

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

% **Date of decision: 5th September, 2019**

+ **CS(OS) 520/2018, IA No.14303/2018 (u/O XXXIX R-1&2
CPC) & IA No.4492/2019 (u/O VII R-11 CPC)**

RAMESH ARYA **Plaintiff**

Through: Mr. Pulkit Thareja, Adv.

Versus

PAWAN ARYA AND ORS. **Defendants**

Through: Mr. Anil Garg, Adv. for D-
1,2,6&7.

Mr. R.S. Kela & Mr. Bharat
Prakash, Advs. for D-3 to 5.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit for partition of property No.A-135, Priyadarshini Vihar, New Delhi, pleading that (i) Sh. Paramanand Arya, being the father of the plaintiff, defendants no.1,2 and 7 and of Shiv Kumar Arya, another brother of the plaintiff and defendants no.1,2 and 7 was the owner of the said property constructed over land ad-measuring 360 sq. yds.; (ii) Shiv Kumar Arya has died leaving the defendants no.3 to 6 as his widow, sons and daughter respectively; (iii) Sh. Parmanand Arya has left a validly executed registered Will dated 8th September, 2005 bequeathing the entire property in favour of his five children; and, (iv) thus the plaintiff, defendants no.1,2 and 7, each have a 1/5th undivided share in the property and the defendants no.3 to 6 together have remaining 1/5th share in the property.

2. The suit was entertained and vide *ex parte* ad-interim order dated 14th November, 2018, which continues to be in force, the parties

restrained from alienating, encumbering or parting with possession of, or any part of, property No.A-135, Priyadarshini Vihar, New Delhi.

3. One joint written statement has been filed by defendants no.1,2,6 and 7 and another joint written statement has been filed by defendants no.3 to 5.

4. The defendants no.1,2,6 and 7 have filed IA No.4492/2019 under Order VII Rule 11 of the CPC.

5. The counsel for the defendants no.1,2,6 and 7 has drawn attention to the Will dated 8th September, 2005 of the father Parmanand Arya *inter alia* providing as under:

“I have the following sons and daughters:

1. Shiv Kumar Arya
2. Satish Arya
3. Ramesh Arya
4. Pawan Arya
5. Mrs. Anju Nijhawan.

I have great love and affection for all my legal heirs. So long as I am surviving I shall continue to be the sole and absolute owner of the property bearing no.A-135, Priyadarshini Vihar, Delhi and none of my legal heirs, relatives shall have any kind of right or interest in the said property in any manner whatsoever.

Now I bequeath that after my death the said property shall subsequently devolve upon my sons and daughter and that none of them shall have any right to get the property partitioned, mortgaged or alienated in respect of the whole or any part in any manner whatsoever. I state that after my death the property No.A-135, Priyadarshini Vihar, Delhi shall be shared in equal proportion by all the 5 legal heirs equally.

This Will is made by me voluntarily wilfully without any force or coercion from any side and the same has been made to set at rest all the controversies, claims or interference of any relative, person or legal heirs in any manner whatsoever and to save any family members from any kind of litigation which may accrue due to the mischief of any person in the family or outside.

I have gone through the contents of the Will and understood the same very well and thereafter the Will is being signed.”

and has argued that since the father Parmanand Arya has willed that none of his children, including the plaintiff, will have any right to get the property partitioned, this suit for partition of the property does not lie. Attention is drawn to Section 122 of the Indian Succession Act, 1925 providing as under:

122. Onerous bequests.- Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Illustration

A, having shares in (X), a prosperous joint stock company and also shares in (Y), a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock companies; B refuses to accept the shares in (Y). He forfeits the shares in (X).

and it is contended that since the Will admitted by the plaintiff imposes an obligation, including on the plaintiff, to not have the property partitioned, and the plaintiff having sued for partition, the plaintiff is deprived of claiming any share in the property under the Will. It is further contended that ***Rajrani Sehgal Vs. Dr. Parshottam Lal*** 46 (1992) DLT 263, on which the counsel for the plaintiff had relied at the time of admission of the suit, is on different facts from that subject matter of the present suit. It is otherwise stated that the plaintiff, defendants no.1,2,6 and 7 as well as defendants no.3 to 5, all admit the document dated 8th September, 2005 to be the validly executed last Will of the father Parmanand Arya.

