

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **RSA 151/2018 & CM APPL. 44187/2018**
NARINDER KHULLAR & ANR Appellants

Through: Mr. Manish Aggarwal, Advocate.
Versus

UMESH UPPAL Respondent

Through: Mr. Ramesh Kumar, Advocate.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA
JUDGMENT (ORAL)

% **05.12.2018**

ANU MALHOTRA, J.

1. Submissions have been made on behalf of either side qua the aspect of formulation of substantial questions of law.
2. The appellants have assailed the impugned judgment of the learned Trial Court of the Court of the Civil Judge-06, Central in Suit No.243/11 and the verdict of the First Appellate Court in RCA No.61071/16 dated 09.07.2018 of the Court of the learned ADJ-04, Central vide which the appeal filed by the appellants herein before the First Appellate Court assailing the impugned judgment of the learned Trial Court was dismissed.
3. Vide the suit filed by the plaintiff arrayed as the respondent to the present appeal, the plaintiff had sought the partition of an immovable property contending to the effect that the plaintiff and the defendant nos. 1 & 2 arrayed as the

appellants to the present appeal were joint owners of the property bearing No.153-A situated at Khasra no.589/333, Sarai Rohilla, Old Rohtak Road area of Village Chowkri Mubarkabad, Delhi and it was submitted to the effect that the plaintiff i.e. the respondent to the present appeal had purchased half portion of the property bearing No.153-A, measuring about 50 sq. Yds., comprising of one hall with tin roof sheets and the other remaining half portion measuring 50 sq. Yds. of the property was purchased by the defendant no.1 arrayed to the said suit and arrayed on record as appellant no.1 to the present appeal and it had been submitted through the said plaint that the plaintiff and the defendant no.1 had become joint owners of the said property with a total area measuring 100 sq. Yds. and it was further contended that the suit property had not been partitioned by metes and bounds and that the defendant no.1 i.e. the appellant no.1 to the present appeal had transferred his share i.e. 50 sq. Yds. of the suit property in favour of his wife i.e. the defendant no.2 arrayed as appellant no.2 to the present appeal.

4. It was submitted before the learned Trial Court by the plaintiff i.e. the respondent to the present appeal that the plaintiff had approached the defendants a number of times for partition of the said property by metes and bounds which they avoided and that even when the plaintiff on 05.08.2004 had finally approached the defendants for partition of the said property, they refused to do so and thus the plaintiff sought the grant of a decree of partition. As indicated vide the judgment

dated 04.06.2015 of the learned Trial Court, the defendants claimed that the suit property was not a plot and was in the shape of a hall constructed over a piece of land measuring 100 sq. Yds. and stated **“that the same was in the possession of the defendants (the appellant nos. 1 & 2 herein) since the year 1995”** and was under their lock and key and categorically denied that the suit property was in joint possession. Furthermore, the defendants also denied that the plaintiff was co-owner/ co-sharer in the suit property.

5. The learned Trial Court vide the judgment dated 04.06.2015 on adjudication of the issues framed on 19.11.2008, which issues read to the effect:-

- (i) ***Whether the plaintiff is entitled for preliminary decree of partition in respect of suit property as prayed? OPP***
- (ii) ***Whether the plaintiff is entitled for the final decree of partition as prayed? OPP***
- (iii) ***Whether the present suit is hit by provisions of section 185 DLR Act as claimed? OPD***
- (iv) ***Whether the present suit has not been properly valued for purposes of Court fee and jurisdiction as claimed? OPD***
- (v) ***Whether the suit is not maintainable in view of other preliminary objection raised in the WS? OPD***
- (vi) ***Relief.”***

and observed categorically to the effect vide para 16 of the said judgment, which reads to the effect:-

“16. Even in the evidence defendant/DW-1 has clearly admitted in his testimony dated 13.08.2013 that he and the plaintiff purchased one half undivided share each in the suit property. Defendant/DW-1 has even gone to the extent of clearly deposing that plaintiff has never relinquished his one half share in writing. The relevant excerpt regarding this contained in the testimony dated 09.02.2013 is reproduced as under:-

“It is correct that as per documents plaintiff is the owner of the ½ share of the suit property. There is no physical partition ever done of the suit property. The plaintiff has never relinquished his ½ share in writing.”

