Reserved on : 3rd January, 2018
Date of decision : 13th February, 2018

+

RFA 974/2016

HARI OM SHARMA

..... Appellant

Through : Mr. Sunil Kumar, Advocate
(Previous)
Mr. P.K. Jain & Mr. Mukesh Verma,
Advocates.
Appellant in person.

versus

GHAN SHYAM DASS SHARMA AND ORS Respondents

Through : Mr. Gaurav Yadav, Advocate for
R1A/ Ms.Triveni Devi and
R3/Smt.Kamlesh.
Mr. Anuj/R2A in person for himself
and for Ms.Veena/ R2B &
Ms.Deepa/R2C.
Mr. Santosh Pratap, Advocate for R4.
Mr.Vikas Tyagi, Bidder.

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. Ghan Shyam Dass Sharma (*hereinafter*, 'D1') purchased property no. 1/3581, Gali No.3, Ram Nagar, Loni Road, Shahdara, Delhi – 110032 area measuring 120 sq. yds (*hereinafter*, 'suit property'). He had five children i.e. three sons and two daughters. They are as follows:

- i. Suresh Chand Sharma (*hereinafter*, 'Plaintiff')
- ii. Subhash Chand Sharma (*hereinafter*, 'D2')

- iii. Hari Om Sharma (*hereinafter*, 'D3')
- iv. Kamlesh (*hereinafter*, 'D4')
- v. Madhu Sharma (since deceased)

Plaintiff's case

2. The Plaintiff – Suresh Chand Sharma, Appellant herein, filed a suit for partition, possession and permanent injunction in respect of the suit property. He pleaded that his father, D1, purchased the suit property by disposing of ancestral property in Rajasthan and that he was living with his wife in the suit property all along. Plaintiff claimed that he was dispossessed from the suit property in the year 1982. He sought his share from D1 some years later but D1 refused to give him any share. D1, thereafter, got a publication issued in *Rastriya Sahara* dated 10th December 2008 that he has debarred and disowned the Plaintiff and his wife from any share in the suit property. Upon seeing this publication, the Plaintiff got a legal notice served upon the father, two brothers and a sister. The suit for partition, thereafter, came to be filed.

Defendants' case

3. A common written statement was filed by the Defendants which is only signed by Shri Hari Om Sharma/D3. It is the case of the Defendants that the suit property was a self acquired property of D1 and that the Plaintiff was paid a sum of Rs.1.50 lakhs in cash 36 years ago. Thus, the filing of the suit for partition after a period of 30 years was claimed to be malafide. The allegation that the suit property was ancestral property was denied.

4. D1 expired on 25th February, 2010 but mother Smt. Triveni Devi was

not impleaded in the suit. The Trial court erroneously records in its order dated 5th July, 2011 as under:

“It is submitted that D-1 who is father of the parties has since expired in February, 2010. All his LR's i.e. his sons and wife are already on record as plaintiff, D-2 to D-4. Application of the plaintiff under Order 33 to sue as an indigent is pending disposal.

Issue notice to SDM, Shahdara to give report regarding financial status of plaintiff on filing of PF for 27.08.2011.

Plaintiff to file an appropriate application for bringing on record LR's.”

5. Following issues were framed in the suit on 29th October 2014:

“(1) Whether the plaintiff is entitled for decree of partition as prayed in the suit? OPP

(2) Whether the plaintiff is entitled for decree of possession as prayed in the suit? OPP

(3) Whether the plaintiff is entitled for decree of permanent injunction as prayed for? OPP

(4) Relief.”

6. In the suit, Shri Suresh Chand Sharma/Plaintiff appeared as PW-1. The Defendants led evidence of Shri Subhash Chand Sharma/D2 (DW-1) and Shri Hari Om Sharma/D3 (DW-2).

7. Mediation was attempted between the parties, but to no avail. On 9th May, 2016 a preliminary decree was passed by which it was held that Plaintiff is the joint owner of the suit property and is entitled to 1/4th share in the property. A Local Commissioner was thereafter appointed, but the report clearly stated that the property could not be partitioned by metes and bounds. Order dated 15th October 2016 reads as under:

“ Pleader fee form filed by counsel for plaintiff. It be taken on record.

The report of the local commissioner filed.

Arguments heard and gone through the record.

Ld. Counsel for the plaintiff prayed to pass final decree as the property could not be partitioned by metes and bounds.

