

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

+ **RFA No.199/2018**

% **23rd February, 2018**

R.C. ARORA Appellant

Through: Mr. Prag Chawla, Advocate.

versus

SHAMMI DEWAN & ANR. Respondents

Through: Mr. Raman Kapur, Senior
Advocate with Mr. Aviral
Tiwari, Advocate and Mr.
Varun Kapur, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

Caveat No.151/2018

1. Counsel appears for the caveators. Caveat accordingly
stands discharged.

C.M. No.7070/2018 (exemption)

2. Exemption allowed subject to just exceptions.
C.M. stands disposed of.

**C.M. Nos.7071/2018 (for condonation of delay in filing) &
7069/2018 (for condonation of delay in re-filing)**

3. For the reasons stated in the applications, delay of 23
days in filing and 32 days in re-filing the appeal is condoned.

C.M.s stand disposed of.

RFA No.199/2018 and C.M. No.7068/2018 (stay)

4. This regular first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant no.2 in the suit impugning the preliminary decree dated 29.8.2017 and the final decree dated 5.12.2017 passed in favour of the respondent no.1/plaintiff with respect to the suit property bearing no.4/19, East Patel Nagar, situated on a plot of 200 sq. yards.

5. At the outset, I would like to note that the appeal is not maintainable because once there are two separate decrees, one being a preliminary decree and another being a final decree, there had to be filed two separate appeals against the two separate decrees but appellant/defendant no.2 for some strange reasons has preferred to file only one appeal against two separate decrees. However, at this stage at the request made on behalf of the appellant/defendant no.2, who prays that this one appeal be treated as two appeals, accordingly the Registry will give an additional RFA number to this appeal with the existing RFA number being that of challenge to the preliminary decree dated

29.8.2017 and the additional number to be given to the RFA will be taken as the RFA to challenge to the final decree dated 5.12.2017.

6. The facts of the case are that respondent no.1/plaintiff filed the subject suit for partition of the suit property. The undisputed facts which have emerged in the record of the suit in the trial court are as under:-

(i) The original owner of the suit property was one Sh. Chandi Ram.

(ii) Sh. Chandi Ram died intestate and 50% undivided share each therefore devolved upon the two sons of Sh. Chandi Ram, namely Sh. Sevak Ram and Sh. Govind Jagtiani.

(iii) Respondent no.1/plaintiff purchased rights in the suit property being 50% undivided share of Sh. Sevak Ram in terms of the agreement to sell dated 12.10.1992/Ex.PW1/3, Will and General Power of Attorney/Ex.PW1/4 and Ex.PW1/5. It may be noted that the agreement to sell dated 12.10.1992 is registered with the Sub-Registrar along with the Will. The agreement to sell dated 12.10.1992 in favour of the respondent no.1/plaintiff clearly specifies that the owner Sh. Sevak Ram transferred to the respondent no.1/plaintiff half

undivided share in the suit property and this is found in the third para of the first page of the agreement to sell, numerical paras 1 and 3 of the second page of the agreement to sell as also similar expressions found in other clauses of the agreement to sell dated 12.10.1992. This agreement to sell also does not talk of any partition having already been effected between two co-owners namely Sh. Sevak Ram and Sh. Govind Jagtiani so that Sh. Sevak Ram and Sh. Govind Jagtiani could be said to be owners of separate specific shares in the suit property.

(iv) The appellant/defendant no.2 states to have purchased the share of the other co-owner Sh. Govind Jagtiani to the extent of top floor/second floor of the suit property. It is the case of the appellant/defendant no.2 that in terms of the agreement to sell dated 11.9.1986 executed by Sh. Govind Jagtiani in favour of Sh. Kamal Malhotra (predecessor-in-interest of the appellant/defendant no.2), Sh. Kamal Malhotra purchased specific portions of the suit property being first floor and the top floor/second floor and the appellant/defendant no.2 purchased the top floor/second floor from Sh. Kamal Malhotra.

(v) When we read the agreement to sell dated 11.9.1986 executed by Sh. Govind Jagtiani in favour of Sh. Kamal Malhotra with respect

to the first floor and second floor/top floor of the suit property, it is found that though para 1 of the agreement to sell dated 11.9.1986 talks of the purchaser, being the purchaser of the first floor and top floor/second floor portion of the suit property, however the other statements made in this very agreement to sell dated 11.9.1986 shows that Sh. Govind Jagtiani was owner only of half undivided share in the suit property. This *factum* of Sh. Govind Jagtiani being owner of half undivided interest in the suit property is so specifically stated in the very first para of the agreement to sell dated 11.9.1986 and also in numerical paras 2 and 3 of this agreement to sell dated 11.9.1986. It is also relevant to note that though the agreement to sell dated 11.9.1986 talks of specifically selling the specific portions of the first floor and top floor/second floor, however besides various clauses mentioning that Sh. Govind Jagtiati was only having half undivided interest in the suit property, it is not stated in this agreement to sell dated 11.9.1986 that a partition had already taken place between the two co-owners of undivided interest of 50% each namely Sh. Sevak Ram and Sh. Govind Jagtiani whereby Sh. Sevak Ram became owner of specific portions of the suit property.

