* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ <u>**RFA No. 72/2019**</u>

% ***28th January, 2019***

KAILASH CHAND & ANR. ..... Appellants

Through: Mr. C.S.S. Tomar, Advocate (Mobile No. 9810622816).

versus

SANTOSH ..... Respondent

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

<u>**VALMIKI J. MEHTA, J (ORAL)**</u>

<u>**C.M. Appl. No. 3897/2019 (for exemption)**</u>

1. Exemption allowed, subject to just exceptions.

C.M. stands disposed of.

<u>**C.M. Appl. Nos. 3898-99/2019 (for delays)**</u>

2. For the reasons stated in the applications the delays in filing and re-filing the appeal stand condoned, subject to just exceptions.

C.Ms. stand disposed of.

<u>RFA No. 72/2019 and C.M. Appl. No. 3896/2019 (for stay)</u>

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendants in the suit impugning the Judgment of the trial court dated 31.05.2018 by which the trial court has decreed the suit for partition filed by the respondent/plaintiff/sister of appellant no. 1 with respect to the suit property bearing no. D-7/68, Dayal Pur, Delhi, on a plot admeasuring 100 sq. yards belonging to the father, Late Sh. Kishan Lal. Appellant no. 2/defendant no. 2 is the wife of appellant no. 1/defendant no. 1/son of Late Sh. Kishan Lal.

4(i). It is undisputed that the suit property belonged to the father Late Sh. Kishan Lal. Respondent/plaintiff/daughter claimed that the father Late Sh. Kishan Lal died intestate on 02.10.2001 and the mother also expired intestate on 23.05.2002, and hence the parties to the suit, respondent/plaintiff and the appellant no. 1/defendant no. 1, being the daughter and son of Late Sh. Kishan Lal have both become equal co-owners and have acquired half ownership interest in the suit property, and therefore, the subject suit for partition was filed claiming 50% ownership rights in the suit property.

4(ii). The suit was contested by the appellants/defendants asserting that the father, Late Sh. Kishan Lal had sold the suit property to appellant no.1/defendant no.1 vide usual Documents being Agreement to Sell, General Power of Attorney etc. dated 05.03.2001 and the appellant no.1/defendant no.1 had sold the property to his wife being appellant no.2/defendant no.2 vide Documentation dated 14.09.2011. It was also pleaded that the respondent/plaintiff had received her share of the suit property from the father being an amount of Rs. 3,00,000/-.

5. After the pleadings were complete, the trial court framed the following issues:-

> "4. The plaintiff filed replication denied the assertions made in the WS and retreating the assertions made in the plaint. From the pleading of the parties the following issues were framed:-
>
> > *1. Whether the plaintiff has ½ share in the suit property bearing no. D-7/68, Dayal Pur, Delhi, measuring 100 sq. yds., as alleged? OPP.*
> >
> > *2. Whether the plaintiff is entitled to a decree of partition against the defendants in respect of suit property as claimed? OPP.*
> >
> > *3. Whether the plaintiff is entitled to a decree of permanent injunction in respect of suit property against the defendants as claimed? OPP.*
> >
> > *4. Whether the father of plaintiff and defendant no. 1 namely Sh. Kishan Lal has sold the property to the defendant no. 1 on 05.03.2001 and if so, to what effect? OPD-1.*

5. Whether the plaintiff received Rs. 3 lacs in respect of her share in the suit property from her father before his death as claimed? OPD 1& 2.

6. Relief.

5. It is a matter of record that additional issue was framed on 23.02.2018 as follows:-

> *"Whether plaintiff is entitled to decree for declaration declaring documents dated 05.03.2001 by late Sh. Kishan Lal in favour of defendant no.1 and documents dated 14.09.2011 executed by Sh. Kailash Chand in favour of Smt. Saroj Devi as null and void? OPP*"

6. The evidence which was led by the parties is recorded in paras 6 to 17 of the impugned judgment, and these paras read as under:-

> "6. It is a matter of record that parties choose not to lead any additional evidence on the additional issue and stated that they had no objection, in case the evidence already on record was read as evidence on the above issue also.
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> 7. To substantiate her case, plaintiff examined four witnesses i.e. she herself. as PW-1, Sh. Ram Pal as PW¬2, Sh. Rajesh Kumar, LDC from the office of Collector of Stamps as PW-3 & Sh. Rajeev Ranjan, UDC in the office of Divisional Commissioner, Treasury Branch as PW-4.
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> 8. PW¬1 deposed on affidavit Ex.PW1/1 and relied upon documents viz. her voter ID card as Ex. PW1/A, electricity bill as Ex.PW1/B, site plan as Ex PW1/C, Mark A receipt regarding cremation of father of plaintiff , Mark B-copy of death certificate of mother of plaintiff and Mark C-certain photographs.
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> 9. PW-2 deposed on affidavit Ex.PW1/2 and deposed along the lines of the plaint.

