

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

+ **RFA No. 1033/2017**

% **19th September, 2018**

ARABPATI LAL Appellant

Through: Mr. Jai Prakash, Advocate
(9990679784)

versus

RAJENDER & ORS. Respondents

Through: Mr. Hemant Payak, Advocate
(9810121426)

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. By this Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC), the plaintiff impugns the Judgment of the Trial Court dated 16.08.2017 by which the trial court has dismissed the suit for partition filed by the appellant/plaintiff with respect to the property bearing no. WZ-1018C, Nangal Raya, Pankha Road, New Delhi on account of the fact that the trial court found that the partition of the suit property had already taken place in the year

1971 and each of the parties had constructed on their own portions and are enjoying the same since the year 1971.

2. The facts of the case are that the appellant/plaintiff pleaded that he alongwith his deceased brother Sh. Mohan Lal, the predecessor-in-interest of the respondents/defendants, purchased the suit property in terms of a registered Sale Deed dated 31.01.1970. It is pleaded that there was no partition between the appellant/plaintiff and his deceased brother, Sh. Mohan Lal, or their successors-in-interest being the respondents/defendants and since though requests for partition were made, the same was not agreed to, and thereafter the subject suit for partition was filed.

3. Respondents/Defendants contested the suit and pleaded that the suit property was already partitioned under an oral partition which took place between the appellant/plaintiff and his brother Sh. Mohan Lal in the year 1971. After the oral partition in the year 1971, the suit plot was divided in two parts, and these two separate parts have been constructed upon, by the respective parties, as regards their portions. Whereas the portion of the plot of the appellant/plaintiff was 54% of the total plot area, as it was the back portion of the plot, the

brother, Sh. Mohan Lal/respondents/defendants had the front portion and therefore only had 46% of the total plot area. It was contended that Sh. Mohan Lal/respondents/defendants have constructed a building, to the extent of third floor, on their own portion of the plot, whereas the appellant/plaintiff had constructed on the plot till the second floor. It was prayed that the suit be dismissed.

4. After the pleadings were complete, the trial court framed the following issues and parties led evidence, and these aspects are recorded in paras 7 to 9 of the impugned judgment and these paras read as under:-

“7. On the basis of pleading of parties, on 3.11.2016 following issues were framed by my Ld. Predecessor Court :-

1. Whether the plaintiff is entitled for partition of suit property being joint and undivided? OPP
 2. Whether the suit property has been orally partitioned from 1971 and parties are in possession of their respective share as shown in their respective site plan? OPD
 3. Whether there is no cause of action in favor of plaintiff and against defendants? OPD
 4. Whether the plaintiff is entitled for relief of permanent injunction against defendants in respect of suit property? OPP
 5. Relief.
8. The plaintiff in support of his case has appeared in witness box as PW-1 and lead his evidence by way of affidavit EX.PW1/A and brought on record sale deed dt. 31.1.1970 as Ex.PW1/1

and site plan as Ex.PW1/2. The witness was cross examined at length and same shall be discussed during the appreciation of evidence. PE was closed.

9. On behalf of defendants, defendant no.1 Rajender Goel was examined as DW-1. He has lead his evidence by way of affidavit Ex.DW1/A and has relied upon site plan Ex.DW1/1. The witness was cross examined at length and same shall be discussed during the appreciation of evidence. DE was closed.”

5. While dealing with issues no. 1 and 2, the trial court has held that though no documentary proof is filed with respect to partition of the property in the year 1971, between the appellant/plaintiff and his deceased brother Sh. Mohan Lal, however, it was held that the partition had taken place in the year 1971 because the respective parties have constructed over their respective shares and both portions have separate electricity and water connections. Each separate portion of both the parties have their separate entrances, with the fact that no evidence has been led by the appellant/plaintiff that the portions which are built upon into separate parts of the plots, are being jointly used by the parties. The trial court has, in para 12 of the impugned judgment, specifically noted the admission made by the appellant/plaintiff, Sh. Arabpati Lal, who appeared as PW-1, and this admission showed that the parties were living in separate portions of the plot which were separately built upon, and that except a common

passage there was no other common part of the property. Separate constructions have been carried out by the parties on their respective portions of the plot including a separate kitchen as well as a separate washroom/toilet. The appellant/plaintiff also conceded that the construction was carried on the separate parts of the plots during the period of 1970-1971.

6. I would also like to note that though in the replication filed by the appellant/plaintiff in the reply to preliminary objections, the appellant/plaintiff has denied that he is in possession of 54% of the plot area and the respondents/defendants have 46% of the area, however in his cross-examination, it was conceded by the appellant/plaintiff that he had 54% of the plot area and respondents/defendants had 46% of the plot area, and this is duly noted by the trial court in para 12 of the impugned judgment. The trial, court in my opinion, has therefore rightly discussed the issues and arrived at the correct findings in paras 11 to 13 of the impugned judgment and these paras read under:-

“11. My issue-wise findings are as under.

ISSUE NO.1 & 2 are taken up together being intermingled.

