

\$~19

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

% *Judgment delivered on: 01.03.2018*

+ **RSA 19/2018**

SUSHIL KATARIA Appellant

Through: Mr. Gaurav Gaur, Adv.

versus

SHANI DEVI & ORS Respondents

Through: Mr. A.K. Suri and Mr. S. Nizam, Advs.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

1. The learned counsel for the respondents appears on service of an advance copy of the appeal. The appellant has impugned the order dated 26.08.2017 dismissing his appeal against a decree of partition apropos property bearing no. 11/16, Ashok Nagar, New Delhi (suit property). The plaintiffs (respondents herein) had sought its partition on the plea that the suit property belonged to their father who had passed away on 22.10.1982. His children i.e. two sons and four daughters had relinquished all their rights in the property in favour of their mother viz. Mrs. Durga Devi. Upon the mother's demise, the plaintiffs had sought partition of the property.

2. The suit was contested by the appellant on the ground that he had become the owner of the property pursuant to his mother's demise on the basis of a registered Will and GPA dated 18.09.1997, as well as a subsequent registered Will dated 12.05.2000 in his favour. The appellant also claims that all his siblings had relinquished their rights by way of an affidavit dated 23.04.2001. A perusal of the said "affidavit" would show that it has been signed by four persons. It lacks the basic substance and format of an affidavit. The purported joint affidavit without an affirmation

or verification is an oddity in law; the said document is of no evidentiary value. The appellant contends that the nomenclature of the document as an affidavit is a misnomer and that in substance it is a “family arrangement”. Therefore, it should have been considered as a “family arrangement”. However, the trial court disregarded the said document since it was unregistered.

3. During the lifetime of the mother, the whole property was rebuilt. The third and fourth floors were sold to third parties by the appellant on the basis of the registered GPA. The appellant continues to occupy the premises. Referring to the plaintiff’s evidence viz. of Ms. Shani Devi (PW1), the learned counsel for the appellant submits that PW1 never objected to the sale of the two floors during their mother’s life time; she claims to have been oblivious of any such transactions; this itself goes on to suggest that she like her other siblings, was never in touch with her mother; that they have now stepped forward to claim a share in the property. However, it had already been bequeathed by the mother to the appellant, by a registered Will, he being the only one of the six children who was taking care of her. Indeed, none of the plaintiffs raised any objection at the time of construction of the new building and its sale by the appellant during the lifetime of the mother. The appellant also refers to the evidence of his neighbour Mr. Kuljeet Kapoor (PW 2) who deposed that late Smt. Durga Devi, at the time of her death, was about 95 years of age; she was entirely visually impaired and speech deficient and could not understand or discern what was wrong or right; nor was she in a proper mental state; she was confined to bed and under the custody of the defendant (appellant). It is argued that interestingly, the said deponent never saw any medical records

pertaining to late Smt. Durga Devi, and the impression which he gathered about her mental illness was of his own judgment without any corroboration. He nevertheless admitted that she could recognize him because of his loud voice. Therefore, the corollary to the evidence is that till the last, Smt. Durga Devi retained her powers of cognition and faculty of discernment despite her impairment of sight.

4. The learned counsel for the appellant submits that both the plaintiffs' witnesses' depositions do not in any way question or falsify the factum of the registered Will having been signed about eight years prior to the demise of the mother; at which time, there is nothing on record to show, that she was of unsound mind. He further submits that the plaintiffs' plea that the mother was confined by the appellant to the cruel exclusion of the other siblings is not proven by any evidence or even an averment in the plaint, because if that was so, then they could well have approached the police or the other authorities, to free their mother from the appellant's alleged oppression, and meet her or take care of her. Indeed, no such steps were taken by any of the siblings and the mother was left entirely in the care of the appellant. If she, of her own volition, bequeathed her property to the only caring son, the appellant, the same ought not be surprising and cannot be doubted in the absence of anything suspicious.

5. Thus far, the appellant's case has a ring of plausibility. However, his case ought to have been proven by evidence. His written statement was filed about 65 days beyond the permitted time. Despite having been granted repeated opportunities to lead evidence, he chose not to do so. In the absence of any evidence to prove and establish his opposition to the suit, it was decreed, the decision was a logical sequiter. The appellant's appeal

before the Appellate Court was dismissed by way of the impugned order which held as under:

“..... 5. Prior to proceed further here it is not out of mention to place here that the suit of the plaintiff has been filed by the plaintiff on 27.11.2006 and after service of summons of the suit, on 03.12.2007 WS alongwith application for condonatin of delay in filing of WS has been filed on behalf of defendant no 2 /applicant here on 25.09.2007 as reflected from the ordersheet dated 03.12.2007 without any documents therefore on subsequent date on 28.02.2008, plaintiff had objected while seeking direction to file documents which is mentioned in the WS but surprisingly the document could not be filed till 04.06.2008.

