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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 13th November, 2019

Decided on : 18th November, 2019

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RFA 425/2008 & CM APPL No.15502/2008

RAM SARAN

..... Appellant

Through : Mr.P.K.Sharma, Advocate.

versus

KARTAR SINGH & ORS.

..... Respondents

Through : Mr.K.B.B.Singh and
Mr.Atul Barthwal, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This appeal is preferred by the appellant against an order dated 16.04.2004 passed by the learned Additional District Judge, Tis Hazari Courts, Delhi (hereinafter referred as the learned '*Trial Court*') in CS No.147/06/1994 whereby the application under Order IX Rule 7 CPC filed by appellant was dismissed and also against the impugned judgment and preliminary decree dated 04.09.2008 passed by learned Trial Court in said suit.

2. Before coming to the impugned orders, let me state in brief the facts of the case.

3. The respondent No.1 had filed this suit for partition, possession and rendition of accounts with respect of the following properties:-

"(i) Constructed House No. IV/855, Bhola Nath Nagar, Shahdara, Delhi measuring 200 sq. yards;

(ii) Constructed House No. 131, Gali Ganga Ram, Chotta Bazar, Delhi measuring 34 sq. yards;

(iii) $\frac{1}{2}$ share in the land measuring 2352 sq. yards comprising Khasra No.57 and 58, situated at Kabir Nagar, Baberpur, Shahdara, Delhi;
(iv) Agricultural land forming part of Khasra No.23/6/1 measuring 4 Bighas, situated at Village Deeg Tehsil Ballabhgarh, District Faridabad (Haryana);
(v) Fixed Deposit Receipts, bank balances and jewelleries and;
(vi) Fixed Deposit Receipts, bank balances and jewelleries in the hand of the defendant no.3 Smt.Bishno Devi."

4. As per the plaint, all these properties were in possession, power and control of one Shiv Narain which came to him either by way of acquisition or by way of ancestral property which were allegedly put by him in a *common pool* and hence such properties became ancestral properties of a *joint Hindu family*. Sh.Shiv Narain had three sons and three daughters. His three sons were the plaintiff, the defendants No.1 & 2; his daughters were defendants No.4 to 6 and defendant No.3 was the widow of Shiv Narain, who also died on 04.07.2000.

5. The defendants No.3, 4 and 6 filed their joint written statement on 06.03.1996, but later they abstained themselves from the proceedings and were ultimately proceeded *ex parte* vide order dated 12.07.1999. The defendant No.5 was proceeded *ex parte* on 13.02.1996; and whereas the defendants No.1 & 2 were proceeded *ex parte* on 12.07.1999.

6. In his plaint, the respondent No.1/plaintiff had alleged his father had left behind a Will dated 12.11.1990 duly registered on 14.1.1990, with the Registrar of Properties, Seelampur, Delhi vide registration No.4493 dated 15.11.1990, additional book No.3, Volume No.272 from pages No.134-141. In the said Will Shiv Narain had bequeathed his properties viz House No. IV/855, Bhola Nath Nagar, Shahdara, Delhi as also House No.131, Gali Ganga Ram, Chotta Bazar, Delhi to his three sons i.e. $\frac{1}{3}^{\text{rd}}$ to each of them viz the appellant, respondents No.1 and 2.

These two properties are only relevant as other properties were left out in the impugned judgment; since no movable properties could either be found/proved and agricultural properties being beyond the purview of this Court.

7. It is the case of the appellant in the year 1988 late Shiv Narain had executed a Will dated 12.05.1988 in favour of his wife / defendant No.3, who then executed an irrevocable GPA dated 02.07.1992 in favour of the appellant and consequently, a sale deed was registered in his favour. Hence it is alleged the appellant is an absolute owner of the Bhola Nath Nagar property. Secondly, Will dated 14.11.1990 is alleged to be forged document, hence need not be relied upon. Thirdly, it was argued since the plaintiff / respondent No.1 herein never entered into the witness box, the appellant was denied of his right to cross-examine respondent No.1 hence the proceedings have been vitiated.

