

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

+ **RFA No. 137/2019**

% ***18th February, 2019***

ASHISH DAVEY Appellant

Through: Mr. Anuj Kapoor, Advocate
(M. No.9891656411) & Mrs.
Kirti Kapoor, Advocate (M.
No.9953277266).

versus

MANJULA Respondent

Through:

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No. 7345/2019 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

RFA No. 137/2019 and C.M. No. 7344/2019(stay)

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the Judgment of the trial court dated 12.10.2018 by which

the trial court has decreed the suit for partition filed by the respondent/plaintiff/sister with respect to the property of the father being Flat No. 373-F, Pocket-II, Mayur Vihar Phase-I, Delhi. By the impugned judgment, a preliminary decree for partition has been passed granting 50% ownership interest in the suit property to both the parties to the suit.

3. The facts of the case are that the respondent/plaintiff filed the subject suit pleading that the suit property was owned by the father of the parties, Sh. Kanwar Lal Davey. It was pleaded that the father died intestate on 15.11.2009 leaving behind his widow/mother of the parties, the respondent/plaintiff/daughter and the appellant/defendant/son. It was pleaded that the mother, Smt. Kiran Davey, expired on 02.04.2015 but before her death, she had executed a Will dated 05.01.2015 bequeathing her 1/3rd share in the suit property in favour of the respondent/plaintiff, and therefore the respondent/plaintiff claimed a 2/3rd share in the suit property. Since partition was claimed, but it was denied by the appellant/defendant, therefore, after serving Legal Notice dated 17.11.2014, the subject suit was filed.

4. The appellant/defendant contested the suit by filing the written statement. It was denied that the suit property belonged to the father. It was however pleaded that besides the suit property, another property belonged to the father bearing no. 16 D, 1st floor, DDA Flats, Near Chilla Village, Mayur Vihar Phase-I, Delhi and that the father during his lifetime in the year 2007 had by an oral partition divided his properties between the parties to the suit, with the appellant/defendant getting the suit property and the respondent/plaintiff getting the property bearing no. 16 D, 1st floor, DDA Flats, Near Chilla Village, Mayur Vihar Phase-I, Delhi. The suit was therefore prayed to be dismissed.

5. The following issues were framed in the suit:

“1) Whether the plaintiff is entitled for the partition of the suit property? If so, to what extent the plaintiff is entitled for the share in the suit property? OPP

2) Whether the Will dt. 05.01.2015 was validly executed by late Smt. Kiran Davey (mother of the parties)? OPP

3) Whether the plaintiff has no cause of action? OPD

4) Whether the plaintiff has filed requisite court fees? OPD

5) Relief.”

6. The evidence led by the parties is that as recorded in paras 5 and 6 of the impugned judgment and these paras read as under:-

“5. The plaintiff led her evidence and only examined herself as PW1, tendered her affidavit as Ex.PW1/1 and relied upon the documents Ex.PW1/A to PW1/I. Ex.PW1/A is the copy of conveyance deed dt.27.4.2005, Ex.PW1/B is the death certificate of Shri Kanwar Lal Davey, Ex.PW1/C and PW1/D are the Aadhar Card and CGHS Card of late Smt. Kiran Davey, Ex.PW1/E is the legal notice and Ex.PW1/F is its postal receipt, Ex.PW1/G is death certificate of Smt. Kiran Davey, Ex.PW1/H is copy of Will dt. 05.1.2015 and Ex.PW1/I is site plan of the suit property.

6. The defendant examined three witnesses in his evidence. DW1 was the defendant himself who tendered his affidavit in evidence Ex.DW1/A and he relied upon Ex.PW1/A as already proved by the plaintiff.”

7. The trial court has held that the respondent/plaintiff failed to prove the unregistered Will dated 05.01.2015/Ex.PW1/H inasmuch as the respondent/plaintiff did not summon a single attesting witness to prove the Will. I may note that the trial court effectively, without saying so, placed reliance upon Section 68 of the Indian Evidence Act, 1872, and as per this Section, for proving of the will at least one attesting witness has to be called, and the attesting witness has to depose with respect to execution and attestation of the will. The trial court has therefore held that since the Will of the mother giving her

1/3rd share in favor of the respondent/plaintiff is not proved and thus both the parties to the suit will get 50% ownership interest in the suit property.

8. The trial court has disbelieved and rejected the case set-up by the appellant/defendant of an oral partition of the year 2007 being effected by the father. I may note that though appellant/defendant led evidence of two witnesses DW-2 and DW-3, namely, Sh. Basant Kumar Davey and Sh. Ram Saran Sharma, the trial court has rejected their depositions to hold that there was no oral partition, and rightly so because self-serving oral deposition cannot take away valuable rights of the respondent/plaintiff in an immovable property. In fact in order to buttress the conclusion of the trial court, and in exercise of powers under Order XLI Rule 24 CPC, this Court observes that if there was really an oral partition, then there was no reason why from the year 2007 till 13.05.2015 when the subject suit was filed, the appellant/defendant did not get the suit property mutated in the municipal records in his name and in fact he did not even file an application for mutation. The appellant/defendant has also not filed any Income Tax Returns showing that the suit property came to be

owned by him on account of the alleged oral partition of the year 2007 effected by the father. Therefore, in my opinion, the trial court has rightly held that merely on the basis of oral depositions of DW-2 and DW-3, the suit property would not be exclusively owned by the appellant/defendant by holding that the father during his lifetime gave the suit property to the appellant/defendant under an oral partition.

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

FEBRUARY 18, 2019
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VALMIKI J. MEHTA, J