6. The counsel for defendants no.3 to 5 on enquiry states that the defendants no.3 to 5 have no knowledge of the Will and thus do not admit the same.

7. However on it being put to the counsel for the defendants no.3 to 5, whether not even in the absence of a Will, the shares of the

parties will still be as pleaded by the plaintiff i.e. $\frac{1}{5}^{\text{th}}$ each of plaintiff and defendants no.1,2 and 7 and $\frac{1}{5}^{\text{th}}$ together of defendants no.3 to 6, the counsel for the defendants no.3 to 5 is unable to controvert. He however states that it is also the plea of the defendants no.3 to 5 that the father Parmanand Arya, during his lifetime only had partitioned the property amongst all the children and thus this suit for partition does not lie.

8. On enquiry as to how there could be a partition during the lifetime of Parmanand Arya who alone is admitted by everyone to be the owner of the property, the counsel for the defendants no.3 to 5 states that the testator Parmanand Arya had allocated different portions of the property to different children.

9. On enquiry, how the said allocation will prevail over the registered Will, it is again stated that the defendants no.3 to 5 have no knowledge of the Will.

10. On further enquiry, it is stated that (a) the defendants no.3 to 5 are in possession of two out of the four rooms of the first floor of the property; (b) the remaining two rooms on the first floor are in possession of defendant no.7; (c) the plaintiff and the defendant no.1 are in possession of the entire second floor; and, (d) the defendants no.1,2 and 7 are in possession of different portions of the ground floor.

11. I may however record that there is some controversy between the parties as to the occupation of different portions of the house. However need to go into the said controversy is not felt for the present purpose.

12. The counsel for the plaintiff, besides relying on *Rajrani Sehgal* supra has also referred to *S.K. Chopra Vs. V.N. Chopra* MANU/DE/1878/2017.

13. The counsel for the plaintiff otherwise has referred to *Narender Nath Seth Vs. Lata* MANU/DE/0450/2012 on the aspects of the partition during the lifetime of the father being not possible and mere occupation of separate rooms does not amount to partition.

14. I have considered the rival contentions.

15. In the face of admitted position, of the father Parmanand Arya having died leaving five Class-I heirs, and also in his Will having bequeathed the property equally to the said five Class-I heirs, the denial by the defendants no.3 to 5 of the knowledge of the Will is immaterial inasmuch as irrespective of the Will, the shares of the parties would be as aforesaid i.e. $1/5^{\text{th}}$ each of plaintiff and defendants no.1,2 and 7 and $1/5^{\text{th}}$ together of defendants no.3 to 6.

16. No merit is found in the only defence of the defendants no.3 to 5, of the father Parmanand Arya in his lifetime having allotted different portions of the house to different family members, this suit for partition is not maintainable. The plea in this respect is vague. It is only pleaded that the father Parmanand Arya “in his lifetime settled the property in question by metes and bounds in favour of his four sons....” No date of such “settlement” is pleaded, i.e. whether before the date of the Will or after. Parmanand Arya, till his demise was the sole owner of the property and neither of the parties thereto had any right, title or interest in the property and their use and occupation if any of the property, during the lifetime of Parmanand Arya was with