7. I may note that respondent no.1/plaintiff does not dispute the *factum* of possession or title of the appellant/defendant no.2 having purchased his rights in top floor/second floor from Sh. Kamal Malhotra and who purchased from Sh. Govind Jagtiani, subject to the defence that Sh. Govind Jagtiani did not have ownership of any specific portions being the first floor and top floor/second floor of the suit property, for selling these specific portions by Sh. Govind Jagtiani under the agreement to sell dated 11.9.1986 with Sh. Kamal Malhotra.

8. The issue before this Court to be decided is whether the appellant/defendant no.2 and the respondent no.2/defendant no.1 became exclusive owners respectively of the second floor/top floor and the first floor of the suit property and which will depend on the fact whether the specific portions of first floor and second floor/top floor of the suit property could be purchased by Sh. Kamal Malhotra from Sh. Govind Jagtiani in terms of the agreement to sell dated 11.9.1986.

9. The following issues were framed in the suit:-

- “1. Whether the plaintiff has locus standi to seek a decree of partition in respect of the suit property? OPP

2. Whether the plaintiff by virtue of agreement to sell dated 12.10.1992 and Will dated 12.10.1992 purchased half undivided share in the suit property? OPP
3. Whether the plaintiff is entitled to a decree of partition? OPP
4. Relief.”

10. Parties led evidence and these aspects are recorded in paras 13 to 17 of the impugned judgment and which paras are reproduced herein for having reference to necessary exhibit numbers to the proved documents before the trial court. These paras read as under:-

“Plaintiff's Evidence

13. In order to prove her case, plaintiff has examined herself as PW-1 and filed her evidence by way of affidavit Ex. PW1/A wherein she reiterated the contents of the plaint on oath. The plaintiff has relied upon the documents Ex. PW1/1 to Ex. PW1/12 i.e

- (a) SPA in favour of Sh. B.K Diwan as Ex. PW1/1,
- (b) Copy of letter dated 08.04.1992 as Ex. PW1/2
- (c) Agreed to sell dated 12.10.1992 as Ex. PW1/3,
- (d) Will and General Power of Attorney as Ex. PW1/4 to Ex. PW1/5,
- (e) Letter dated 27.02.1998 requesting for mutation of property as Ex. PW1/6.
- (f) Banker Cheque dated 27.02.1998 for sum of Rs. 23,000/- and Rs. 1800/- as Ex. PW1/7 and Ex. PW1/8.
- (g) Letter of plaintiff dated 31.12.2001 to the Assistant Assessor and Collector as Ex. PW1/9.
- (h) Photographs of suit property as Ex. PW1/10.
- (i) Site plan of suit property as Ex. PW1/11.
- (j) Certified copy of order dated 20.05.2002 as Ex. PW1/12.

14. PW-2 Sh. Ajay Kumar UDC from L & DO was examined. He brought the record regarding original letter dated 08.04.1992 written to Sh. Sewak Ram and others regarding substitution of succession in interest in respect of the suit property. He has identified the copy of the same as Ex. PW2/A (OSR). He was cross-examined by counsel for defendant and then discharged.

15. PW-3 Sh. Naresh Kumar Parasher, UDC from the office of Sub Registrar was examined. He brought the record regarding registration of agreement to sell dated 12.10.1992 coupled with copy of WILL and GPA in respect of suit property. He has identified the agreement to sell as Ex. PW1/3. He further deposed that the WILL of Sh. Sevak Ram dated 12.10.1992 in favour of Ms. Shammi Diwan was registered in office on 12.10.1962. He has identified the original WILL as Ex. PW1/4. He further deposed that GPA dated 12.10.1962 was executed by Sh. Sewak Ram in favour of Ms. Shammi Diwan and identified the same as Ex. PW1/5. PW-3 was cross-examined on behalf of the defendants and then discharged. Thereafter, PE was closed.

Defendants' Evidence

16. Defendant no.1 examined herself as D1W1. She has tendered her affidavit in evidence as Ex.D1W1/A wherein she has reiterated and reasserted the contents of the written statement on oath. She has relied upon the documents which are as follows:

- (a) General Power of attorney, Agreement to sell, receipt, possession letter and affidavit, all dated 29.10.1990 of suit property as Ex. DW1/1 to Ex. DW1/7.
- (b) Demand notice of house tax and a letter to Assistant Assessor & Collector, MCD as Ex.DW1/8 and Ex. DW1/9.
- (c) Original agreement to sell dated 11.09.1996 as Ex.DW1/10.
- (d) Original site plan as Ex.DW1/11.
- (e) Original General Power of Attorney dated 19.09.1986 as Ex. DW1/12
- (f) Original Special Power of Attorney dated 18.09.1986 as Ex. DW1/13

DW-1 was cross-examined on behalf of the plaintiff at length and then discharged.

