

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

+ **RFA No. 641/2018**

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

SAJAN SETHI Appellant

Through: Ms. Amita Gupta and Ms.
Kinjal Shrivastava, Advocates
(8149285043)

versus

RAJAN SETHI Respondent

Through: Mr. Samrat Nigam, Advocate
(9810424476)

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. 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 20.04.2018 by which the trial court has passed a final decree for partition with respect to the property bearing no. D-1090, New Friends Colony, New Delhi (*hereinafter* 'suit property') situated on a plot of 292 sq. yards. There is already a preliminary decree passed between the parties on

06.03.2017 declaring the shares/rights of the parties in the suit property, and the same has become final.

2. The facts of the case are that the suit property was owned by the father of the parties, Sh. S.L. Sethi. On the death of the father of the parties, the suit property devolved upon the mother, Smt. Krishna Sethi by virtue of the Will of the father. When the mother died, she died leaving behind her Will dated 27.01.2005. To the extent of the facts stated above, the same are not in dispute. The issue pertains to the partition of the suit property in terms of the Will of the mother dated 27.01.2005.

3. As per the Will dated 27.01.2005 of the mother, there is no dispute that the ground-floor portion fell to the share of the respondent/plaintiff, the first-floor portion fell to the share of the appellant/defendant and the second-floor portion was to be divided equally between the parties with the front-half portion falling to the share of the appellant/defendant and the back-half portion of the second-floor falling to the share of the respondent/plaintiff. The relevant para of the Will of the mother dividing the property reads as under:

“a) House No. D-1090, New Friends Colony, New Delhi shall devolve upon my both sons Shri Rajan Sethi & Shri Sajan Sethi in the following manner:

- Ground Floor shall fall to the exclusive share of my elder son Sh. Rajan Sethi, first floor shall fall to the exclusive share of my son Sh. Sajan Sethi. Top floor shall be divided by my children in equal share. The front half portion shall go to the exclusive share of my son Sh. Sajan Sethi and half back portion shall go to the exclusive share of my elder son Sh. Rajan Sethi. The booster pump/motor installed at ground floor shall be used by both the children without any interference/obstruction by any of them in any manner what so ever. My both sons shall not sell their share in the property to an outsider without concurrence of each other and shall first offer to the other before taking any step in that regard.”

4(i). Therefore, there is no dispute that in terms of the Will dated 27.01.2005 of the mother, the ground-floor vests with the respondent/plaintiff, the first-floor vests with the appellant/defendant and the second-floor vests to the extent of half each in favour of both the parties with the appellant/defendant getting front-half portion and the respondent/plaintiff getting the back-half portion.

4(ii). However, the dispute exists as to whether or not there are common areas on the ground-floor of the property as this ground-floor has fallen to the share of the respondent/plaintiff.

4(iii). It is argued on behalf of the appellant/defendant that though the ground-floor vests in the respondent/plaintiff in terms of the Will of the mother, yet the appellant/defendant has a right to use

the driveway on the ground-floor and the back courtyard and these should be held as common areas even though the Will does not designate such areas as commonly owned areas. There is also a related issue to be resolved and that is with respect to allowing of another/additional entrance door by making an entrance door in the second-floor landing of the staircase, so that the respondent/plaintiff will have direct access/entrance to the back portion of the second-floor which falls to the share of the respondent/plaintiff.

5. The Ld. counsel for the appellant/defendant has very vehemently argued that the appellant/defendant has a right to use the driveway on the ground-floor which should be held as a common area, and also that the rear courtyard should be held as a common area because the water pipes of the appellant/defendant are situated in the rear courtyard along with the booster pump of the appellant/defendant.

6. In my opinion, normally a driveway on the ground-floor of the property would be a common area, but in the peculiar facts of the present case, where the suit property also has a side lane and from this side lane there is a direct entrance to the staircase which takes the appellant/defendant to his first-floor portion, then in my opinion, the appellant/defendant cannot claim a right to use the driveway. In order

to appreciate the issue, let me reproduce the photographs of the road in front of the property as also the side lane which have been filed by the appellant/defendant and these photographs are reproduced as under:







SIDE LANE



ENTRANCE



TRUCK ENTERING SIDE LANE



7. Though the specific detailed location may not be completely understood from the photographs, therefore to clarify it is stated that the suit property is located in such a manner that the front

facade of the property opens to an approximately 60 feet wide main road, and that there does not exist another house of any other person immediately adjacent to the property on one side but there exists a side lane of the same length as the length of the suit property. This side lane is a typical side lane found in various colonies of Delhi, where a particular plot has a better location on account of it being a corner plot. The suit property is a corner plot because on one side there is a main road of the colony, approximately 60 feet wide, and on one side of the property there is a side lane, with the side lane itself abutting a park. This side lane is not a usual road, and is in fact bound on both sides, at the front end as well as the back, by gates which have been put there by the colony residents. This side lane is not a normal thoroughfare or a public road because it is not regularly used by vehicular traffic.

