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

+ **CS(OS) 2177/2015**

SHRI RAKESH MALHOTRA Plaintiff
Through: Mr. Naresh Thanai, Advocate.

versus

SHRI VIKAS MALHOTRA & ANR Defendants
Through: Mr. Rahul Shukla, Advocate with
Mr. Bhuvan Ravindran, Advocate.

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Reserved on : 04th October, 2018
Date of Decision : 22nd October, 2018

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J:

1. Present suit has been filed for partition by the plaintiff against the children of his deceased brother. The prayer clause in the plaint is reproduced herein below:

“In the facts and circumstances as stated above, it is most respectfully prayed that this Hon’ble Court may be pleased to:-

- a. partition the suit property bearing no.10, Block No.BM admeasuring 324 sq.mtrs. in Shalilmar Bagh Residential Scheme (BM-10, West Shalimar Bagh, New Delhi-110088) and ½ share of plaintiff be separated.*

- b. award cost in favour of plaintiff; and*
- c. any other or further order which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

2. The learned predecessor of this Court had directed the parties to maintain status quo with regard to title and possession of the suit premises vide order dated 27th July, 2015. The said order was confirmed till the disposal of the suit on 23rd February, 2016.

RELEVANT FACTS

3. The relevant facts of the present case are that the plaintiff and his elder brother, Shri Ravindra Kumar Malhotra (father of the defendant no.1), jointly acquired plot No.BM-10, West Shalimar Bagh, Delhi-110088(hereinafter the suit property) vide a perpetual lease deed dated 28th December, 1981.

4. The superstructure on the plot comprises the ground and first floor with an open terrace encompassing a small store and toilet. The construction was jointly raised by the plaintiff and father of the defendant no.1 and was completed in September 1988.

5. It is the case of the defendant no. 1 that in September, 1988, the plaintiff and father of the defendant no.1 orally partitioned the suit property, wherein the first floor with the rear half of the terrace went to the share of the plaintiff and ground floor and front half of the terrace went to share of the father of the defendant no.1.

6. Admittedly, the plaintiff and father of the defendant no.1 executed separate affidavits accepting division of the suit property on 23rd September, 1993. While it is the case of the defendants that the division of the suit

property was for all times to come, the case of the plaintiff is that the division was for the purpose of house tax assessment.

7. On 25th April, 1996 the suit property was converted from leasehold to freehold and conveyance deed was executed by DDA in the names of the plaintiff and father of the defendant no.1.

8. While, father of the defendant no.1 died on 27th October, 2009, mother of the defendants died on 19th April, 2011.

9. The plaintiff filed the present suit for partition on 23rd July, 2015.

10. Vide order dated 16th May, 2016 the following issues were framed:

“i) *Whether the suit property is liable to be partitioned, even in the face of the affidavit of the plaintiff dated 23.09.1993? OPP*

ii) *If yes, its effect? OPP*

iii) *What is the effect of the execution of the lease deed and conveyance deed in respect of the suit property on the aspect of partition? Onus upon parties.*

iv) *Relief.”*

ARGUMENTS ON BEHALF OF THE PLAINTIFF

11. Mr. Naresh Thanai, learned counsel for plaintiff contended that no partition of the suit property had ever taken place between the plaintiff and Shri Ravinder Kumar Malhotra—father of defendants. He stated that for the sake of convenience only, the plaintiff and the father of the defendants had occupied the first and the ground floor respectively. He contended that the alleged partition, if any, was unfair and inequitable as the front and back lawn on ground floor had been appropriated by the defendants. He also

pointed out that terrace and other common areas like store and washroom had been left undivided.

12. Learned counsel for plaintiff emphasised that in 1993, the father of the defendants had got the affidavit signed from the plaintiff on the pretext that it was required for the purpose of House Tax Assessment by Municipal Corporation of Delhi (for short 'MCD'). He contended that the plaintiff later on learnt that the said affidavit had not even been submitted to the MCD. He also contended that there was no intention on the part of the parties to partition the suit property by metes and bounds.

13. Learned counsel for plaintiff submitted that the onus to prove oral partition was on the defendants—which they had failed to discharge. He reiterated that except the plea that the partition had taken place immediately after construction in 1988, no particulars with regard to date or month of the partition or as to who were present at the time of partition had been mentioned in the written statement. He submitted that a Division Bench of this Court in ***Lala Om Prakash Vs. Hari Ram, 116 (2005) DLT 71 (DB)*** has held that when an oral agreement is pleaded, the party must plead precisely the year, month and date of such an oral agreement.

