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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 24th May, 2018
Pronounced on: 05th July, 2018**

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CS(OS) 2746/2014 & IA Nos.9466/2015, 11813/2017, 2287/2018

DHIAN NATH KAPUR

..... Plaintiff

Through : Mr.Girdhar Govind and
Mr.Baljinder Singh, Advs. with
plaintiff in person

versus

PRAN NATH KAPUR

..... Defendant

Through : Mr.Jasmeet Singh, Adv. for LR-1.

Mr.Neeraj Malhotra, Sr. Adv. with
Mr.Jayant Mudgal, Advs. for LR-2
& 3.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. On 14.09.2017 this Court *inter alia* passed the following order:-

"IA No.9465/2015

This suit is filed by the plaintiff against the defendant (his brother) for partition and injunction in respect of property that is a built up plot admeasuring 1302 sq. yards, bearing No.14, Park Area, Opp. Ajmal Khan Park, New Delhi -110005. This property originally belong to Mr.Dina Nath Kapur who died on 20th March, 1978 leaving behind a registered Will with the Sub- Registrar as document No.108 in book No.3, volume No.1, at pages 89 to 91 on 29th May, 1965.

All the assets which were left by the deceased father of the plaintiff and defendant were duly distributed in the ratios of ½ : ½ and only the suit property needs to be partitioned. Both the parties agree that the plaintiff and defendant are in joint possession of the property as per the terms of the Will and there is no dispute qua their shares in the property being 50% each per the registered Will. It is alleged that since

the defendant was coming in the way of the plaintiff's enjoying of the premises he filed this suit for partition by metes and bounds.

The defendant though had admitted the Will dated 29.5.1965 to be the last and final Will of their deceased father, but alleged that as per the said Will the parties could make use of this property for residing themselves, letting on rent or sale with mutual consent and divide sale proceeds among themselves half and half, but so long as the property remains in joint possession, the share of each for its use or rent income will be governed by the Will itself. It is alleged that since, the parties have not agreed mutually to sell the property, the suit is premature. The legal heirs of defendant though have shown their inclination to sell the property and distribute the proceeds equally but the same is opposed by the plaintiff as he insist the property needs to be partitioned by metes and bounds.

The question if the property can be divided/partitioned by metes and bounds or needs to be sold can be looked into while passing the final decree. However one thing which stands admitted by both the parties is per Will dated 29.5.1978 both brothers are entitle to equal shares in premises in dispute and hence have consented to passing of the preliminary decree. The learned counsel for the plaintiff has even referred to an admitted undated letter Ex.P3 written by the defendant-Pran Nath Kapur and it read as under;-

"You have decided to not to sell the house and therefore I suggest you house land should be divided half half and the two registry in separate names of Dhian Nath and Pran Nath be made so that there will be no dispute after my death."

In the circumstances, I feel there is no impediment in passing of a preliminary decree declaring both the plaintiff and his brother to be the owners of the subject property in equal shares and hence a preliminary decree of partition is passed in favour of the plaintiff - Dhian Nath Kapur to be owner of 1/2 share in the subject property per Will dated 29.05.1978 and the other 1/2 goes to the legal heirs of Late Sh.Pran Nath.

The application stands disposed of in terms of the above."

2. Admittedly per Will dated 15.05.1965 both the brothers were entitled to equal share in sale proceeds in the event of sale of the subject property.
3. The defendants though moved a Review Petition No.471/2017 alleging factual and other errors in order dated 14.09.2017 and though some clerical errors were corrected, but since there was no error apparent on the face of record, the petition was dismissed vide order dated 08.01.2018. However, the order dated 08.01.2018 stipulate *a) the effect*

of specific condition in the subject Will and **b)** the effect of an undated letter Ex.P3 shall only be considered at the time of grant of the final decree of partition; hence these arguments for final decree.

4. The specific condition(s) of the Will Ex.P1 dated 15.05.1965 is as under :-

"1. Property No.1 Bungalow at 14, Park Area, Karol Bagh, New Delhi

On my death in case my wife, Vidyavati is still alive she will have full rights of its use but no power of sale, mortgage, transfer or donate or to make gift. She will have full authority to reside, or to lease it on rent and recover its rent and append the same as she likes none of my sons, daughters or other relations would have any concern with it.