Plaintiff filed the suit with relief for partition, possession and permanent injunction in respect of the property bearing no.1/3581, Gali No.3, Ram Nagar, Loni Road, Shahdara, Delhi (as shown in the site plan Ex.PW1/1). Vide judgment dated 09.05.2016, a preliminary decree was passed and plaintiff was held entitled to 1/4th share in the property. The relief of possession and permanent injunction was also allowed.

After passing of the preliminary decree, local commissioner was appointed to suggest mode and manner of partition by metes and bounds. As per the report of local commissioner, the suit property measured 24 x 45 ft and the parties/defendants did not wish to give 1/4th share to the plaintiff vide preliminary decree and agreed to given only 1/5th share i.e. 4.8 ft x 45 ft each. The such partition is not acceptable by the plaintiff.

In view of the report of local commissioner and submissions of the parties, property could not be partitioned by metes and bound. No proposal has come from anyone regarding sale/purchase of share of another by fixing its value.

There are 4 share holders of this suit property as per preliminary decree. In my opinion, the physical partition is not possible at all.

In view of facts and circumstances of the case, this court has accordingly no option except

to put the property for sell through public auction and the amount recovered be divided according to the shares of the parties already fixed in the preliminary decree. All the parties are permitted to participate in the public auction. The minimum price of the suit property shall not be less than the value as per minimum circle rates of the area. The relief of possession cannot be granted to the plaintiff in such situation as the sale is only option and the buyer will get the possession after purchase.

With these observations, final decree is passed in terms of the above order. Parties to bear their own costs. Decree be prepared accordingly after payment of court fee. File be consigned to record room.”

8. Thus, the Court directed public auction of the property and directed the money to be divided according to their respective shares.

9. The preliminary decree primarily records that the two Wills, which were relied upon by D2 & D3, have not been proved and hence Plaintiff is entitled to 1/4th share in the property. It is this decree which is assailed in the present appeal.

10. In the meantime, the execution proceedings had continued and the property was put to auction. A bidder, Shri Vikas Tyagi, bid for a sum of Rs.73,50,000/-, which was deposited in two instalments, namely Rs.18,62,500/- on 16th October 2017 and the remaining Rs.54 Lakhs on 31st October 2017. The said money is now lying with the executing court.

Arguments of Appellant/D3

11. Appellant/D3 submits that the preliminary decree fails to consider

several facts:

- (i) That there was an application under Order VI Rule 17 of CPC which was pending for impleadment of mother Smt. Triveni Devi, but the same was neither considered nor disposed of.
- (ii) That the two Wills dated 27th October, 2006 which were executed by the father, were registered Wills and were in fact proved in accordance with law. It is submitted that the two Wills were of the same date and they bequeathed to D2 and D3 58 ½ sq. yds each of the suit property. D3 was the witness to the Will bequeathing the property to D2 and *vice versa*. Both the brothers had appeared before the Trial Court and they were attesting witnesses to the Wills and hence the Wills stood proved.
- (iii) The Trial Court also erred in completely rejecting the Wills on the ground that the same were not pleaded in the written statement. The Appellant submits that the said Wills were traced only in the year 2014, and accordingly, in the evidence by way of affidavit, the same were duly mentioned and both the brothers were cross examined on the said aspect. The non-mentioning of the factum of Wills in the written statement was because of the fact that the father was alive at the time when the written statement had been filed. Thus, during the lifetime of the father, the Wills could not have been mentioned as part of the pleadings and were rightly brought to the notice of the Court and the Plaintiff at the time of recordal of evidence as the father had passed away during the pendency of the suit.
- (iv) D3 further submits that the father never intended to give any share in the suit property to the Plaintiff and that his wish ought to have been

honoured by the Trial Court.

- (v) D3 further submitted that the second daughter of D1, Smt. Madhu Sharma had expired, however, her legal heirs ought to have been brought on record which was not done. This is a fundamental error in a suit for partition, and the decree cannot sustain.
- (vi) D3 was not cross-examined by the Plaintiff and hence his evidence should be taken as being admitted.

Submissions of Smt. Kamlesh Sharma/D4

12. D3 submits that the impugned judgment suffers from several irregularities.

- a) That the sister Smt. Kamlesh/D4 was never served, inasmuch as her address in the memo of parties is reflected as the suit property whereas admittedly she was married and living in Gurgaon.
- b) That the written statement filed, though claimed to be on behalf of the Defendants, was only filed by the two brothers, D2 & D3 as is evident from the Vakalatnama, which is on record, wherein only the father and two brothers have authorized the filing of the written statement. Thus, the sister was never given an opportunity to contest the case.