14. In the alternative, learned counsel for plaintiff submitted that whenever the partition is alleged to have taken place in 1988 or 1993, the property was leasehold and therefore there was a bar on partitioning of the land. He emphasised that as the property was leasehold, the land underneath had not been and could not have been divided for use and occupation. According to him, since the land remained joint even after superstructure had been divided, it, at best, could be said to be an arrangement or division of the superstructure and not a partition by metes and bounds.

15. He submitted that even after the oral partition had taken place, the same would have to be undertaken once again in view of the land having been converted to freehold on 25th April, 1996 and being available for partition now. He pointed out that the partition by metes and bounds could take place when the portions of the property of each co-owner are carved out without any interference from other co-owners. He submitted that in case any portion of the property remained joint between the co-owners, the property would have to be partitioned again. In support of his submission, he relied upon the following judgments:-

A. ***Abhay Sapru Vs. Chitralekha Bakshi & Anr. 2008 Vol. 2 AD Delhi 230*** wherein it has been held as under:-

"33.Mere separation of residences or even businesses between the family members does not lead to an inference of partition by metes and bounds (see Madan Lal v. Yoga Bai, (2003) 5 SCC 89). The family settlement Ex.D-1/3 does not deal with, and it could not have dealt with the effect of this arrangement on the respective undivided 1/3rd shares of the parties in the land underneath, which they acquired by inheritance and which right is duly recognised in the settlement Ex.D-1/3. The family settlement does not suggest that the parties had also partitioned by metes and bounds this interest in the land or that on the arrangement being arrived, the defendant No. 1 lost its then owned one-third share in the land. The scheme of the family arrangement itself suggests that it was not a complete and final partition by metes and bounds but a living arrangement arrived at between the parties...."

B. ***Most. Marjadi Devi & Ors., Vs. Jagarnath Singh & Ors., AIR 1983 Pat 129***, wherein it has been held as under:

"The jointness in the Hindu family comes to end when the partition is proved. When partition is proved, then it will be presumed that it was by metes and bounds, unless it is rebutted in evidence by other side. In case plaintiff comes with the case that

there was a partition yet there was no division by metes and bounds the court can certainly reopen if it is proved to the satisfaction of Court that there was partition of shares still the properties were not divided by metes and bounds."

ARGUMENTS ON BEHALF OF THE DEFENDANTS

16. *Per contra*, Mr. Rahul Shukla, learned counsel for defendants stated that oral partition of the property had taken place in September, 1988 after construction of the superstructure. He stated that while the first floor with rear half terrace had gone to the share of the plaintiff, the ground floor and front half of the terrace had gone to the share of Shri Ravinder Kumar Malhotra—father of the defendants. He pointed out that both the floors of the suit property had separate kitchens, independent ingress and egress, separate utility connections like water and electricity. He emphasised that the terrace was divided into two equal portions as only three floors were permitted to be constructed on the plot at that point of time.

17. Learned counsel for defendants stated that so far as the store is concerned, it is a part of the staircase which is being temporarily used for storage. He stated that in case further construction of second floor is carried out, the temporary store as well as the washroom on the second floor would have to be removed. He submitted that even if any area/portion of the property had been left undivided by the parties, then in that eventuality only that common or undivided portion would have to be partitioned again and not the entire property. He emphasised that the front as well as back lawn and set backs are common areas to be used by the owners of the building.

18. Mr. Rahul Shukla, learned counsel for defendants submitted that re-opening of partition due to change in circumstances would be like

'unsettling a bee-hive'. He stated that re-opening of partition due to conversion of land underneath could also lead to re-opening of rights of daughters in those cases where partitions had acquired finality before commencement of the Hindu Succession (Amendment) Act, 2005.

19. He lastly contended that equity is in favour of the defendants as they had invested huge amounts of monies in renovation of the ground floor. He stated that the defendant no.1's wife is a Dental Surgeon and the defendant no.1 had set up a dental clinic on the ground floor after investing huge amounts of monies. He contended that re-opening of the partition of the superstructure would lead to undue harassment to the defendant no.1 and his family members.

COURT'S REASONING

THE PLAINTIFF IN THE PRESENT CASE HAS FAILED TO PROVE THAT THE SUIT PROPERTY IS LIABLE TO BE PARTITIONED DESPITE HIS AFFIDAVIT DATED 23rd SEPTEMBER, 1993.

20. Having heard learned counsel for the parties, this Court is of the view that the factum of oral partition is confirmed from the plaintiff's own admission that parties had been residing in their separate and distinct portions since construction of the superstructure. The said fact is also confirmed from the valuation report dated 20th September, 1993 whereby the parties informed the MCD that they had divided the suit property amongst themselves. The relevant portion of the valuation report is reproduced hereinbelow:-

"As per lease the ownership of plot is in joint ownership of the two brothers viz. Shri Rakesh Kumar Malhotra and Shri Ravindra Kumar Malhotra. It was informed that both brothers

have divided the property. Both have undivided 50% share in the land, with the right of access...”