17. Defendant no. 2 examined Sh.R.C Arora as D2W1. He has tendered his affidavit in evidence as Ex. D2W1/A. D2W1 deposed that no partition by metes and bounds has taken place. Further it is deposed that defendant no. 2 is in possession of the portion which he is entitled for. He was cross-examined on behalf of the plaintiff at length and then discharged. Thereafter, DE was closed by both the defendants.”

11.(i) Let us examine the issue as to whether Sh. Kamal Malhotra had and could at all have purchased specific portions of the

suit property being the first floor and second floor/top floor in terms of the agreement to sell dated 11.9.1986.

(ii) In my opinion Sh. Govind Jagtiani was not legally competent to sell first floor and second floor/top floor of the suit property to Sh. Kamal Malhotra in terms of the agreement to sell dated 11.9.1986 inasmuch as Sh. Govind Jagtiani was not the owner being the specific portions of the first floor and second floor/top floor. Sh. Govind Jagtiani could have been owner of the first floor and second floor/top floor only if between him and his brother Sh. Sevak Ram there was a partition which was effected giving the rights of the first floor and second floor/top floor to Sh. Govind Jagtiani and of the ground floor to Sh. Sevak Ram. However no such partition between Sh. Sevak Ram and Sh. Govind Jagtiani is proved to have taken place and that neither in the agreement to sell executed by Sh. Sevak Ram in favour of the respondent no.1/plaintiff and nor in the agreement to sell executed by Sh. Govind Jagtiani in favour of Sh. Kamal Malhotra there is any statement whatsoever of the suit property having already being divided with ground floor falling to the share of Sh. Sevak Ram and first floor and second floor/top floor falling to the share of Sh. Govind

Jagtiani. Also as stated above, both the agreements to sell in favour of respondent no.1/plaintiff and Sh. Kamal Malhotra in its various paras talk of Sh. Sevak Ram and Sh. Govind Jagtiani being only owners of half undivided shares in the suit property and there is no reference to any partition which had taken place between Sh. Sevak Ram and Sh. Govind Jagtiani. Therefore merely mentioning by Sh. Govind Jagtiani in the agreement to sell dated 11.9.1986 entered into by him with Sh. Kamal Malhotra that Sh. Govind Jagtiani was transferring first floor and second floor/top floor of the suit property to Sh. Kamal Malhotra would not make either Sh. Govind Jagtiani or Sh. Kamal Malhotra specific owners of the first floor and second floor/top floor of the suit property. Therefore since the suit property remained undivided between Sh. Sevak Ram and Sh. Govind Jagtiani, and also as between persons who are successors-in-interest from Sh. Sevak Ram and Sh. Govind Jagtiani namely the respondent no.1/plaintiff in the suit on one side with respect to 50% undivided share owned by Sh. Sevak Ram and appellant/defendant no.2 and respondent no.2/defendant no.1 as undivided half owners of share of Sh. Govind Jagtiani, surely a preliminary decree of partition had to be passed and so was rightly

passed by the trial court in terms of the impugned judgment dated 29.8.2017.

12. In view of the above discussion, there is no merit in the appeal challenging the preliminary decree for partition dated 29.8.2017 holding that the respondent no.1/plaintiff is the owner of 50% undivided share in the suit property.

13. As regards the appeal against the final decree dated 5.12.2017, the same is without any substance because when a person asks for partition he really has to be given his monetary share in the suit property. The suit property besides being undivided, as already held above, is constructed only up to second floor. The FAR of properties in Delhi in the meanwhile after construction has changed and ordinarily on a plot of such size as the suit property of 200 sq. yards it is possible to construct besides a basement and stilt parking, four floors. Really therefore on partition the monetary value which will be given to a co-sharer will be with respect to not only physical existence structure on the suit property but really with respect to entitlement in terms of FAR to have an additional covered area than which is already constructed on the suit property. Therefore the only way in which each party could be given his monetary value in the suit property of 50% would be not to

physically partition the existing structure/construction upon the suit property in view of the changed FAR and correct shares of the parties for being given to them would only be possible by sale of the suit property whereby net sale proceeds of 50% will be given to the successor-in-interest of Sh. Sevak Ram (i.e respondent no.1/plaintiff) on one hand and the successors-in-interest of Sh. Govind Jagtiani on the other (i.e appellant/defendant no.2 and respondent no.2/defendant no.1). Also, and as already stated above, once the suit property itself is undivided, then, the requirement of physical partition to the extent of 50% will have to be in terms of monetary value of each share which will have to be necessarily co-related to the entitlement to a covered area/FAR in terms of the shares of the respective parties. Therefore there is no merit in challenge by the appellant/defendant no.2 to the final decree dated 5.12.2017.

14. In view of the above discussion, these appeals are clearly misconceived and are therefore dismissed with costs of Rs.50,000/- payable by the appellant to the respondent no.1/plaintiff. Costs be paid within six weeks.

FEBRUARY 23, 2018
Ne

VALMIKI J. MEHTA, J