13. It is argued that the non-giving of the correct address of D4 is evident from the list of witnesses wherein she is described as under:

*“Smt. Kamlesh Sharma w/o Shri Ram Prakash Sharma
r/o Gurgaon.”*

14. Thus, Plaintiff was well aware that D4 was a resident of Gurgaon, but the address given was of the suit property and her defence has not been taken into consideration.

Submissions of Respondent No.4/Plaintiff

15. On the other hand, learned counsel for Plaintiff submits that Smt. Kamlesh/D4 was always aware of the proceedings, inasmuch as a Local Commissioner was appointed in this matter who had visited the suit property. Reliance is placed on the following paragraphs of the Local Commissioner's report:

"Accordingly, the undersigned alongwith said two police personnel reached at the suit property no.1/3581, Gali No.3, Ram Nagar, Loni Road, Shahdara, Delhi.32 on 13.10.2016 and the undersigned met the defendants no.2 & 3 at the spot and the undersigned therefore served the notice of his visit to the said Shri Subhash Chand Sharma and Hari Om Sharma and they also received the notice on behalf of defendant no.4 Smt. Kamlesh.

....

And whereas I had discussions with the parties present at the spot as per the directions of this Hon'ble Court to derive out possible manner partition of the property. Shri Subhash Chad Sharma raised objections that their mother Smt. Triveni Sharma has also one fifth share in the property and he offered to give 1/5th share out of the property to the plaintiff. Shri Hari Om Sharma however refused to give any share to the plaintiff in the property. Effort was made to talk with the defendant no.4 Smt. Kamlesh telephonically by the son of Hari Om Sharma, but she did not pick the phone call."

16. Learned counsel for Plaintiff further submits that the summons was received by D4's bhabhi when it was served through the Court. He further

submits that D3 was not cross examined and the cross examination of D2 was adopted for D3. The Plaintiff further submitted that both the brothers being beneficiaries in the Wills could not have proved the same as attesting witnesses.

Analysis and Findings

17. The suit is for decree of partition, possession and permanent injunction. When the suit was filed, D1 was alive and hence there may not have been a necessity to implead the mother. However, giving of wrong address of a legal heir of D1 i.e. sister R3, thereby depriving her from filing her written statement in the matter is a fundamental error. Memo of parties clearly does not give her current address as she is married and lives with her husband in Gurgaon. She has been shown to be a resident of the suit property, which admittedly she is not. Thus, though Smt. Kamlesh/D4 must have been in the know of the litigation, she never received the summons from the Court, she did not file the written statement and hence, she was not given an opportunity to appear in the suit. Even the report of the Local Commissioner shows that her two brothers received the notice from the Local Commissioner on her behalf. Vakalatnama, which has been signed in favour of the counsel who signed the written statement for the Defendants, is also signed by the father and the two brothers. Thus, clearly Smt. Kamlesh/R3 was never properly impleaded in the suit.

18. The non-impleadment of the second daughter, namely Smt. Madhu Sharma through her LRs is also vital and goes to the root of the matter. It cannot be presumed that her LRs are not interested for their share in the suit property, even though her husband may have re-married post her demise.

She ought to have been impleaded as a Defendant in the suit through her LRs and hence the Trial Court was in error in not directing her impleadment through LRs.

19. Another fundamental error committed by the Trial Court is non-impleadment of Smt. Triveni Devi, wife of Mr. Ghan Shyam Dass Sharma, D1, who was the owner of the suit property. She, being the widow, had a right to be properly represented in her own capacity and put forward her case. The order dated 5th July 2011 was erroneous when it records that the wife is already on record as D4. The Trial Court appears to have been under a confusion, as D4 was the daughter and not the wife of D1. Thus, this fact was also brought to the notice of the Trial Court by means of an application filed under Order VI Rule 17 CPC moved by D2 seeking impleadment of the mother. Despite this application being pending the widow was not impleaded.

20. During the pendency of this appeal, Mr. Subhash Chand Sharma/D2 also expired and he was represented in the Court through his son Mr. Anuj Sharma as recorded in the order dated 2nd January 2018. In the present appeal Smt. Triveni Devi and LRs of Shri Subhash Chand Sharma were impleaded.