ISSUE NO.1 Whether the plaintiff is entitled for partition of suit property being joint and undivided? OPP

ISSUE NO.2. Whether the suit property has been orally partitioned from 1971 and parties are in possession of their respective share as shown in their respective site plan? OPD

Ld. Counsel for plaintiff has submitted that property in question was jointly purchased by plaintiff and his brother Mr. Mohan Lal predecessor in interest of defendants. Both brothers have jointly constructed the property and started residing there. The property has never been partitioned. It has been further submitted that because the property was not partitioned, the same was not mutated separately. There is no documentary proof that late Mohan Lal or his LRs i.e. present defendants have ever informed any of the Government department that the portion they are residing is a separate portion exclusively belonging to them only. It has been further submitted that during evidence of DW1 one fact came on record that electric meters installed in suit premises are on the common electric line from one electric pole. It has been further submitted that there is no documentary proof that property has been ever partitioned. It has been further submitted that in case the property has been partitioned, it has not been registered in view of registration act. On the basis of these submissions prayer has been made to grant decree of partition to plaintiff.

On the other hand, Ld. Counsel for defendant has submitted that after plaintiff and his brother late Mohan Lal purchased the property, they have mutually agreed for oral partition. Since the plaintiff was given back portion of property, he was given 4% extra share in the property. The plaintiff is in possession of extra 4% share has been admitted by him during cross-examination. It has been further submitted that oral partition of property took place in 1971 has been categorically admitted by plaintiff during cross-examination. It has been further submitted that after oral partition both parties have carried out constructed over their respective shares. Both portions have separate electric and water connection. Both portions have separate entries. There is nothing in the site plan even filed by plaintiff which suggest that property is commonly used by both parties. It has been further submitted that kitchen of parties is also separate. It has been further submitted that there is no requirement of registration of oral partition as per registration act. It has been further submitted that there was no occasion for defendants to inform any government agency by defendants that a particular portion belongs to them. On the basis of these submissions prayer was made to dismiss the suit.

12. Arguments of Id. Counsel for both parties heard. It is not disputed that property in question was purchased by the plaintiff and his deceased brother Mohan Lal in their joint name. The plaintiff Arabpati Lal when examined as PW-1 in his affidavit Ex.PW1/A has stated to the effect that property in question was jointly constructed by him and his brother Mohan Lal and are enjoying the property as joint/co-owner. During cross-examination of this witness, the explanation, inter alia, in this respect has been called. The relevant portion of cross examination of this witness in this respect is as under :

Question: Kindly see the site plan Ex.PW1/2 and tell the court which portion shown in site plan you reside?

(The witness is seeing the site plan, he has asked about different portion in site plan. Counsel for defendant has explained about three floors reflected in three different portions of the site plan)

Ans. I resides in the complete back portion of property. The plot where house is constructed in triangle shape.

The construction of the property was carried out in the year 1970-1971. The property in my possession was construction in two portion in different times. In 1970- 71 ground floor was constructed. it is correct that at present in back portion of property I am residing whereas front portion is occupied by defendants. It is correct that there is way to go to property in my occupation. There is no connection in between the portion occupied by me and defendant except the passage referred by me as shown A to A1 IN Ex. PW1/1. It is correct I have separate kitchen from the defendant. It is also correct that we have separate washroom, toilet and bathroom. it is correct that kitchen, bathroom and toilet are separate since construction was carried out in 1970-1971. it is correct that ground floor, first floor and terrace shown in red are constructions made by me.

From the said cross-examination of PW1 it reflects that since the property has been purchased in the year 1971, two separate sets have been constructed with separate ingress and egress. Both portions are not connected in any manner as there are separate bathroom, kitchens etc. Further this witness has stated that he has constructed first floor, second floor and terrace.

Now the question arises under what eventualities the parties have constructed separate portions on the front and on the back of property. Before reaching at any conclusion, here it is necessary to again reproduce the relevant portion of cross-examination of PW-1 which is as under :

It is incorrect to suggest that defendants are occupying 46% of total plot area and I am occupying 54% of the same. Vol. My portion may be exceeding only maximum by 4% as compared to the portion occupied by defendant and I am willing to surrender the same.

The said statement made by the witness reflects that though he has denied the suggestion that he is in occupation of more area than that of defendants, but the witness in unmistakable terms has further deposed to the effect that in case the portion in his occupation is more than that of defendant, he is ready to surrender the same. Hence, the Court has no hitch to reach at conclusion that the area under the occupation of plaintiff on rear side of portion is 4% more than that of defendants.

13. In respect to oral partition between parties, very important explanation was called from this witness during his further cross-examination, which is as under :-

Question I put it to you that oral partition of property was carried out in the year 1971 itself after construction of property and both parties are residing in their separate share? Ans. It was only brotherly mutual understanding in which brothers decided who would live where. Vol. Initiated partition talks with my brother Mohan Lal. It could not materialized in his life time.

The said portion of cross-examination shows that there was mutual understanding between brothers that who would reside in which of the portion.”

(underlining added)

7. Learned counsel for the appellant/plaintiff once again argued that the properties were divided only for mutual convenience and there was no partition, however, in view of the aforesaid detailed discussion in the impugned judgment of the trial court, and the

reasoning and conclusions given by them, have been accepted by this Court, I do not find any substance whatsoever in the arguments urged on behalf of the appellant/plaintiff that no partition took place.

8. There is no merit in the appeal. Dismissed.

SEPTEMBER 19, 2018/ib

VALMIKI J. MEHTA, J