the permission of Parmanand Arya. There was thus no question of any partition in lifetime of Parmanand Arya; partition can only be between those having share, right, title or interest in the property. Parmanand Arya after his demise, could have partitioned the property, by Willing demarcated portion thereof to the parties. It is not the case of the defendants no.3 to 5, that Parmanand Arya left any such Will. In the absence of any Will, inheritance by the parties could only be jointly. Even if the parties had been allocated separate portions of the property for their respective use, by Parmanand Arya, the same in the absence of a Will, would not lead to the parties, on demise of Parmanand Arya, inheriting the said respective portions. Moreover, even if Parmanand Arya had desired the parties to so continue in possession of their respective portion, also after his death, the same would not amount to partition. Reference in this regard can be made to the dicta of the Division Bench of this Court in ***Preeti Satija Vs. Raj Kumari*** AIR 2014 Del 46 (DB) holding that public notices, as are often found to be given, of disinheriting one of the children, do not constitute a Will and on the basis thereof the child so disinherited cannot be deprived of a share in the estate.

17. The Legislature has provided for any desire with respect to the estate, to be expressed by way of a Will executed in the manner laid down by law and till the allocation, even if done by the father in his lifetime, of different portions of the property between different family members forms subject matter of a Will executed in accordance with law, the said allocation would come to an end on the demise of the testator and the division thereof can only be in accordance with law

i.e. by mutual partition or by a suit for partition. Thus, no need to put the suit to trial on the said aspect also or to frame any issues arises.

18. Else, mere occupation of different portions of the property, does not amount to partition and reliance by counsel for plaintiff on *Narender Nath Seth* is apposite. There is no plea of any oral partition, after the demise of Parmanand Arya. Reference can also be made to *Rameshwar Prasad Gupta Vs. Rajinder Kumar Gupta* MANU/DE/7647/2011 and *Abhay Sapru Vs. Chitralekha Bakshi* MANU/DE/0113/2008 holding that possessing of different portions of the property by different parties is merely an arrangement for convenience and does not constitute a partition.

19. No merit is also found in the contention of the counsel for the defendant no.1,2,6&7 of the plaintiff, by seeking partition of the property in contravention of the Will, having been left with no share under the Will in the property.

20. I have drawn the attention of the counsel for the defendants no.1,2,6 and 7 in this regard to Sections 114,117, 119, 127, 138 and 139 of the Indian Succession Act and the Scheme whereof running throughout is, of vesting of the estate immediately in the legatee, *de hors* such conditions. Thus IA No.4492/2019 under Order VII Rule 11 of the CPC is dismissed.

21. The right to seek partition with other co-sharers, is a right inherent to a property. Supreme Court in *Danamma Vs. Amar* (2018) 3 SCC 343 though in the context of a daughter, who by virtue of amendment of the year 2005 to the Indian Succession Act, 1956

became a coparcener, held that the daughter having become a coparcener, one of the incidents of coparcenary is the right of a coparcener to seek a severance of status and hence was entitled to seek partition. This Court also in *Sri Kishan Vs. Ram Kishan* 159 (2009) DLT 470 negated the argument that the suit for partition was not maintainable owing to withdrawal of an earlier suit for the same relief, reasoning that the right to enforce partition is a legal incident of co-ownership and as long as such co-ownership subsists, the right to seek partition continues.

22. I may in this context also record that Section 10 of the Transfer of Property Act, 1882 provides, that where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void. Similarly, Section 11 thereof provides that where on a transfer of property, an interest therein is created absolutely in favour of any person but the terms of transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction. Both the said provisions also enforce the view that once absolute title in a property is vested, any condition imposed on use or enjoyment of the property is void.

23. I may however clarify that the provisions of the Transfer of Property Act would not apply to a testament. The definition in Section 3 of the Transfer of Property Act of an 'instrument' is clear, that it means a non-testamentary instrument i.e. would not include a

Will. Section 5 thereof, also defines 'Transfer of property' as meaning "any act by which a living person conveys property, in present or in future, to one or more other living persons". Thus making of a Will, is not 'transfer' within the meaning of the Transfer of Property Act.

24. The question otherwise also is not *res integra*. Supreme Court in ***Chhote Khan Vs. Mal Khan*** AIR 1954 SC 575 was concerned with a Settlement Agreement between family members, owners of an immovable property and which settlement *inter alia* debarred any of them from claiming partition. It was *inter alia* held that partition is a right incident to the ownership of property and once the defendants in that case were found to be the co-owners, their right to partition could not be resisted.