21. It is the settled position in law that in a suit for partition all the co-sharers have to be impleaded and non-impleadment of the co-sharers goes to the root of the matter. The Supreme Court in ***Kenchegowda v. Siddegowda alias Motegowda (1994) 4 SCC 294*** held that a suit for partition filed without impleadment of all co-sharers was not permissible in law. This position has been upheld by a Division Bench of the Andhra Pradesh High Court ***M. Vidyasagar Reddy v. M. Padmamma 2016 (4) ALT 95***. A

Division Bench of the Karnataka High Court in ***S.K. Lakshminarassapa v. Sri B Rudriah*** 2013 (1) KCCR 672 has held as under:

“58. In a partition suit, all co-parceners must be before Court either as plaintiffs or as defendants. Any co-parcener or co-sharer who sues for partition of property must make the other co-parceners or co-sharers as defendants because the partition which is made in his favour is a partition against his co-parceners or co-sharers.....”

Thus, for any decree to be passed in a suit for partition all co-parceners/co-sharers must be made parties.

22. Coming to the question of whether the Plaintiff is entitled to 1/4th share in the suit property, it has to be seen that D1 was alive when the suit was filed and accordingly there was no question of pleading the Wills during his lifetime. If parties are made to disclose their bequests during their lifetime, it could lead to enormous disharmony in the family and sometimes there could be graver consequences. Thus, D1 deemed it appropriate not to reveal the existence of the Wills while he was alive. After he passed away on 14th September, 2010, the suit had been dismissed in default. It was finally restored, after the Plaintiff took steps, only on 26th October, 2013. In fact, even on 21st January, 2014, costs were imposed on the Plaintiff. Enquiry was commenced into the financial status of the Plaintiff by the SDM and permission was granted to the Plaintiff to pursue the suit as an indigent person. On 29th October, 2014 the issues were framed and immediately thereafter, the Wills were disclosed by D2 & D3 in their affidavits by way of evidence which are dated 20th November, 2015. Thus, the Defendants have, produced certified copies of both the Wills dated 27th October, 2006 duly certified by the Sub-Registrar's office at the earliest

opportunity.

23. Shri Subhash Chand Sharma, DW-1 was cross-examined on the Will. The deposition of both D2 & D3 is on identical lines and Plaintiff ought to be believed on his submission that he adopted the same cross examination for both D2 & D3. However, the Trial Court fails to accept these Wills as having been proved on the ground that the Wills are beyond pleadings. Moreover, the said two documents, executed on the same date, were for two separate portions of the suit property in favour of both sons D2 & D3. Each of the sons stood witness to the other's Will. Thus, it cannot be stated at this stage, that the Wills cannot be considered or that they were not proved. It is the settled law that a Will can be set up by way of a defence. The ideal situation would have been for D2 & D3 to have amended the written statement and pleaded the two Wills. This was not done. However, in the facts of this case, the non-pleading of the Wills cannot be faulted with. The Trial Court was clearly in error by coming to a conclusion that the defence of the Defendants is false and concocted. Such a finding is not supported on the basis of the record. Moreover, there is also contemporaneous evidence to show that the father had disowned the Plaintiff in the form of the newspaper publication (Ex. PW-1/2). Thus, all the facts support the existence of the Wills at least at this stage.

24. This Court, therefore, finds that the non-impleadment of Smt. Triveni Devi and Smt. Madhu Sharma, through her LRs, is a flaw and the decree could not have been passed in their absence, as they were necessary and proper parties to the suit. The impugned decree is liable to be set aside. Thus, the issues framed shall be re-adjudicated by the Trial Court. It is directed that the Plaintiff shall implead Smt. Triveni Devi, Smt. Kamlesh at

her correct address and Smt. Madhu Sharma through her LRs in the suit. They shall be given an opportunity to file their written statements and lead evidence in the matter. D2 and D3 may seek permission to amend the written statement if so advised which shall be considered by the trial court in accordance with law.

25. The question that now arises is as to what would happen to the auction proceedings which have been taken place in the meantime. Bidder Mr. Vikas Tyagi had appeared before this Court upon notice being issued and contended that he had already made deposits in the sum of Rs.73,50,000/-. It is submitted by the parties that the same is lying in a fixed deposit before the Trial Court. It is directed that the bidder be refunded the entire amount along with the interest, if any, accrued thereon. The preliminary decree for partition is set aside.

26. D2 & D3 along with their families and mother Smt. Triveni Devi are residing in the suit property. Since the decree of partition has been set aside, the decree for possession is also liable to be set aside. It is, however, directed that during the pendency of the suit before the Trial Court there would be an injunction restraining all parties from parting with possession or creating any third party interest in the suit property. This shall be subject to the final outcome in the suit.

27. Appeal is allowed in the above terms with no order as to costs.

PRATHIBA M. SINGH, J.
Judge

FEBRUARY 13, 2018/dk