(emphasis supplied)

21. Along with the valuation report dated 20th September, 1993, plaintiff as well as the father of the defendants Shri Ravinder Kumar Malhotra, had filed separate affidavits dated 23rd September, 1993 with sufficient particulars confirming that the property had been partitioned. The documents specified the respective areas allocated to them in the suit property. The affidavits of the plaintiff and father of the defendants are reproduced hereinbelow:-

A. Affidavit of Plaintiff

“Affidavit of Shri Rakesh Malhotra, son of Late Shri Parkash Lal Malhotra, r/o BM-10, West Shalimar Bagh, Delhi-110052.

I, Rakesh Malhotra, the Deponent, described above, do hereby solemnly affirm and declare as under:-

- 1. That I alongwith my brother Shri Ravindra Kumar Malhotra purchased in 1981 a Plot No.BM-10, West Shalimar Bagh, Delhi-52 in an open auction from Delhi Development Authority. The cost of plot was shared by both of us equally.*
- 2. That the construction of building on the said plot was undertaken from August, 1986 to September, 1988 and the cost of construction was shared equally by both of us.*
- 3. That the Deponent is in occupation of First Floor of building, while my brother Shri Ravindra Kumar Malhotra is residing on the Ground Floor thereof.*
- 4. That now, with mutual consent I, Rakesh Malhotra and Ravindra Kumar Malhotra have agreed to divide for all times to come, the property so that—*

- a) The First Floor remains in my possession;
- b) The first Floor remains in possession of Shri Rakesh Malhotra.
- c) The passage and drive way & staircase is used as common property.
- d) The Front half of roof will remain with Shri Ravindra Kumar Malhotra and the rear half will be retained by me.

I will not interfere in the peaceful possession and enjoyment of the property by Shri Ravindra Kumar Malhotra. The rates & taxes appurtenant to share will be paid by me.

*Sd/-
Deponent*

Verification:-

*I, Rakesh Malhotra, the deponent described above, do hereby solemnly affirm and declare that the contents of the above affidavit of mine are true and correct to the best of my knowledge and belief and nothing material has been concealed therefrom.
Verified at Delhi on this 23rd day of September, 1993.*

*Sd/-
Deponent”*

B. Affidavit of Father of the Defendants

“Affidavit of Shri Ravindra Kumar Malhotra, s/o Late Shri Parkash Lal Malhotra, r/o BM-10, West Shalimar Bagh, Delhi-52.

I, Ravindra Kumar Malhotra, the deponent described above, do hereby solemnly affirm and declare as under:-

1. That I alongwith my brother Shri Rakesh Malhotra purchased in 1981 a Plot No.BM-10, West Shalimar Bagh, Delhi in an open auction from Delhi Development Authority. The cost of plot was shared by both of us equally.
2. That the construction of building on the said plot was undertaken from August, 86 to September, 1988 and the cost of construction was shared equally by both of us.

3. That I the deponent am in occupation of Ground Floor of the building, while my brother Shri Rakesh Malhotra is residing on the First Floor thereof.
4. That Now, with mutual consent, I, Ravindra Kumar and Shri Rakesh Malhotra have agreed to divide for all items to come, the property so that-
- a) The Ground Floor remains in my possession.
 - b) The First Floor remains in possession of Shri Rakesh Malhotra.
 - c) The Passage and drive way and stair case is used as common property.
 - d) The Front Half of roof will remain with the deponent and the rear half will be retained by Shri Rakesh Malhotra.

I will not interfere in the peaceful possession and enjoyment of the property by Shri Rakesh Malhotra. The rates & taxes appertunent to share will be paid by me.

Sd/-
Deponent

Verification:-

I, Ravindra Kumar Malhotra, the deponent described above, do hereby solmenly affirm and declare that the contents of the above affidavit of mine are true and correct to the best of my knowledge and belief and nothing material has been concealed therefrom.

Verified at Delhi on this 23.9.1993.

Sd/-
Deponent”

(emphasis supplied)

22. It is pertinent to mention that in the present suit, no relief qua cancellation/withdrawal of affidavit dated 23rd September, 1993 has been sought by the plaintiff. Accordingly, this Court is of the view that the intention of the plaintiff and the father of the defendants was to partition the

suit property and the parties are in possession of independent residential units by virtue of a partition effected between the parties.