*After death of my wife this house will be sole property of my two sons Shri Pran Nath and Dhian Nath and they can make use of it for residing themselves, letting on rent or sell with mutual consent as they think fit and divide its sale proceeds among themselves half and half, but as long as the house remains as their joint property share of each for its **use** or rent income will be as under:-*

*Ground floor with Western side flat, Garrage etc. will remain in **possession** of Sri Dhian Nath Kapur and first floor with Barsati and three flats of Eastern side will remain in **possession** of Shri Pran Nath Kapur. Both Shri Pran Nath and Dhian Nath will be entitled to use open ground and live peacefully.*

5. And the contents of undated letter dated Ex.P3 is as under:

"You have decided to not to sell the house and therefore I suggest you house land should be divided half half and the two registry in separate names of Dhian Nath and Pran Nath be made so that there will be no dispute after my death."

6. The arguments of the learned senior counsel for the defendants is three fold – **a)** the intention of the testator needs to be respected in all circumstances; **b)** the undated letter do not reflect the intention of the testator; and **c)** constructing of a vertical wall would damage the structure of the building and hence be not allowed in any circumstance.

7. It was argued by the learned senior counsel for the defendants, a bare perusal of the Will dated 15.05.1965 of the testator would reveal the

intention of the testator was to allow the brothers to *use* their respective portions of the property so long they remain joint and only in case of sale, the proceeds were to be distributed equally between them. Hence it is argued that to share 50% of proceeds, the plaintiff need to wait till the sale of the subject property and per condition stipulated in the Will this property *cannot be partitioned by metes and bounds* and the parties could only enjoy the accommodation given to them in the Will till the subject property is sold.

8. The learned counsel for the plaintiff on the other hand argued no doubt the intention of the testator needs to be respected, but if the parties are unable to live together in peace and if the brothers upon whom such property is devolved had during their lifetime agreed to divide it among themselves in the ratio of $\frac{1}{2} : \frac{1}{2}$, per *Ex.P3*, then the intention of the testator be read as substituted in the later document *Ex.P3* executed by the actual legatees and hence the plaintiff be held to be entitled to a final decree of partition by metes and bounds as the plaintiff do not intend to sell the property at any cost for emotional reasons.

9. The learned counsel for the plaintiff has also referred to various properties in the vicinity viz. houses No.3,4, 6, & 7 which have been subdivided vertically and argues if the division of the land is held to be not permissible, then the super structure over the land be divided to use it separately by the parties.

10. In *Inderjit Singh & Another vs Tarlochan Singh & Another* 1991 (20) DRJ 281 this Court held:-

“The superstructure of built on a plot can be partitioned by metes and bounds according to the respective shares of the parties while keeping the plot underneath the structure as joint and no permission of the lessor is needed for effecting the partition of the building by metes and bounds.”

11. This law was reiterated in *Mohinder Singh vs Kartar Lal* 1997 III AD (Delhi)626. Similar other decisions were cited viz *Chiranjilal & Another vs Bhagwan Dass & Others* 1991 (3) Delhi Lawyers 350; *Ram Lal Sachdev vs Smt.Sneh Sinha* 83 (2000) DLT 141; and *Kanwal Sibal vs NDMC* 2015 VIII AD (Delhi) 235.

12. The arguments of the learned counsel for the plaintiff are on the premise the law recognizes where unity of ownership is retained, the unity of possession may be disrupted i.e. where title to a plot of land and building constructed thereon may be retained in unity, different portions can be possessed independently i.e. in severality by the joint owners. Law recognizes partition of a building on a single entity plot of land where different portions of the built up area are enjoyed by different owners separately while retaining commonality of interest in the land on which the building is erected.

13. It is argued by the learned counsel for the plaintiff the vertical division of property will do less harm to the property and would rather give more FAR and additional built up areas to parties, hence the partition by metes and bounds be ordered and the plaintiff be allowed to built up a vertical wall in between the plot of land.

14. Certain Sections of the Indian Succession Act are to be kept in mind qua construction of the Will:

“74. Wording of will.—It is not necessary that any technical words or terms of art be used in a Will, but only that the wording be such that the intentions of the testator can be known therefrom.

85. No part rejected, if it can be reasonably construed.—No part of a Will shall be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.

87. Testator’s intention to be effectuated as far as possible.—The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

***Comments:** The Court should adopt that construction which will give effect to each and every disposition. All possible efforts should be made to give to the provisions of the Will an effective and consistent meaning. In construing the language of the Will, Court is entitled to put itself into the testator’s armchair and is bound to bear in mind all circumstances which the testator would have taken into consideration while making the disposition. The true intention of the testator has to be gathered from the reading of the whole Will. The effort of the Court must be to give effect to the expression made by the testator and not to make it inoperative. Every intention contained in the Will should, as far as possible, be given effect to; Papoo vs. Kuruvilla, 1994 (2) KLT 278. ”*

15. In *Arunkumar and Another vs Shriniwas and Others* (2003) 6 SCC

98 the Court held:-

“7. (i) The fundamental rule is to ascertain the intention of the testator from the words used, the surrounding circumstances for the purpose of finding out the intended meaning of the words which have been employed; (ii) The Court in doing so is entitled to put itself into the armchair of the testator and is bound to bear in mind also the other matters than merely the words used and the probability of the testator had/would have used the words in a particular sense, in order to arrive at a right construction of the Will and ascertain the meaning of the language used.....”