8. Though the Ld. counsel for the appellant/defendant passionately argued that as per the photographs filed by the appellant/defendant it is shown that there are trucks with iron rods which are using the side lane, and thus it would become dangerous for the appellant/defendant and his children to use the same, however this argument is completely frivolous and self-destructive because surely if

the contention is that risk is posed on account of trucks having iron rods using the infrequently used side lane, then in fact there is a far greater risk of the appellant/defendant and his family members using the front entrance as the trucks would be using the approximately 60 feet wide road in front of the suit property in a much more regular manner every day. It is on the main road that in fact there would be far more vehicular movement; including of trucks, and surely not in a small side lane which is just of the length of the property because the side lane is not for normal vehicular use at all. The appellant/defendant has filed convenient photographs which would only show that once in a blue moon i.e. possibly once in many months, this side lane is open for trucks to enter into the same for transportation of materials etc. to the houses which fall to the back-side of the suit property. Therefore, such infrequent usage of the side lane by vehicles cannot be argued by the appellant/defendant to be dangerous for his use by him and his family members of this side lane which adjoins the side entrance gate in the suit property, and which side entrance gate directly touches and opens onto the staircase which is used by the appellant/defendant and his family members to reach their first-floor portion.

9. At the cost of repetition, it is observed that the argument of the appellant/defendant is self-defeating because if the argument is that the use of the side lane is dangerous because of its use by trucks, then in fact the use of the front gate is far more dangerous because the front-gate abuts the normal 60 feet wide road which is available everyday to all sort of vehicles including trucks carrying all sort of materials.

10. I, therefore, reject the argument urged on behalf of the appellant/defendant that the side lane cannot be used by the appellant/defendant and his family members allegedly because of trucks using the same.

11. In my opinion, once in the peculiar facts of the present case, and taking the location of the property in account, the entire ground-floor vests with the respondent/plaintiff and the appellant/defendant cannot claim use of the very small front driveway in the property and this would be all the more and especially so because the cars of the appellant/defendant and his family members are being parked in this side lane, as is argued by the Ld. counsel for the respondent/plaintiff.

12. That takes us to the issue of the use of the rear set back portion or the rear courtyard where the water pipes of the appellant/defendant; as well as the booster pump of the appellant/defendant connected with those pipes; are located. So far as these amenities of water pipes and booster pumps are concerned, this is in fact only an easementary right once the entire ground-floor ownership vests with the respondent/plaintiff. In fact, even in the Will of the mother, no rights of ownership are created in favour of the appellant/defendant of this rear courtyard. The Ld. counsel for the respondent/plaintiff has no objection that at all points of time the appellant/defendant or his nominees will have necessary access to the pipes and the booster pump in the rear courtyard as required whether towards maintenance of the same or for the repairs of the same and also for any other purpose which would require such access because of the booster pump or pipes of the appellant/defendant being located on the rear/back side of the property. The appellant/defendant can access the water pipes and booster pump after giving a reasonable notice of an hour or so, and if the respondent/plaintiff and his family members are not available in the suit property for some reason, then they would have an agent/nominee who would give access to the

appellant/defendant and his nominee to access the water pipes and the booster pump existing at the rear side of the property.

13. This takes us to the issue of access to be granted to the respondent/plaintiff for the back portion of the second-floor of the property. Thankfully, the same would also not be difficult because the landing which presently exists on the second-floor portion, opening onto the second-floor, this landing is of such a size that after the existing door on the second-floor is found to be used by the appellant/defendant for entering his front portion, there will still be sufficient landing space left in this landing which abuts the wall or the portion adjoining the back portion of the second-floor falling to the share of the respondent/plaintiff. Therefore, the respondent/plaintiff is given the right to open a door which directly opens to the back portion of the second-floor, falling to the share of the respondent/plaintiff.

14. In view of the aforesaid discussion, the impugned judgment of the trial court directing the sale of the second-floor is set aside. So far as the other directions with respect to common areas are concerned, they have already been stated above, and in this regard the operative portion for disposing of the present appeal will be as under:

- (i) The appellant/defendant will not have a right to use the small driveway on the ground-floor of the property.
- (ii) The appellant/defendant will however have easementary right to use the water pipes and booster pump at the rear courtyard, which are the water pipes and booster pump, and which feed the first-floor and second-floor of the suit property falling to the share of the appellant/defendant.
- (iii) The respondent/plaintiff will use a part of the landing of the staircase on the second-floor which adjoins the back portion of the second-floor of the suit property so that a door can be constructed on this second-floor landing which opens directly to the back portion of the second-floor of the suit property falling to the share of the respondent/plaintiff.

15. The appeal is accordingly disposed of in terms of the aforesaid directions, leaving the parties to bear their own costs.

FEBRUARY 18, 2019/ib

VALMIKI J. MEHTA, J