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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on :28th May, 2018

Date of Decision: 1st June, 2018

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RFA 249/2017

SANJAY KUMAR

..... Appellant

Through: Mr. Ghanshyam Thakur, Advocate
(M: 8586816803).

versus

RAJESH KUMAR

..... Respondent

Through: Mr. Ravi Bassi and Mr. Sanyam
Malik, Advocates (M: 9810021293).

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. Smt. Laxmi Devi was the owner of property bearing Nos. Y-316 and Y-317 which is a land measuring 50 sq. yds. (25 sq. yds. each) situated in J.J. Colony, Camp No.1, Nangloi, Delhi-110041 (*hereinafter, 'suit property'*).

2. The Respondent/Plaintiff - Mr. Rajesh Kumar (*hereinafter, 'Plaintiff'*) and the Appellant/Defendant - Mr. Sanjay Kumar (*hereinafter, 'Defendant'*) are the sons of Smt. Laxmi Devi. A mutual agreement was duly signed by her by which she fixed the share amongst her three sons i.e. the Plaintiff, the Defendant and the Sh. Ajay Kumar. The manner in which the division was made by her is contained in the said mutual agreement and is as under:

"1. Shri Rajesh (legal heir of the first party) owner part of the abovesaid property 3.1/2 x 20 and IInd Floor with roof rights and Stair case & loby of first floor common uses by... the member of abovemention and there are no any make additional

alternation in the space of lobby and also owner under portion of stair case in favour of the Rajesh.

2. Shri Sanjay Kumar (legal heir of the first party) owner part of the bearing property No.Y-316 & 317, situated at Camp No.1, Nangloi, Delhi, go to ownership only one shop which size 7.1/2 x 20 approx. with Ist floor one room (10x10) and one bathroom, and stair case and lobby both are plot uses by the mutual common uses without any additional alteration.

3. Shri Ajay Kumar (legal heir of the first party) owner part of the bearing property No.Y-316 & 317, situated at Camp No.1, Nangloi, Delhi, go to ownership only one room 10' x 20' with kitchen said space only part of the property No.Y-316, common stair case on ground floor and common uses of the both are plot lobby without additional alternation”

(verbatim reproduction)

3. This mutual agreement was signed by all the brothers and their mother. It is the Plaintiff's case that upon the request of the Defendant, 3½ x 20 portion of the Ground Floor was allowed to be retained as some articles/belongings of the Defendant were lying there. The said portion remained in the Defendant's possession, and he refused to vacate the same. Despite intervention of relatives, he did not vacate and finally the Plaintiff got legal notice dated 25th February, 2010 served on the Defendant. However, since the Defendant did not vacate the property despite receipt of the notice, the Plaintiff filed the subject suit seeking the following reliefs:

“a) a decree of possession in favour of the plaintiff and against the defendant in respect of the suit property specifically shown red in the site plan annexed with the plaint.

b) a decree for mesne profits @ Rs.5000/- per month w.e.f. 21.10.2009 and pendete lite and future upto

realization of the possession of the suit property.

c) a decree of permanent injunction in favour of the plaintiff and against the defendant thereby restraining the defendant, his legal heirs, managers, attorneys from parting with the possession of suit property creating third party interest and causing injury damage the same.

d) Cost of the suit may also be decreed in favour of the plaintiff and against the defendant.”

4. The Defendant set up a defense that he is a tenant in the property on a monthly rent of Rs.1,000/-. It was claimed that though the rent was being paid, no rent receipt was issued. It was claimed by the Defendant that he filed a civil suit for injunction being suit no.57/2010 which was decreed in his favour. Thus, it was claimed that the subject suit was a counter blast.

Paragraph 5 of the written statement reads as under:

“5. That the plaintiff has filed a mutual agreement with the suit, and the said mutual agreement was executed between the mother of plaintiff as well as defendant; but defendant later come to know that the executor of the said agreement is not owner of the property in question. In fact father of the plaintiff as well as defendant was owner of the suit property, hence the said agreement has no locus standi in the eyes of law; hence the present suit is liable to be dismissed on this lone ground.”