16. In *Siddamurthy Jayarami Reddy (Dead) by LRs vs Godi Jayarami Reddy and another* (2011) 5 SCC 65 the Court noted:-

“27.It is well settled that the court must put itself as far as possible in the position of a person making a will in order to collect the testator’s intention from his expressions; because upon that consideration must very much depend the effect to be given to the testator’s intention, when ascertained. The will must be read and construed as a whole to gather the intention of the testator and the endeavor of the court must be to give effect to each and every disposition. In ordinary circumstances, ordinary words must bear their ordinary construction and every disposition of the testator contained in will should be given effect to as far as possible consistent with the testator’s desire.”

17. In *Rajesh Arora vs State* 2009 AIR (Delhi) 111 this Court noted:-

“24.... It is trite that a Will is a document which speaks from the death of the testator. After Testator has departed from this world, if he leaves

behind a bequest, his wishes with regard to his earthly possession and the manner in which he wants the same to be exploited must be honoured.”

18. Thus it is the intention of the testator which is of paramount importance and to cull out the intention the first step is to give literal meaning to the words expressed/used in the Will.

19. Now if one gives a *literal* meaning to *each* and *every* word as written in the Will dated 15.05.1965 it says after the death of the wife of the testator this house shall be the sole property of his two sons namely Mr.Pran Nath Kapur and Mr.Dhyan Nath Kapur and they can make *use* of it for *residing themselves*, letting it on rent or sell with mutual consent, but as long as the house remains as their joint property share of each for its *use* or *rental income* will be as stipulated viz., *Ground floor with Western side flat, Garrage etc. will remain in **possession** of Sri Dhian Nath Kapur and first floor with Barsati and three flats of Eastern side will remain in **possession** of Shri Pran Nath Kapur. Both Shri Pran Nath and Dhian Nath will be entitled to use open ground and live peacefully.*

20. A bare perusal of the above would reveal the intention of the testator was *as long as* both the sons are *alive* and are *living together* in peace and *as long as* the house remains their joint property, *each one shall use* their respective portions allotted to them as per the Will. The condition stipulated is applicable only upon the sons *living* and *using* the property and is not extendable upon death of anyone of the sons. Hence on death of one of the sons, the condition stipulated viz., *use* of respective portions for residing *themselves* shall automatically go away.

21. The Will dated 15.05.1965 do not visualize a situation if upon the death of any of the son(s), their legal heirs shall be bound by such condition of *user* of respective accommodation; the right of residential use being a personal right was given to Mr. Pran Nath Kapur and Mr. Dhyan Nath Kapur only, hence upon death of any of the two brothers, such condition would automatically be waived as a deceased brother cannot *use* the property for his residence. Thus upon death of any one of the son(s) the remainder would not be bound to *use* the property in such particular manner, as stipulated in Will.

22. Moreso both the plaintiff and defendant being legatees of the testator, during their lifetime entered into a settlement vide an undated letter viz. Exhibit P-3 which notes as the plaintiff has decided not to sell the property the house be divided *half and half* and *two registries in separate name* be made so that there is no dispute after his death.

23. If the legal heirs of the defendant insist the *intention* of the testator be respected then why they resist to the *intention* of their own father/husband who during his lifetime had agreed to divide/partition the property. Thus there is no impediment to move towards passing a final decree. However at this stage the Court is not to decide how the property is to be divided into two units since as a comprehensive report of the Local Commissioner would be needed who shall in his report would consider all factual/legal aspects qua division of property in two units viz. super structure or otherwise, if possible or lest sale is the only alternative. Hence before passing a final decree of partition it would be appropriate to appoint a Local Commissioner to suggest the various modes of partition.

Mr.Amit Chadha, Advocate (Mobile No.9911116613) is therefore appointed as a Local Commissioner to visit the property and suggest modes of partition. The fee of the Local Commissioner is fixed at ₹1,25,000/-, besides incidental and out of pocket expenses, to be shared by the parties equally. The commission be executed within ten weeks from today and report thereof be filed thereafter. Needless to say that learned Local Commissioner shall put the parties to advance notice prior to his visit/inspection of the suit property.

24. Copy of this order be sent to the learned Local Commissioner for compliance.

25. List on 25.10.2018.

YOGESH KHANNA, J

JULY 05, 2018

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