From the above it is clear that in the present case there is no dispute as to the equal share of the parties in the suit property. However, so far as defendant no.1 transferring his share i.e. 50 sq yrds to his wife i.e. defendant no.2, there is no dispute raised by the plaintiff who admits this transfer.”

which indicated that the defendant no.1 i.e. the appellant no.1 in his testimony dated 13.08.2013 had categorically admitted that he and the plaintiff i.e. the respondent to the present appeal purchased ½ undivided share each in the said property and also stated that the plaintiff i.e. the respondent to the present appeal had never relinquished his one half share in writing. The relevant portion of the testimony dated 09.02.2013 of DW-1 i.e. the defendant no.1 is as under:-

“It is correct that as per documents plaintiff is the owner of the ½ share of the suit property. There is no physical partition ever done of the suit property. The plaintiff has never relinquished his ½ share in writing.”

6. It was thus apparent as held by the Trial Court that there was no dispute as to the equal share of the parties in the suit property and that the factum of the defendant no.1 i.e. the appellant no.1 having transferred his share i.e. 50 sq. Yds. to his wife/ defendant no.2 i.e. the appellant no.2 herein was not disputed by the plaintiff i.e. the respondent to the present appeal also. In his testimony dated 09.02.2015 on examination as DW-1, the appellant herein is indicated to have categorically stated that there was no document to the effect that the plaintiff would not demand any partition of the suit property unless he returned an amount allegedly due to him in relation to which amount, it has been submitted that there is civil suit for recovery which is pending. In any event the pendency of such civil suit for any recovery to be effected by the appellants from the respondent is

de hors the issue of partition raised in the civil suit disposed of vide the impugned judgment dated 04.06.2015.

7. Another contention that was sought to be raised on behalf of the defendants arrayed as the appellants to the present appeal before the learned Trial Court was to the effect that the plaintiff was without possession and that the suit must fail as no relief of possession had been sought. Vide para 22 of the judgment of the learned Trial Court, it is indicated that a Local Commissioner was appointed who submitted his report Ex.DW1/P1 the contents of which read to the effect:-

“ 22. During the course of final arguments it was argued by the Ld. Counsel for the defendant that the plaintiff is without possession and the present suit must fail as no relief of possession has been sought. This contention was opposed by Ld. Counsel for the plaintiff who argued that both parties are in joint possession. In this regard firstly, it is noted that a Local Commissioner was appointed in the beginning of the suit who gave his report Ex.DW1/P1 along with photographs and stated that there were two iron shutters and a grilled rolling shutter in between them and thus there were 3 shutter and the outer shutter was broken having no lock, the grill gate after this was opened by the workers of defendant and thereafter the last gate i.e. iron shutter was having 3 locks and out of which 2 locks are not working and both

parties were having key of the outside lock. It is observed that the defendant/DW1 in his testimony dated 09.02.2015 clearly deposed that he is satisfied with the Local Commissioner report Ex.DW-1/P1. When it was suggested to DW-1 that both parties had one key each he denied the same and then only volunteered to state that the plaintiff had duplicate key which he got manufactured. It is pertinent to note that no such objection was raised by defendant either before the proceedings of the Local Commissioner, who was appointed on 14.09.2004 till his inspection of the suit property on 01.10.2004 or prior to this date of his cross examination while even he filed his WS (original WS) in November, 2004 i.e. after the Local Commissioner visit. Even no complaint is seen to be made regarding the plaintiff allegedly having made/ manufactured a duplicate key. This clearly implies that defendants had knowledge of the plaintiff having duplicate key and which cannot be necessarily said to have been obtained without defendants' knowledge. Thus, it cannot be said that the plaintiff did not have a joint possession with the defendants in the suit property. it may also be noted here that admittedly the suit property even today consists just a hall without any further construction. Merely, that some drums are kept in it, which even is not proved to whom it belongs, cannot make the plaintiff without possession. Even otherwise the suit property being just a godwon

having no construction except for the entry door/shutters, of which plaintiff even has the key, therefore, the possession goes along with title.”,

and it has been specifically stated that DW-1 i.e. the appellant no.1 in his testimony dated 09.02.2015 had categorically deposed to the effect that he was satisfied with the Local Commissioner's report Ex.DW1/P1. The learned Trial Court has also taken into account the aspect that the report Ex.DW1/P1 indicated that both the plaintiff and the defendants had one key each of the suit premises though initially DW-1 i.e. the appellant no.1 denied the factum of both parties having one key each, went on to volunteer that the plaintiff i.e. the respondent herein had a duplicate key which he had got manufactured in relation to which no such objection is indicated to have been raised by the defendants i.e. the appellants herein neither before the Local Commissioner appointed on 14.09.2004 nor on the date of the inspection of the suit property i.e. 01.10.2004.

