

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

% **Date of decision: 23rd October, 2018.**

+ **CS(OS) 632/2016**

SUDESH BALA & ORS

..... Plaintiff

Through: Mr. Sumit Kumar, Adv.

Versus

VINOD KUMAR & ORS

..... Defendants

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The five plaintiffs namely (i) Smt. Sudesh Bala; (ii) Smt. Aadesh; (iii) Smt. Suresh; (iv) Smt. Minakshi; and, (v) Smt. Kamal have instituted the present suit for (a) declaration of the Sale Deed dated 15th September, 2004 executed by defendant No.1 in favour of the defendant No.2 in respect of 1/16th share in Khasra No.58 (1-18) and 78/11 (2-0) situated in Extended Laldora of Village Samalkha, Delhi to be null and void and not binding on the plaintiffs; (b) declaration that the Gift Deed dated 10th November, 2006 executed by defendant No.2 in favour of the defendant No.1 in respect of 1/16th share in Khasra No.58 (1-18) and 78/11 (2-0) situated in Extended Laldora of Village Samalkha, Delhi is null and void and not binding on the plaintiffs; (c) declaration of the Sale Deed dated 14th February, 2006 executed by defendant No.1 in favour of the defendant No.3 in respect of 1/16th share in Khasra No.58 (1-18) and 78/11 (2-0) situated in Extended Laldora of Village Samalkha, Delhi to be null and void and not binding on the plaintiffs; (d) declaration of the Sale Deed dated 5th May, 2009 executed by defendant No.1 in favour of the defendant No.2 with respect to built up property measuring 70 sq. yds. i.e. 6/40 share in Khasra No.78/13/2 min (0-

7) and 78/16 (1-9) situated in Extended Laldora of Village Samalkha, Delhi as null and void and not binding on the plaintiffs; (e) declaration of the Sale Deed dated 5th May, 2009 executed by defendant No.1 in favour of the defendant No.2 in respect of built-up property measuring 200 sq. yds. i.e. 6/40 share in Khasra No.78/13/2 min (0-7) and 78/16 (1-9) situated in extended Laldora of Village Samalkha, Delhi as null and void and not binding on the plaintiffs; (f) partition of properties shown in red colour in the site plan Annexure A, B & C to the plaint; and, (g) permanent injunction restraining the defendants from dealing with the properties.

2. The suit was entertained and vide *ex-parte* ad-interim order dated 23rd December, 2016, the defendants restrained from creating any third party interest in the properties. The defendants failed to appear inspite of service and their right to file written statement was closed vide order dated 5th May, 2017 and vide order dated 4th July, 2017, the defendants were proceeded against *ex-parte* and the plaintiffs relegated to leading *ex-parte* evidence and the *ex-parte* ad-interim order made absolute till the decision of the suit.

3. The plaintiffs, in their *ex-parte* evidence, besides examining plaintiff No.2 Smt. Aadesh, have examined Naresh, native of Village Samalkha and known to the plaintiffs as PW-2, UDC from the office of Sub-Registrar, Kapashera as PW-3 and an Assistant from National Institute of Open Schooling as PW-4 and closed their *ex-parte* evidence.

4. It is the case of the plaintiffs in the plaint, (i) that the five plaintiffs are the sisters of the defendant No.1; (ii) that the defendant No.2 Smt. Leela