8. Before coming to the contention of the appellant, it would be appropriate to look into the observations made in para Nos.8.2 to 8.5 of the impugned judgment noted below:-

“8.2 On the plain reading of pleading, it can be gathered at glance that the plaint does not reflect constitution of Hindu undivided family or joint Hindu family of deceased Shiv Narayan. The plaint does not narrate as to in which form there was joint Hindu family was in existence or who were the members of the Joint Hindu family. There is no pleading or evidence to the effect as to who were constituting Joint Hindu family of Shri Shiv Narayan. Similarly, there is also no evidence, except narration of pleading in the affidavit of plaintiff Kartar Singh, as to how there was coparcenary properties. In addition there is narration of division of property by deceased Shri Shiv Narayan and his brother Shri Puran Singh, again there is no iota of reference of ancestral property or joint Hindu family property in the will dated 15th November, 1990 as there was joint property of Shri Shiv Narayan and Shri Puran Singh, they divided it by themselves. By taking into totality of circumstances, it is held that plaintiff failed to establish that there was Joint Hindu Family property or ancestral property. In case, the plaintiff assisted his father in construction of the house or made contribution for electricity or water connection, it would not construe that

he took his self acquired earning into the common pool as there is no Joint Hindu Family.

8.3 At the time of filing of suit, there were six properties enumerated in paragraph 4 and another property/agricultural land in Tehsil Ballabgarh referred in paragraph 18 of the plaint. The items no. V & VI in paragraph 4, duly detailed in another paragraph of the plaint vis-a-vis affidavit of plaintiff Kartar Singh are in respect of fixed deposit receipts, bank deposits/balances, jewelleries but subsequently when supplementary affidavit was filed on 27th October 2007, it enumerated four properties, out of them the two properties are (i) and (ii) described in paragraph 2.1 of this judgment, the other two properties are immovable properties of agriculture land situated in village Deeg Tehsil Ballabgarh, Haryana, left to be adjudicated. The agriculture Land comprising Khasra NO 23/6/2, 16/1 & 16/2 and other agricultural land comprising Khasra No. 23/6/1 (Girdawari Ex. PW1/4 & Ex.PW 1/5 in favour of defendant No. 3) are located in village Deeg, Tehsil Ballabgarh, District Faridabad, Haryana. Section 158 of the Punjab Land Revenue Act, 1887 bars jurisdiction of civil courts and as per Section 111 of the Act, the Revenue officer has jurisdiction to partition such land. Without adjudication on the issue whether such land was purchased by the deceased Shiv Narayana in the name of defendant No. 3 or otherwise, the property situated in District Faridabad is governed by the Punjab Land Revenue Act being an agricultural land. The similar analogy also applies in respect of agricultural land of Khasra No. 57 & 58 of village Baberpur, Shahdara, Delhi and this land is also governed by Section 55 read with item no 11 scheduled- I of the Delhi Land Reforms Act, 1955 and jurisdiction to partition agricultural land lies with the Revenue Assistant. Hence, it is held that the agricultural land are not subject matter of the present suit for partition. Now the case is to be assessed with regard to the other properties.