> 10. PW-3 filed copy of relevant entry as Ex. PW3/1.
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> 11. PW 4 Sh. Rajeev Ranjan proved he relevant stam vendor sale register as Ex PW 4/1. Thereafter PE was closed.
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> 12. Defendants examined five witnesses in support of their case i.e. Smt. Saroj/D¬2 as DW2, Sh. Kailash Chand/D¬1 as DW¬1 and Sh. Nand Kishore as DW-3 and Sh. Sandeep Kumar as DW¬4 and SH. Mahesh Sharma as DW5.
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> 13. DW-1 deposed on affidavit Ex DW1/A and relied upon documents already exhibited as Ex.PW1/D1 and PW1/D6.
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> 14. DW-2 deposed on affidavit Ex DW 2/A.
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> 15. DW¬3 deposed on affidavit Ex. DW3/A and relied upon already exhibited documents such as Ex. PW1/D1 , D¬4 & D¬5.
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> 16. DW-4 deposed on affidavit Ex. DW4/A and relied upon already exhibited documents such as Ex. PW1/D1 colly.
>
> 17. DW 5 Mahesh Sharma deposed on affidavit ExDW5/A and relied on documents already Ex PW 1/D1, D4, D5 and D6."

7. The trial court has held that the documents which are relied upon by the appellant no.1/defendant no.1 in his favour dated 05.03.2001, and said to be executed by the father, are forged and fabricated documents. For this purpose, the trial court has referred to the fact that the appellants/defendants failed to prove the purchase of the stamp papers from the concerned stamp vendor, inasmuch as the License Number of the stamp vendor was No. 160 but the stamp vendor from whom the impugned stamp papers were purchased was

holding License No. 164. Trial court has also referred to the discrepancies in the statements made by the attesting witnesses for disbelieving the case of the appellants/defendants. The trial court has further concluded that since the appellant no.1/defendant no.1 was not the owner of the suit property in terms of the Documentation dated 05.03.2001 alleged to have been executed in his favour, hence the appellant no.1/defendant no.1 could not have further transferred the suit property to his wife i.e. appellant no. 2/defendant no. 2 by the subsequent Documentation dated 14.09.2011.

8. Ld. counsel for the appellants/defendants does not dispute the findings of the trial court with respect to the illegality/invalidity of the documents executed in favour of the appellant no.1/defendant no.1 by the father on 05.03.2001, and in my opinion even if this challenge was laid, this challenge was liable to be rejected for the additional reasons which I am giving in exercise of powers under Order XLI Rule 24, CPC. The additional reasons for my opinion are that the alleged Documentation dated 05.03.2001 in favour of the appellant no.1/defendant no.1/son are not only unregistered documents, but the fact of the matter is that the consideration is alleged to have been paid

to the father in cash, and no evidence has been led in order to establish an actual payment of consideration by the appellant no.1/defendant no.1/son to the father Late Sh. Kishan Lal i.e withdrawal/availability of moneys with appellant no. 1/defendant no. 1 from/in his bank accounts on crediting of the alleged sale consideration in the bank account of the father. I may further note that no evidence has been led by the appellants/defendants that the Documents dated 05.03.2001 and 14.09.2011 were acted upon, inasmuch as, the suit was filed on 26.11.2011 and from 05.03.2001 till the filing of the suit on 26.11.2011, there is no effort made to get the suit property mutated in the name of the appellant no.1/defendant no. 1 in any public record, be it the house tax record or the income tax record. The best proof of the validity of the documents would be of the documents having been acted upon, by relying on the same before any public authority, and in this regard the appellants/defendants have miserably failed.

9(i). The only argument which is urged on behalf of the appellants/defendants before this Court is by placing reliance upon the judgment of the Hon'ble Supreme Court in the case of ***Prakash and Others. v. Phulavati and Others, (2016) 2 SCC 36.*** It is argued on behalf of the appellants/defendants that the '2005 Amendment' to Section 6 of the Hindu Succession Act, 1956 is prospective in nature, and therefore, the respondent/plaintiff/sister could not have claimed rights in the suit property, inasmuch as, the father Late Sh. Kishan Lal had expired on 02.10.2001.

9(ii). In my opinion, this argument urged on behalf of the appellants/defendants is completely misconceived because the issue of prospective applicability of the '2005 Amendment' to Section 6 of the Hindu Succession Act would only have been relevant if it was the case of the appellants/defendants that the property was not owned by the father exclusively i.e. the property instead was not the self-acquired property of the father Late Sh. Kishan Lal, and that the suit property was an HUF property, and admittedly it is not the case of the appellants/defendants that the suit property is/was an HUF property. In fact the appellants/defendants claimed that the suit property exclusively belonged to the father Late Sh. Kishan Lal, because the appellant no.1/defendant no.1 claims to have purchased the suit property from his father in terms of the Documentation dated 05.03.2001.

10. In view of the aforesaid discussion, there is no merit in this appeal. Dismissed. All pending applications are also disposed of.

JANUARY 28, 2019 **VALMIKI J. MEHTA, J**

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