Wati is the wife of defendant No.1 and defendant No.3 Nitin Kumar is the son of defendants No.1&2; (iii) that the defendant No.4 Smt. Chameli Devi is the mother of the plaintiffs and defendant No.1; (iv) that the father of the plaintiffs and the defendant No.1 was the owner of (a) built up house measuring 476 sq. yds. situated in Laldora Abadi Village Samalkha, Delhi; (b) built up house measuring 88 sq. yds. situated in Laldora Abadi of Village Samalkha, Delhi; and, (c) built up house measuring 35 sq. yds. situated in Laldora Abadi of Village Samalkha, Delhi; (v) that the father of the plaintiffs and defendant No.1 died on 2nd January, 1990 and his estate was inherited by the plaintiffs, defendant No.1 and defendant No.4 in equal shares; (vi) that the defendant No.1, in April, 2013, in settlement of the share of the plaintiffs in the father's estate, gave a built-up house measuring 88 sq. yds. to the plaintiffs with promise to give other properties also to the plaintiffs; (vii) that the defendant No.1 has however thereafter not given any other property to the plaintiffs; (viii) that in October 2016, defendant No.3 disputed any claim of the plaintiffs in the properties and disclosed about the sale deeds, gift deeds aforesaid executed by the defendants *inter se*; (ix) that the sale deeds are a nullity as the same have been executed, without any sale consideration because the defendant No.2 is a house wife and even otherwise there is no question of sale transaction between husband and wife; (x) that at the time of the sale deed in favour of the defendant No.3, the defendant No.3 was a minor and could not have been possessed of sale consideration stated to be paid under the sale deed in his favour; (xi) even otherwise, once the defendant No.1 had executed sale deed, he could not have again executed another sale deed with respect to the same

property; (xii) that the defendant No.1 even otherwise was not entitled to execute sale deed of more than 1/7th share in the property which alone was owned by him in the estate of the father; and, (xiii) that the plaintiffs, in December, 2016 again requested the defendants for their share but were refused.

5. The plaintiff no.1 appearing as PW-1, in her affidavit by way of examination-in-chief has merely reiterated the contents of the plaint and not otherwise proved any of the averments in the plaint. PW-2 Naresh in his affidavit by way of examination-in-chief though has stated that the father of the five plaintiffs and the defendant no.1, and who was the husband of the defendant no.4, was the owner of the properties mentioned in the plaint and that he died leaving the five plaintiffs, defendant no.1 and defendant no.4 as his heirs, has also not otherwise proved either of the said averments. PW-3 brought the Sale Deeds/Gift Deeds qua which reliefs of declaration have been claimed and certified copies of which were tendered by the PW-1 in evidence. PW-4 produced the mark sheet of Secondary School Examination taken by the defendant no.3, to prove the date of birth of defendant no.3.

6. The counsel for the plaintiffs has merely repeated the facts stated in the plaint and not urged any other argument.

7. I have considered, whether to, on the basis of unrebutted statements by way of examination-in-chief of the plaintiff no.1 appearing as PW-1, grant the reliefs claimed in the suit and find myself unable to do so for the following reasons:-

A. The gravamen of the claim of the plaintiffs in the suit is that

the properties, Sale Deeds and Gift Deeds *inter se* defendants with respect where to are sought to be declared as null and void and of which partition is sought in the suit, were the properties of the father of the plaintiffs who died intestate leaving the plaintiffs, defendant no.1 and defendant no.4 as his heirs and each of whom inherited 1/7th share in the said properties. Without the plaintiffs proving that the said properties were owned by the father, the plaintiffs neither have any right to seek declaration as null and void of the Sale Deeds/Gift Deeds *inter se* defendants nor a right to seek partition of the said properties. It was thus incumbent on the plaintiffs to prove the same.

- B. The plaintiff no.1, in her affidavit by way of examination-in-chief, has in a parrot like fashion merely repeated what is pleaded in the plaint i.e. that the father was the owner of the said properties. PW-2 claiming to be a native of the village where the properties are situated has supported the plaintiffs and has reiterated that the father of the plaintiffs was the owner of the said properties. Though ordinarily such un rebutted statements, when the defendant is *ex parte*, are accepted but in the present case I am unable to do the same for the reasons hereafter appearing.
- C. The plaintiffs themselves have proved before the Court the Sale Deeds/Gift Deeds *inter se* qua which the relief of declaration as null and void is claimed. Each of the said

documents proved as Ex.PW-1 to Ex.PW-1/7, in the recitals thereto records that the transferor, whether as seller or donor was the sole absolute and exclusive owner in possession of the properties subject matter thereof and the said property stood mutated in the name of the transferor in the revenue records as owner and the property under transfer was the self acquired property of the transferor and the transferor had full right to transfer the same.