5. The Defendant claimed that the mother of the parties-Smt. Laxmi Devi had no rights in the property and in any case, he was a protected tenant under the provisions of the Delhi Rent Control Act. On 18th October, 2010, the Trial Court passed the following orders after hearing the parties:

“Replication filed to the written statement of the defendant. File perused for the purpose of framing

issues. From the pleadings of the plaintiff it has been revealed that the plaintiff has filed the present suit being owner of the property on the ground that property stood in the name of mother of plaintiff and defendant who is still alive. Mother of the plaintiff and defendant partitioned/divided the property in equal share among the plaintiff and both the defendants vide partition deed dated 21.10.09. The said deed is not registered one. Here the question arises whether the claim of the plaintiff in the present matter being owner of the property is justified or not. Ld. counsel for plaintiff submitted that with the partition deed dated 21.10.09 the plaintiff became owner of the property and on this score he intend to file certain judgment in support of his contention. Allowed. However it would be appropriate if before proceeding ahead preliminary issue is framed regarding the maintainability of the suit. Accordingly following preliminary issue framed:-

Whether the suit is maintainable in its present form?

OPP

To come up on 10.2.11 for arguments on preliminary issue.”

6. On 16th May, 2011, after hearing the parties, the Trial court came to the conclusion that *prima facie* the suit was maintainable in its current form.

On 10th May, 2013, the following issues were framed by the Trial court:

1. Whether it was the father of the plaintiff and the defendant who was the owner of the suit property? If so, whether the partition deed dated 21-10-09 executed by the mother of the parties thereby bequeathing equal share in favour of the plaintiff, the defendant and their brother in respect of the suit property is not legal and valid? OPD

2. Whether the defendant is a tenant in respect of the suit property under the tenancy of the plaintiff at the monthly rent of Rs. 1000/-? If so, whether the suit is

barred u/s 50 of the Delhi Rent Control Act? OPD

3. If issue nos. 1 & 2 are decided in negative, whether the plaintiff is entitled to a decree for possession, permanent injunction and mesne profits? OPP

4. Relief.”

7. The Defendant thereafter moved an application under Order VI Rule 17 CPC seeking permission to amend the written statement. The same was however dismissed with costs on 24th January, 2014. The amendment sought was to seek permission to add a plea in the written statement that the parents of the parties were not the owners of the suit property and hence there was no need to pay rent. The Trial court, after noticing the plea in the written statement that the Defendant was a tenant and that he used to pay a monthly rent of Rs.1,000/-, held that the stand taken in the amendment is contrary to the plea in the written statement. The Defendant was thus not allowed to set up a new case by way of amendment. Relevant portion of the order dated 24th January, 2014 is set out below:

“VII The amendment which has been sought on behalf of defendant/applicant that the parents of plaintiff and defendant were not owner of the suit property. Hence, there was no need to pay the rent. It has been specifically denied that the plaintiff was the owner of the suit property.

If the Written Statement is perused, it is noticed that the defendant has taken the plea that he was tenant in respect of suit property and was residing in the said premises alongwith his family members. The said premises was taken on rent by him from the plaintiff at the time of a temporary settlement at a monthly rent of Rs.1,000/-.

VIII The suit filed by the plaintiff has been for possession, permanent injunction and mense profit. In the plaint the plaintiff has alleged himself to be the

owner of the suit property.

For determination of dispute between the parties, the plaintiff has to prove that he was the owner of the suit property and he has let out the premises to the defendant which fact he has admitted in the written statement itself. By way of amendment, the defendant has disputed the tenancy of the plaintiff. The stand taken by the defendant in the written statement was contrary to the stand which he has taken in the application for amendment. By way of amendment in the written statement taking the plea that the plaintiff was not the owner of the suit property, the defendant has set up a new case. Such an amendment was not permissible. The amendment sought was not necessary for deciding the real controversy between the parties.