8.4 Now the facts emerged and the immovable property bearing House No. IV- 855, Bhola Nath Nagar, Shahdara, Delhi (measure 200 sq. Yards) and constructed House No.131, Gali Ganga Ram, Chhota Bazar, Delhi (measuring 34 sq. yards) and other moveable chattals remained the subject matter of suit for partition, possession and rendition of account. It also stands established from the aforementioned subject paragraphs that there does not exist a joint Hindu family or the joint Hindu family properties/ ancestral properties. In addition, the plaintiff has produced witness Shri Ramesh Vashisht, Advocate an attesting witness to the will Ex. PW1/2 and witness Smt. Prem Lata from the office of Sub Registrar, Seelampur that Will Ex. PW 1/2 was registered on 15th November, 1990 in their office, as document No. 4493 volume NO. 292. Additional book no. 3, page 135 to 141. This will Ex. PW1/2 recites that all previous Will, if any, executed by testator Shiv Narayan, prior to the Will dated 12th November, 1990, registered on 15th November 1990, are revoked. The defendant No. 2 relied upon irrevocable power of attorney dated 2nd July 1992 in his favour by defendant No. 3, on the basis of Will dated 12th May 1988 by Shri Shiv Narayan in her favour. Whereas, apparently the irrevocable general power of attorney dated 2nd July 1992 is subsequent to will dated 12th /15th November 1990 Ex.PW1/2 and on 12th/15th November 1990, the testator Shiv Narayana had cancelled/revoked all previous Wills; could Smt. Bishno Devi defendant No.3 on 2.7.1992 execute irrevocable general power of attorney on the basis of Will dated 12th May 1988 in her favour, when on 12th /15th November 1990 the previous Wills were revoked by the said Shri Shiv Narayan? The defendant No. 2 has not filed any written statement nor there is written statement by other defendants No.1 & 5. The plaintiff has

proved execution of Will through witnesses Smt.Prem Lata and attesting witness Shri Ramesh Vashisht, Advocate and in the light of Will Ex.PW1/2, the contentions of defendant No.2 remained alike oral testimony against the documents. When the documentary record is available, the oral testimony carries less weight in comparison to the documents.

As per Will Ex.PW1/2, its testator bequeathed property House No.IV-855, Bhola Nath Nagar, Shahdara, Delhi and House No.131, Gali Ganga Ram, Chhota Bazar, Delhi besides other agricultural land. The Will narrates such properties as property of deceased Shiv Narayan and there is no narration to the effect that the properties were ancestral properties, from that point of view, the plaintiff narrated the fact by deviating from the narration given in the Will Ex.PW1/2. On consolidated reading of document Will Ex.PW1/2, vis-à-vis, the findings already concluded that there does not exist Joint Hindu Family or ancestral properties, the defendants 4 & 6, also the defendant No.5, cannot be held entitled for their share in the properties by virtue of provisions of Hindu Succession Act, 1956 or the amended provisions of the year 2005, since shares are to be determined as per desire of deceased expressed in his Will Ex.PW1/2. In terms thereof, the plaintiff Shri Kartar Singh, the defendant No.1 Shri Ram Kishan and the defendant No.2 Shri Ram Saran are entitled for one-third share each in both the properties i.e. House No.IV-855, Bhola Nath Nagar, Shahdara, Delhi and House No.131, Gali Ganga Ram, Chhota Bazar, Delhi. The Will Ex.PW1/2 also deciphers the determined portions for the plaintiff, the defendant No.1 & 2 so that each one may have equal share/area of 600 sq.ft, in Bhola Nath Nagar property although it is subject matter of physical report in respect of the property of House No.IV-855, Bhola Nath Nagar, Shahdara, Delhi and house No.131, Gali Ganga Ram, Chhota Bazar, Delhi. The defendant No. 4,5 & 6 are not entitled for any share in such properties.

8.5 There is no iota of evidence with regard to bank balances, fixed deposits, receipts, and jewellerys. Secondly the supplementary affidavit on 15th October 2007 also suggest that such chattels are no more subject matter of partition of the property. Thus, for want of proof or existence of chattels, the suit for partition or rendition of account in respect of fixed deposit receipts, jeweleries items, cash balances became infructuous."

9. The crux of the above decision is **a)** the plaintiff failed to establish there was any *joint Hindu family* and/or any ancestral property; **b)** the partition of two agricultural properties was beyond jurisdiction of this Court; **c)** no movable property could be established; **d)** Will dated 12.11.1990 clearly stipulates earlier Wills, including Will dated 12.05.1988 executed in favour of the defendant No.3 all stood revoked, hence the reliance placed by defendant No.2 upon irrevocable GPA dated 02.07.1992 in his favour by the defendant No.2 or any alleged sale deed need be ignored.