- D. Even though the defendants had chosen not to contest the suit but in the circumstances it was still incumbent on the plaintiffs to in their *ex parte* evidence prove, otherwise than by their bare statement, that the properties were owned by the father. The plaintiffs have failed to do so.
- E. Merely because the defendant is *ex parte* does not in all cases relieve the plaintiffs from proving title in the ordinary mode by which title is proved in law. The ordinary mode by which title relating to immovable property is proved is by proof of title documents of the property. The counsel for the plaintiffs at this stage interjects and states that the properties were ancestral properties of the father of the plaintiffs. Though it is not so pleaded in the plaint and is not so deposed in the *ex parte* evidence but even if it be so and no title documents in the name of the father with respect to the properties are available, the plaintiffs were still required to prove the revenue records regarding the property in the name of the father of the parties

and which also the plaintiffs have failed to do.

- F. The father of the plaintiffs is stated to have died as far back as on 2nd January, 1990. This suit, *inter alia* for partition has been filed on 21st December, 2016 i.e. after 26 years of the date when the plaintiffs claimed to have inherited a share in the property. Though there is as such no limitation prescribed for seeking partition of immovable property but such long delay added to the burden on the plaintiffs to prove their entitlement and which burden the plaintiffs have failed to discharge.
- G. The plaintiffs, conscious of the said fact and perhaps to explain the delay, have pleaded and the plaintiff no.1 has deposed that the defendant no.1 in April, 2003, in part settlement of the share of the plaintiffs in the father's estate, gave a built-up house measuring 88 sq. yds. to the plaintiffs with promise to give other properties also to the plaintiffs. However the plaintiffs have again failed to prove that any such house was given by the defendant no.1 to the plaintiffs in April, 2013. Neither any document of transfer of the said house by the defendant no.1 in favour of the plaintiffs nor any document to show possession of the plaintiffs of the said house has been proved. In fact there is no proof that the plaintiffs, since demise of the father on 2nd January, 1990 and till the institution of the suit on 21st December, 2016, were exercising any right of ownership or share in ownership with respect to the properties qua which the suit has been filed. If any such house

was given by the defendant no.1 to the plaintiffs in April, 2013, it is inconceivable that there would have been no record thereof.

- H. Further, if the properties belonged to the father of the plaintiffs and the plaintiffs had inherited a share therein, as is the case of the plaintiffs in the suit, the question of the defendant no.1 “giving” any house out of the estate of the father to the plaintiffs would not have arisen and at best, in partial partition the said house would have come to the exclusive share of the plaintiffs. The use of the word “gave” itself shows that it was the defendant no.1 who was the owner of the property and entitled to ‘give’ the same to whosoever he desired/wanted.
- I. The other grounds impugning the Sale Deeds and Gift Deeds *inter se* defendants, save ground of the defendant no.1 being not the sole owner thereof, are no grounds in law. The plaintiffs as third parties to the Sale Deed, cannot challenge the Sale Deed on the ground of the same being without any consideration. Reference in this regard may be made to ***Muddasani Venkata Narasaiah Vs. Muddasani Sarojana*** (2016) 12 SCC 288. The Sale Deeds record payment of sale consideration by the transferee and receipt thereof by the transferor and the plaintiffs have no locus to aver that the Sale Deeds are without sale consideration. The reason given for the Sale Deeds being without consideration i.e. that the defendant no.2 or defendant no.3 having no source of income is also no

ground in law. The notion held by the plaintiffs of sale to minor being not possible is also unsustainable in law. Similarly, the plaintiffs have a misconceived notion that there can be no sale transaction between husband and wife.

8. The plaintiffs having failed to prove their case, the suit is dismissed. However, no costs.

OCTOBER 23, 2018

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RAJIV SAHAI ENDLAW, J.

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