Not only this, it is noticed that the application for amendment has been made by the defendant after the issues were framed and the case was listed for evidence. Even the defendant was directed to lead evidence and inspite of filing the affidavit, he has moved the present application. Under such circumstances, the amendment does not deserve to be allowed. Therefore, the application under Order 6 Rule 17 of CPC for amendment in the written statement stands dismissed with cost of Rs.1,000/-.”

This order was challenged in CM(Main) 656/2014 and was dismissed as not pressed on 14th July, 2014.

8. The Trial Court thereafter recorded evidence of parties and decreed the suit. The Plaintiff appeared as PW-1. The Plaintiff stated in his cross-examination that though initially they were all staying together, since 1988, he started residing separately in the same premises. He claimed that the Ground Floor and the First Floor were constructed by his parents and the Second Floor onwards was constructed by him with his own funds. He

stated that the third brother, Mr. Ajay Kumar and his mother were residing together and due to the arrogant and aggressive attitude of the Defendant, the two brothers and the mother are not on speaking terms with the Defendant.

9. The Defendant appeared as DW-1 but the documents exhibited by him have been given DW2 series numbers. He confirmed that the entire Ground Floor of the property including the three shops, out of which two shops are in his possession, including the suit property. The cross-examination seeks to point out various portions of the affidavit which are beyond his written statement. It, therefore, clearly appears that in the affidavit, the Defendant sought to set up a completely new case then what was pleaded in his written statement. This is not permissible in law. The most important part of his cross-examination is as under:

“It is correct that Ex.DW.2/PX-2 was executed between my mother Smt. Laxmi Devi and plaintiff Rajesh Kumar, myself and my brother Mr. Ajay Kumar. The same bears my signature at point A to E. Vol. The same was signed by me under pressure. It is wrong to suggest that Ex.DW.2/PX-2 was voluntarily signed by me under no pressure. I have not mentioned the fact of pressuring me to sign Ex.DW2/PX-2 in my written statement as well as EX.DW.2/PX-1. It is correct that in my present written statement as well as EX.DW.2/PX-1, I have stated that the above said agreement was mutually executed and acted upon in our family. Vol. I have stated so as at that time I was not aware of actual owner of the suit property. It is correct that as per Ex.DW.2/PX-2, the suit property falls in the share of plaintiff and the same was accepted by myself and my other family members. We have been residing in the property No, Y-316 and 317 since 1973. It is correct that since 1973 nobody

including Shri Ajmeri S/o Ram Jani has got issued any notice or filed any case to dispute possession of our father and family over the suit property.”

10. In the above extracted part of his deposition, the Defendant admits the execution of the mutual agreement between his mother and all three brothers. He also recognized and identified all his signatures on the said document. He confesses that he had not taken a plea in the written statement that the document was executed under pressure, which he stated in his affidavit. He seeks to justify that the admission in respect of the mutual nature of his agreement was because of his ignorance of the fact that his parents were not the actual owners of the property. He further admits that as per the said mutual agreement, the suit property falls in the share of the Plaintiff and that he had accepted the same. On a specific suggestion as to whether anyone else has claimed any rights in the suit property, he admits that nobody has claimed any rights or issued any notice in respect of the suit property. He further admits that in the earlier suit filed by him being suit no.57/2010, he had admitted the execution of the mutual agreement. The relevant part of the said suit is extracted herein below:

“2. That after the death of the father of the parties the said property was mutated in the name of the mother of the plaintiff and the defendants.

*3. That after mutual family **settlement/agreement dated 21.10.2009** the said property was mutually partitioned between the plaintiff, defendant, and Shri Ajay. The copy of the agreement is enclosed herewith.”*

11. He further admits in his cross examination as under:

“It is correct that as per mutual agreement the suit property belongs to the plaintiff and I am liable to

hand over the possession of the same to the plaintiff”.

12. The Defendant also produced a second witness, Mr. Virender Kumar, UDC (*described as DW1 in the Trial court record*) from the Delhi Urban Shelter Improvement Board (*hereinafter ‘DUSIB’*) office brought the records to show that as per the allotment register, Y-316 was allotted to Sh. Ganga Prasad, son of Sh. Mohan Lal and Y-317, Nangloi, Camp No. 1, Delhi-110041 was allotted to one Sh. Ajmeri. The said official also confirmed that in this area, sale, purchase of the property has been permitted but the suit property has not yet been converted from leasehold to freehold. Sh. Ganga Prasad is the father of the parties.