23. No issue has been framed in the present suit whereby onus had been placed on the defendants to prove the factum of partition. The issue framed in the present suit is whether the suit property is liable to be partitioned in face of the affidavit of the plaintiff dated 23rd September, 1993. The onus of the said issue had been placed on the plaintiff. Consequently, this Court is of the view that the plaintiff in the present case is estopped and has failed to prove that the suit property is liable to be partitioned despite his affidavit dated 23rd September, 1993. Accordingly, issue nos. (i) and (ii) are decided against the plaintiff.

BY PARTITION THE PROPERTIES NEED NOT BE DIVIDED BETWEEN THE PARTIES EQUALLY.

24. In *Onkar Nath Kapoor Through LRs & Ors. Vs. Jawhar Lal Kapoor (Deceased) Through LRs & Ors., 2018(3) AD(Delhi) 673*, it has been held that by partition the properties need not be divided between the parties equally. Parties may agree for a bigger or smaller share in the property or may entirely relinquish their shares for nothing. Consequently, the argument that the partition between the parties was inequitable is untenable in law.

A LEASEHOLD PROPERTY CAN BE PARTITIONED FOR USE AND OCCUPATION. PARTITION CAN BE RE-OPENED ONLY IF IT IS SHOWN THAT THE SAME HAD BEEN OBTAINED BY FRAUD, COERCION, MIS-REPRESENTATION OR UNDUE INFLUENCE. IN THE PRESENT CASE THE RIGHTS OF THE PARTIES STOOD CRYSTALLIZED IN ACCORDANCE WITH THE PARTITION WHICH HAD TAKEN PLACE AND THE SAME CANNOT BE TAKEN TO BE SET

ASIDE OR INVALID MERELY ON THE CONVERSION OF THE LAND
FROM LEASEHOLD TO FREEHOLD.

25. This Court is further of the opinion that a leasehold property can be partitioned for use and occupation. A coordinate Bench of this Court in ***Dalip Kumar Vs. Om Parkash & Ors., RFA 73/2010*** has held that even a tenanted premises can be partitioned. The relevant portion of the aforesaid judgment is reproduced hereinbelow:-

“13. I am unable to concur with the reasoning aforesaid of the learned ADJ. A tenancy right, specially in a premises governed by the Rent Act and from which the landlord cannot evict save on the grounds provided in the Statute, is a valuable asset and there is no bar in any law whatsoever to partition thereof. Of course, the said partition has to be in accordance with law and the Court cannot direct partition in a manner prohibited by the Rent Act. Thus, the assumption by the learned ADJ, of the tenancy rights being per se impartible, is found to be erroneous.

14. I have already recorded hereinabove, one of the manners in which the tenancy premises can be partitioned. Similarly, if the tenancy premises and the number of heirs permit, partition can also be by devising modalities for use thereof by the heirs, without infringing the law governing the tenancy premises or the terms and conditions of the agreement, if any, of tenancy. Just like it has been held in judgments supra vis-a-vis constructions on leasehold land, that the bar to subdivision of the leasehold rights in land is not a bar to subdivision of superstructure constructed thereon, with leasehold rights in land continuing to jointly vest in all the heirs, the tenancy rights in a premises can be partitioned by allocating exclusive use of different portions thereof (if possible) to different heirs, with the tenancy rights jointly vesting in all the heirs.”

(emphasis supplied)

26. Another coordinate Bench of this Court in **Ram Lal Sachdev Vs. Smt. Sneh Sinha**, AIR 2000 Delhi 92, passed a final decree of partition in respect of a leasehold property. The relevant portion of the said judgment is reproduced hereinbelow:-

“9. I have given my thankful (thoughtful) consideration to these submissions and have arrived at the conclusion that the points raised on behalf of the defendant are not res nova. Although the decision in the case of Chiranjilal v. Bhagwan Dass (AIR 1991 Delhi 325) (supra) and Mohinder Singh v. Kartar Singh (1997 (3) AD (Delhi) 626) (supra) do not in terms refer to the Lease Deed this has infact been kept in perspective. I am also of the opinion that although the applicability of Appendix J of the bye-laws had not been raised in these procedure their ratio remains unaffected. This is for the reasons that it is only the super structure which is being partitioned between the parties. Even though a notional division of the plot may occur as a consequence of the passing of a decree for partition, this would not tantamount to a violation of the covenants of the Lease Deed. As far as the plot is concerned, it would continue in the joint name of the parties. Even if, eventually, a wall is constructed dividing the plot, this division would be as between the parties and would not be binding in any manner on the Lessor. Under Section 132 of the MCD Act, the parties can apply for assessment of their respective portion separately and therefore, a division as prayed for in the plaint is not an event unforeseen or unrecognised by law....