8. In the circumstances, the observations of the learned Trial Court to the effect that the defendants would thus have to be held to have the knowledge of the plaintiff having a duplicate key and it could thus not be necessarily said to have been obtained without the defendants i.e. the appellants knowledge.

9. Vide the judgment dated 04.06.2015, the learned Trial Court thus granted a final decree for partition in favour of the

plaintiff and against the defendants holding that the plaintiff was entitled to and the defendants were liable for partitioning the suit property i.e. property bearing no. 153-A, measuring about 100 sq. Yds., bearing Khasra no.589/333, situated at Sarai Rohilla, Old Rohtak Road, area of Village Chowkri Mubarkbad, Delhi by metes and bounds equally in terms of para 23 and 24 of this judgment.

10. The First Appellate Court on the appeal filed by the appellants herein in RCA No.61071/16, made an observation qua the submission that the respondent vide a mutual agreement arrived at between the parties in the year 1995 had abandoned his rights over the suit property that the said aspect had already rightly been refuted vide the judgment of the learned Trial Court and it was categorically observed vide the judgment of the First Appellate Court that there was nothing on the record to indicate even the mentioning of a date or month of any mutual family settlement arrived at between the appellants and the respondent whereby the respondent was stated to relinquish any rights in favour of the appellants herein.

11. During the course of submissions that have now been made what is sought to be urged on behalf of the appellants is that there are separate documents of property in relation to the 50 sq. Yds. in property bearing no.153-A, at Khasra no. 589/333, situated at Khasra no.589/333, Sarai Rohilla, Old Rohtak Road area of Village Chowkri Mubarkabad, Delhi in

favour of the appellant no.1 and the respondent herein and thus when there were two separate sets of documents, there was no partition of the said property required. During the course of submissions made before the learned Trial Court as observed vide para 23 of the judgment dated 04.06.2015 of the learned Trial Court, it is indicated that a submission was made on behalf of the defendant no.1 i.e. the appellant no.1 herein by his counsel that physically the share in the suit property was not ascertained in relation to which there was a submission made on behalf of the plaintiff adverting to the title document Ex.PW1/2 which described the suit property. During the course of submissions made now, it has been submitted on behalf of the appellants that the said contention raised before the learned Trial Court was erroneous. Apparently, taking into account the submission that had been made before the learned Trial Court to the effect that there had been no ascertainment of the share in the suit property, the grant of a decree of partition in the circumstances cannot be held to be erroneous. The learned Trial Court verdict also categorically indicates that DW-1 i.e. the appellant no.1 herein had categorically stated that *“It is correct that the plaintiff has a right to claim his one half share in the suit property”* though he went on to state that the said right arose only after the payment of money due upon him in relation to which it was not so mentioned in the pleadings or affidavit in relation to what amount of money he had to receive from the plaintiff i.e. the respondent herein qua which it has also been

submitted during the arguments addressed today that there is a civil suit for recovery in relation to such payments of money to be made allegedly by the respondent to the appellants which is pending. The testimony dated 09.02.2015 of the appellant no.1 examined as DW-1 also during the course of proceedings in the Civil Suit bearing no. 243/11, indicates that it was stated by the appellant no.1 *“there is no document to the effect that the plaintiff will not demand any partition of the suit property unless he returns the amount allegedly due to him.”*

12. The circumstances of the case as brought forth through the judgment dated 04.06.2015 of the learned Trial Court and the judgment dated 09.07.2018 of the First Appellate Court in RCA 61071/16 which bring forth the concurrent findings on facts, cannot be assailed through the present second appeal in terms of Section 100 of the CPC inasmuch as there is nothing on the record to indicate that the findings of the learned Trial Court or the First Appellate Court were in any manner perverse or not as per the evidence led on record.