Analysis and Findings

13. A perusal of the documents and the evidence on record clearly shows that the mutual agreement entered into by the mother along with the three sons is fully admitted by both the Plaintiff and the Defendant. In fact, the said mutual agreement has been admitted by the Defendant in the earlier suit which was filed by him seeking permanent injunction. In the said suit, the Defendant not only admits the mutual agreement dated 21st October, 2009 but also admits all the three separate portions as has been extracted in paragraph 2 above, have fallen into the share of all the three brothers. In the said suit, the case set up by the Defendant was that the property was leased out to him on a monthly rent. In the said suit, the Plaintiff herein took the plea that the rent of Rs.1,000/- was incorrect and that the suit property Y-317 was capable of fetching rent of Rs.5,000/- to Rs.10,000/- per month. In the said suit, the Plaintiff herein gave the following statement:

“I am defendant in the present matter. I have

already filed a suit for possession, permanent injunction and mesne profits against the plaintiff which is pending adjudication before the court of Shri Bhupesh Kumar, Ld. ADJ and fixed for 02.06.2010. Hence I will not dispossess the plaintiff without due process of law from the suit property.”

Thus, the suit was then withdrawn by Sh. Sanjay Kumar.

14. It is clear that the Defendant has admitted to the entire case of the Plaintiff in the pleadings and evidence as enumerated below:

- i) Complaint in suit no.57/2010 paragraph 2 to 5;
- ii) Written statement in the present suit in paragraph 5 wherein mutual agreement is admitted;
- iii) Cross-examination in paragraph 9 & 11 as extracted above.

15. Thus, the Defendant having admitted the terms of the mutual agreement cannot be allowed to resile from the same on the plea that his parents were not the owners of the suit property. Clearly, from the deposition of the officials from DUSIB, sale and transfer of property was taking place in the colony. The family of the parties has been living in this premises since 1973. This being the position, the plea of the Defendant that his parents were not the owners cannot be accepted. Moreover, the mother of the parties duly entered into the mutual agreement with all three brothers which is itself an admitted document. The electricity and telephone bills, property tax documents placed on record show that the family has been residing in this property. The Defendant himself having filed a suit claiming rights in the suit property is bound by the admission in the said suit. Thus, under Order XII Rule 6, the present suit is liable to be decreed in view of the admissions in the earlier suit filed by the Defendant. Be that as it may, the

Defendant having obtained advantage on the basis of a particular plea cannot resile from the same.

16. The Trial Court is right in observing that the Defendant has taken mutually destructive pleas. The fact that the parties have been staying in Y-316 and Y-317 is not in dispute. There is no evidence to show or to establish the plea that the mutual agreement was entered into under pressure. The evidence of the official from DUSIB does not by itself mean that the parents of the parties did not have rights in the suit property. It is an admitted position that no one else has claimed any rights to the property. From the records produced by the official of DUSIB, it is clear that Y-316 was allotted in the name of Sh. Ganga Prasad i.e. the husband of Smt. Laxmi Devi. They were the parents of the parties. The documents relating to property tax show that even qua Y-317 either of the brothers has been paying property tax and they are running their shops as well. It cannot be therefore held that the property belongs to a third party.

17. The documents on record are sufficient to hold that the Plaintiff has acquired rights under the mutual agreement. The Mutual agreement is in the form of a family settlement. The plea of the Ld. Counsel for the Defendant is that the mutual agreement is not a registered document and hence does not confer any rights. He submits that the title has to be proved beyond any doubt and if there is a cloud on the title, decree of possession cannot be granted. He relies on the following judgments:

- ***Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria***
AIR 2012 SC 1727
- ***Anathula Sudhakar v. P. Buchi Reddy*** ***AIR 2008 SC 2033.***

18. It is the settled position in law that absolute title would have to be

proved against a trespasser but where the parties are in relationship with each other and only the mutual rights have to be decided, absolute title does not have to be proved.