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11.In the normal course, the Local Commissioner would be appointed for proposing a division of the suit property by metes and bounds. I however, feel compelled to pass a final decree in the peculiar circumstances of the present case, for the reasons that there is no dispute in respect of the actual physical division of the super structure. If a notional line is drawn

extending from the wall dividing the orange and blue portion shown in Annexure 'B', there would be an automatic division of the property in equal shares. In conclusion, therefore, Issue No. 1 is decided against the defendant. The plaintiff is entitled to the relief of the partition of property bearing No. D-66, Naraina, New Delhi by allotting to him the construction shown in blue in Annexure A and B.....”

(emphasis supplied)

27. Consequently, the suit property being leasehold in 1998 was not a bar to it being partitioned. In fact, the rights of the parties stood crystallized in accordance with the partition which had taken place and the same cannot be taken to be set aside or invalid merely on the conversion of the land from leasehold to freehold.

28. This Court is of the view that once partition has taken place, it cannot be re-opened unless and until it is shown that the same had been obtained by fraud, coercion, mis-representation or undue influence. [See ***Ratnam Chettiar and Others Vs. SM. Kuppuswami Chettiar and Others, (1976) 1 SCC 214***]

29. If the plea of the plaintiff of re-opening of partition due to conversion of land from leasehold to freehold is accepted, then it would lead to re-opening all the partition decrees that had been passed by the Courts with regard to leasehold properties!

30. There is no judicial decision or legislation in support of plaintiff's argument. The judgment of Patna High Court in ***Most. Marjadi Devi & Ors.*** (supra) pertains to joint family properties and consequently has no relevance to the present case.

31. The judgment of a Coordinate Bench of this Court in *Abhay Sapru* (supra) also offers no assistance to the plaintiff as the observations in the said judgment are in the context of an oral family settlement and memorandum of family settlement executed in the said case and its effect after the death of one of the co-owners. The Court in *Abhay Sapru* (supra) did not hold that a leasehold property cannot be partitioned or that on conversion of leasehold property to freehold, the partition effected previously would cease to be legal or valid.

32. Accordingly, the issue no. (iii) is decided against the plaintiff.

IN CASE THE PARTITION IS PARTIAL, THE PORTION OF THE PROPERTY WHICH HAD BEEN EXCLUDED FROM PARTITION WOULD BE LIABLE TO BE PARTITIONED ALONE. ACCORDINGLY, THE RELIEF IS MOULDED.

33. In *Satya Kumar Banerjee Vs. Satya Kripal Banerjee, 1909 LawSuit(Cal) 145*, it has been held that in case the partition is partial, the portion of the property which had been excluded from partition would be liable to be partitioned alone. In *Satya Kumar Banerjee* (supra) it has also been held as under:-

*“[4]The cases of Hari Das Sanyal v. Pran Nath Sanyal 12 C. 566 and Jogendra Nath Mukerji v. Jugobundhu Muherji 14 C. 122 are authorities for the proposition that a partition suit must embrace the entire property jointly owned by the parties and a suit for partition cannot be entertained for the division of a portion only of the joint property. These cases, however, do not support the proposition that a partial partition by private arrangement is inoperative in law. It was ruled by their Lordships of the Judicial Committee in *Rewnn Persad v. Musammat Radha Beeby* 4 M.I.A. 137 at p. 168 : 7 W.R. 35 (P.C.) that a division may be effected without an instrument in*

writing and maybe either total or partial. The same view is indicated in the judgment of their Lordships of the Judicial Committee in Katama Natchiar v. Raja of Shivagunga 9 M.I.A. 539 at p. 614 : 2 W.R. 31 (P.C.) and Ghintaman Singh v. Nowlahho Konwari 2 I.A. 263 : 1 C. 153 at 161 : 24 W.R. 255 The identical view was followed in the cases of Gavrisankar Rajaram v. Atmaram Prabhuram 18 B. 611 and Bhawani Prasad v. Juggernath 9 C.L.J. 133 : 13 C.W.N. 309 : 3 Ind. Cas 241. In the latter case it was pointed out that if the private partition was partial, the property which had been excluded from partition continued to be joint and so liable to be partitioned.”

(emphasis supplied)

34. Since post-conversion of the suit property from leasehold to freehold the land underneath is available for partition, this Court decrees the present suit to the extent of declaring the plaintiff and the defendant no.1 to be joint and co-owners of fifty per cent each of the land underneath plot No.BM-10, West Shalimar Bagh, Delhi-110088.

35. The Registry is directed to prepare a decree sheet accordingly.

MANMOHAN, J

OCTOBER 22, 2018

js/rn