13. Another contention raised during the course of submissions made before the First Appellate Court to the effect that there was no preliminary decree directed to have been passed and that a final decree of partition could not have been ordered in relation to which reliance has been placed on behalf of the respondent to the observations in para 6.1 of the judgment of the First Appellate Court which read to the effect:-

“6.1 The Respondent has submitted that it is not statutorily required that preliminary must follow before passing of final decree. In the course of written argument it is submitted by the Respondent as under:

“In the judgment reported as SLP(C) No.17932/2009 titled as “Subh Karan Bubna v. Sita Saran Bubna” decided on 21.08.2009 in para 9.2 (I), para 10 and in the Appeal (Civil) 2508/1997 titled as “Rachakonda Venkat Rao v. R. Satya Bal” decided by the Supreme Court on 11.09.2003 (second last para) it has been categorically held that it is not always necessary to pass a preliminary decree when share of the parties are not in dispute. A final decree of partition can be passed straightway with or without passing a preliminary decree.”,

and reliance has thus been placed on behalf of the respondent on the verdict of the Hon’ble Supreme Court in **“Shub Karan Bubna @ Shub Karan Prasad Bubna Vs. Sita Saran Bubna and Ors.”** decided on 21.08.2009 reported in 2010(79) ALR 144 with observations in para 9.2 specifically to the effect:-

“9.2 In regard to immovable properties (other than agricultural lands paying land revenue), that is buildings, plots etc. or movable properties:

(i) where the court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the court will

pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds.

(ii) where the division by metes and bounds cannot be made without further inquiry, the court will pass a preliminary decree declaring the rights of the parties interested in the property and give further directions as may be required to effect the division. In such cases, normally a Commissioner is appointed (usually an Engineer, Draughtsman, Architect, or Lawyer) to physically examine the property to be divided and suggest the manner of division. The court then hears the parties on the report, and passes a final decree for division by metes and bounds.

The function of making a partition or separation according to the rights declared by the preliminary decree, (in regard to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions. When the Commissioner gives his report as to the manner of division, the proposals contained in the report are considered by the court; and after hearing objections to the report, if any, the court passes a final decree whereby the relief sought in the suit is granted by separating the property by metes and bounds. It is also possible that if the property is incapable of proper division, the court may direct sale thereof and distribution of the proceeds as per the shares declared.”,

wherein it has been categorically laid down as a principle emerging in relation to partition suits that in relation to immovable properties i.e. buildings, plots etc. or in relation to moveable properties, where the Court can conveniently and without further inquiry make division without the assistance of any Commissioner or where the parties agreed upon the manner of division, the Court will pass a single decree comprising a preliminary decree declaring the rights of several parties and also a final decree dividing the suit property by metes and bounds.

14. In the circumstances of the case as contended on behalf of the appellants during the course of submissions made, the properties are clearly identifiable and thus as per the documents that are on the record in possession of the appellants and thus the principles laid down in para 9.2 of the verdict of the Hon'ble Supreme Court in **“Shub Karan Bubna @ Shub Karan Prasad Bubna Vs. Sita Saran Bubna and Ors.”** (supra) clearly apply and it is held that there is no infirmity in the verdict of the learned Trial Court granting only the passing of a final decree of partition which has been so upheld by the First Appellate Court.

15. In the circumstances, the contended substantial questions of law sought to be formulated which read to the effect:-

“(a) Is a suit for partition of the property maintainable if the joint possession of the said

*property was never proved either of the parties
?*

*(b) Whether a preliminary decree of partition
is required to be granted before passing of a
final decree of partition under statutory
mandate?*

*(c) Whether a final decree can be passed
without considering the material evidences
brought on record and admission made in
cross examination?*

*(d) Whether the suit for partition of a property
is maintainable where admittedly
Plaintiff/Respondent and Appellant/Defendant
are owners by different set of documents?”,*

do not arise in the facts and circumstances of the instant case.
Thus, the present RSA 151/2018 and the accompanying
application are declined and dismissed.

ANU MALHOTRA, J

DECEMBER 05, 2018/NC