19. The Defendant having admitted the mutual agreement which is in the nature of a family settlement is fully recognized. As per the judgment of the Supreme Court in ***Kale v. Deputy Director of Consolidation (1976) 3 SCC 119***, no registration of such a document is needed. In ***M/s Saurabh Buildcon Pvt. Ltd. v M/s Aster Technologies Pvt. Ltd. & Anr. [CS(OS) No.2498/2012 dated 10th December, 2012]***, a Learned Single Judge of this court has held as under:

“5. I am unable to agree with the submissions as made on behalf of the defendants that the plaintiff is not the ‘owner’ of the suit premises. Firstly, an owner to whom possession can be granted need not to be a complete owner of the suit premises, and all that is required is that the plaintiff must have a better title to the suit premises than the defendant. Secondly, the Agreement to Sell dated 29th December, 2009 being duly stamped and registered, the plaintiff is entitled to legal rights flowing from the doctrine of part performance contained in Section 53A of the Transfer of Property Act, and therefore, plaintiff has the requisite title for being entitled to file the suit for recovery of possession.”

20. In ***Suresh Srivastava v. Subodh Srivastava (2012) ILR 6 Del 272***, on family settlements, a Learned Single Judge of this court has observed as under:

“14. I must at this stage state that Courts have repeatedly observed that family settlements which settle the disputes between the parties, bring family peace, and therefore peace in the community must be

endeavoured to be upheld and not to be set aside. I think this rationale squarely applies in the facts of the present case. That a family settlement is not required to be stamped or registered is now well settled law and reference can be made to the celebrated judgment in the case of Kale & Ors. Vs. Dy. Director of Consolidation & Ors AIR 1976 SC 807”

21. Moreover, recently on 13th April, 2018 in **Vinod Kumar v. Asha Devi [RFA 476/2015]** this Court has, after discussing the case law relating to family settlements held that no registration is required in the case of a family settlement. The relevant portion is extracted below:

*“25. Even this Court in **Bhagwan Krishna Gupta v. Prabha Gupta ILR (2008) 2 Del 79** has taken a view that a “family settlement can be oral and need not be in writing. An oral family settlement is binding on the parties and need not be registered.” Thus, oral family settlements are recognised in law and are binding on the members of the family.”*

22. In view of the above discussion, the Trial Court’s findings that the Plaintiff is the owner of the property for the purpose of seeking possession against the Defendant is upheld. This answers issue no.1.

23. Insofar as issue no.2 is concerned i.e. whether the Defendant is a tenant under the Delhi Rent Control Act, there is no shred of evidence to show that the Plaintiff had collected Rs.1,000/- per month as use and occupation charges or as rent. This issue has been rightly decided in favour of the Plaintiff. The Plaintiff is thus entitled to the decree of possession.

24. Insofar as mesne profits is concerned, the Defendant appears to be running a shop in an extremely densely populated area and earning huge profits. Thus, the Defendant is liable to pay mesne profits. The amount of

mesne profits prayed for by the Plaintiff in the prayer is Rs.5,000/- but the amount awarded by the Trial Court is Rs.8,000/- which is not permissible. The suit is thus, decreed for possession and mesne profits. The Defendant is directed to handover possession of the property bearing shop measuring 3^{1/2} x 20 ft. situated on the Ground Floor of property no.Y316 & 317, J.J. Colony, Camp No.1, Nangloi, Delhi as per the site plan filed on record of the Ground Floor of the property. It is further decreed that the parties shall be bound by the mutual agreement dated 21st October, 2009. The Defendant is directed to pay use and occupation charges @ Rs.5,000/- per month w.e.f. 21st October, 2009 till date of handing over of possession. The Plaintiff is also awarded interest @ 8% per annum on the decretal amount w.e.f. 21st October, 2009.

25. Appeal is dismissed. No order as to costs.

JUNE 01, 2018

Rahul

**PRATHIBA M. SINGH
JUDGE**