10. Admittedly, the appellant *did not file* any written statement nor there is any written statement filed by defendants No.1 & 5. On the other hand, plaintiff duly proved the execution of Will dated 14.11.1990 through witness Smt.Prem Lata from the office of the Sub Registrar and through another witness Sh.Ram Vashist, Advocate who attested the registered Will Ex.PW1/2. Admittedly, per Will Ex.PW1/2, the testator had bequeathed both houses at Shahdara and Delhi in favour of his three sons. The daughters were given no share in the properties per desire of the deceased testator expressed in his Will Ex.PW1/2. The Will also determined the respective portions of three sons so that each may have equal area of 600 square feet in Bhola Nath Nagar property and thus, preliminary decree of partition was passed.

11. The learned counsel for the appellant relied upon *Sangram Singh vs Election Tribunal Kotah and another* AIR 1955 SC 425 to say since the plaintiff appearing as *PW1* was never allowed to be cross-examined, there was a clear violation of principle of natural justice.

12. Admittedly, the appellant never filed any written statement and was proceeded *ex parte* in the year 1999. Even his application under Order IX Rule 7 CPC moved in the year 2004 was dismissed. He never challenged such order by filing any CM(M) or in any other proceedings. Moreso, on 14.03.2000 when the suit was pending before this Court an affidavit of *ex parte* evidence was filed by respondent No.1 and documents were directed to be exhibited too. The evidence affidavit was thus taken on record. Admittedly, the respondent did not file any application at any time seeking permission of the Court to cross-examine

the respondent No.1/plaintiff. Thus there was no challenge to exhibiting of documents/evidence vide order dated 14.03.2000 and if the appellant had wished to cross examine, he could have moved an application seeking such permission which, admittedly, was never moved, hence in appeal the appellant cannot raise such contention.

13. Another contention raised was sale deed in favour of appellant was got executed pursuant to the registered Power of Attorney dated 02.07.1992 executed by his mother, relying upon Will dated 12.05.1988, was never sought to be cancelled. Admittedly, neither any written statement was filed by the appellant herein before the learned Trial Court nor any document, muchless such sale deed was ever filed by him. Moreso, the Will dated 14.1.1990 Ex.PW1/2 was held to be a valid and genuine Will of the testator, hence any document executed in favour of the appellant, based upon any earlier Will, duly cancelled by deceased Shiv Narain by his later Will, obviously shall have no legal effect. Admittedly, neither the Will dated 12.05.1988, the registered Power of Attorney 02.07.1992 nor the sale deed were ever proved by the appellant herein before the learned Trial Court. On the other hand, two witnesses viz PW1 from Registrar's Office and PW2 an attesting witness duly proved Will Ex.PW1/2 in favour of three sons of late Shiv Narain. The another attesting witness to the Will Ex.PW1/2 namely Surender Mohan Sharma had since expired, per his wife's Smt.Sunita Sharma's affidavit on record.

14. Thus, where the appellant was not diligent in pursuing his cause before the learned Trial Court, now cannot agitate upon documents

allegedly executed in his favour, saying the learned Trial Court had ignored the same.

15. The appellant has also challenged the order dated 16.04.2004 passed by learned Trial Court on his application under Order XI Rule 7 CPC. His application rather note he was absent since 12.07.1997 till he filed such application on 15.04.2004 i.e. for almost five years approx, hence, the order dated 16.04.2004 notes he has not been appearing in the matter since 1996, without any cogent reason or sufficient cause and hence such application was rightly dismissed. No new grounds are alleged to set aside order dated 16.04.2004 even in this appeal.

16. In view of above, the appeal is dismissed being devoid of merits. The pending applications, if any, also stand dismissed. The matter is lingering before the learned Trial Court since long, hence the learned Trial Court/Successor Court is expected to proceed expeditiously in accordance with law. The parties to appear before the learned Trial Court/Successor Court on 05.12.2019 at 10.00AM.

17. Copy of this order be communicated to the learned Trial Court/Successor Court for compliance.

18. No order as to costs.

YOGESH KHANNA, J.

NOVEMBER 18, 2019
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