6. Vide order dated 19.08.2008 issues was framed. Vide order dated 16.03.2010 Ld Trial Court closed the opportunity for cross-examination of plaintiff's witnesses i.e PW1 and PW2 Smt Shani Devi and Sh Kuljeet Kapoor respectively and case proceeded for the DE on 20.04.2010. On 20.04.2010, defendant no 1 has filed his evidence by way of affidavit but could not be examined as the application on behalf of defendant no 2 filed for seeking cross-examination of PW's, after considering the same, the one opportunity is given to the defendant to cross-examine PWs as such case adjourned for 05.07.2010, thereafter 30.07.2010, 29.09.2010 and on 29.09.2010 PW1 has been examined.

7. On 10.03.2011 PW2 has been examined thereafter, case adjourned for DE. In view of the submission made by the defendant no 2/ applicant/appellant here, on 07.04.2011 permission had been given to the defendant no.2 for the cross-examination of defendant no 1. On 30.05.2011, defendant no 1 had been cross examined by the

defendant no 2 while accorded last and final opportunity to the defendant no 2 to conclude his evidence on NDOH i.e 25.08.2011 but could not conclude the evidence till 18.04.2012 therefore, DE was closed and on the subsequent date 16.05.2012 instead of seeking permission for leading evidence, adjournment sought by the counsel for defendant no 2/ applicant/appellant here for the final arguments as such case adjourned for 10.07.2012 then 16.08.2012.

9. Further In normal circumstances appellate court is suppose to dispose off appeal on the basis of material and evidence brought on record during trial. However provisions of Order 41 Rule 27 CPC provides for production of additional evidence in Appellate Court. It says "The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, but if-

(a) The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) The party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not with his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, Appellate Court may allow such evidence or document to be produced, or witness to be examined."

Clauses, (a), (aa) and (b) of sub-rule (1) of Rule 27 of Order 41 refer to three different situations. Power of

the appellate court to pass any order there under is limited. For exercising its jurisdiction there under, the appellate court must arrive at a finding that one or the other conditions enumerated there under is satisfied. A good reason must also be shown as to why the evidence was not produced in the trial court.....”

6. It is evident that the appellant chose not to lead evidence despite the repeated opportunities. His inability or constraint in not having led evidence on account of his having fallen ill for a long period and that his counsel had misled him or otherwise had failed in his duty, too is unbelievable because if it were so, then some application or evidence to support this contention ought to have been brought on record. Nothing was so done. Under Order 41 Rule 27 of the Code of Civil Procedure (CPC), additional evidence would be permissible if the applicant were to show that the evidence tendered was refused by the court or that it came to his knowledge afterwards despite due diligence, and as a sequiter, any such document is to be produced or witness needs to be examined to pronounce judgment or any other substantial cause. Neither of the aforesaid conditions are met, hence the appellant does not qualify for the benefit of the said provision. The learned counsel for the appellant submits that the expression “substantial cause” would cover the appellant’s unfortunate predicament i.e. his having been misled by his counsel. The said argument is not supported by any correspondence between him and his counsel. There is nothing on record to substantiate the aforesaid plea. Indeed the counsel for the respondents submits that this plea is belied by the fact that the appellant had knowingly changed his counsel during the trial of the suit which means that he was conscious and had knowledge of what was going on apropos his suit.

7. The appellant insists on the following question of law arising for consideration in this appeal:

- (i) whether the expression 'sufficient cause' under Order 41 Rule 27 CPC would include deficient services by counsel?
- (ii) whether the defendant could be denied right to prove his registered documents for negligence of his counsel? And,
- (iii) whether a decree of partition could be passed in respect of the property which has already been sold to the third parties?

8. The learned counsel for the appellant submits that in view of the illness and peculiar circumstances obtaining to the appellant, his right to lead evidence may be re-considered and another opportunity be granted to him subject to such terms as this Court may deem appropriate; that putting the appellant's to terms would take care of any such inconvenience as could have been caused to the respondents. The Court is of the view that ample time was granted to the appellant to lead evidence. He chose not to do so. Evidently, he was unhappy with the services of his first counsel, hence the said lawyer was consciously replaced by another one. Corrective measures should have been taken at least at that stage, to bring on record such evidence as the appellant wanted to. It was not done. The final adjudication resulted in a decree. Now, he virtually seeks a condonation of his earlier conduct which in effect disregarded the ample opportunities granted to him. His underlying rationale being that inconvenience primarily on account of legal expenses, as may have been caused to the respondent, can be set aside by paying costs to the Decree Holder. This reason can hardly be a ground for setting aside the impugned order. Payment of costs to the respondent for remanding the case cannot be a reason for undoing a vested

right which may have accrued in favour of the Decree Holder. A legal error must be discerned from the impugned order. The proposed questions of law formulated by the appellant do not arise for consideration. The appellant's request for remand of the case for leading his evidence is untenable since the suit has been decreed after complete trial, in which ample opportunity was accorded to him to lead evidence. The law does not envisage for a party negligent in pursuing its case, to seek remand and re-trial, simply because it claims to have the means to meet such terms as may be imposed by the Court.

9. The appeal is without merit and accordingly is dismissed.

NAJMI WAZIRI, J

MARCH 01, 2018/kk

न्यायमेव जयते