25. However Section 127 of the Indian Succession Act, to which attention of the counsel for the defendants No.1 to 6 & 7 has been drawn, is as under:

"127. Bequest upon illegal or immoral condition.-A bequest upon a condition, the fulfilment of which would be contrary to law or to morality is void."

26. Once it is held that right of partition is an inherent right in property, any condition in the Will restraining partition would be contrary to law and would be void under Section 127 supra.

27. I find the Division Bench of the High Court of Madras in ***Atika Begum Vs. Haji A.A.M. Abdulla*** 2002 SCC OnLine Mad. 138 also to have held that a right of transfer is incidental to and inseparable from the beneficial ownership of the property and therefore an absolute

restraint of such power is repugnant to the nature of the estate and any such condition violates such right, as the same is opposed to the rule of justice, equity and good conscience. Supreme Court also in ***Gopala Menon Vs. Sivaraman Nair*** (1981) 3 SCC 586 held that if the testator vests an absolute estate in the property bequeathed to his wife, she would be entitled to dispose of that property in any manner she likes and no authorisation by a Will by her husband would be necessary, empowering her to dispose of the property. It was further held that the absolute and unrestricted power to dispose of property is a necessary incident of an absolute estate and that it is implicit, when an absolute estate is conferred that the grantee is free to deal with and dispose of the property in any manner and a restraint on alienation is void. A Division Bench of the High Court of Lahore also, as far back as in ***Umrao Singh Vs. Baldev Singh*** AIR 1933 Lah 201 held that once the Will in unmistakable terms declared that the three sons of the testator were heirs and were absolute owners in equal shares, a subsequent clause in the Will restraining their power of alienation and partition in respect of immovable properties until the youngest of them had attained majority, was void. It was held to be settled law that where in a Deed of Gift or Will, an absolute estate of inheritance is created in favour of a person any subsequent clause which purports to restrict that interest is invalid and the donee or legatee takes an absolute estate as if the deed contained no such restrictive condition. It was further held that the rule is the same, even though the restriction is for a limited period only and purports to cut down the donee's right to enjoy the property as full owner or alienate it until a certain age

beyond the date of majority. In ***Raj Rani Sehgal*** supra referred to by the counsel for the plaintiff also, it was held that in case there are unambiguous dispositive words in the Will, they should be given full effect, consistent with the intention of the testator and in case any restriction or qualifying expression is used to circumscribe the enjoyment of the property so made, then that is to be ignored as being really repugnant of the deceased. Reliance, by counsel for plaintiff, on ***S.K. Chopra*** supra, is also apposite.

28. Parmanand Arya, in the present case, has not bequeathed the property to his five children “subject to” their not partitioning, mortgaging or alienating the same. The intention is thus clear that the bequest of the property to the five children in equal share is absolute. Resultantly, the condition that none of the five sons shall have any right to get the property partitioned, mortgaged or alienated, is to be disregarded.

29. It cannot also be lost sight of, that different portions of the property, even if equitably allocated for use, have different value and the testator cannot compel any of the legatees to, under fear of losing share in valuable property and at the cost of paucity of accommodation with resultant inconvenience and harassment, continue to reside in the property, sharing it with others. From the factum of defendant no.6, who is the daughter of defendant no.3 and sister of defendants no.4 and 5, filing written statement along with defendants no.1,2 and 7 and not with her mother and brothers who have filed the separate written statement, it is quite obvious that the defendant no.6 also desires a separate share in the property.

Considering the number of shareholders of the property and considering the size and construction of the property, a clause as aforesaid in the admitted Will, depriving the legatees of any right to get the property partitioned, if enforced, leads to nothing but disputes amongst the family members and chaos in the place of their residence.

30. Another aspect may be noted. The condition in the Will aforesaid, even if were to be held to be valid, now has ceased to have any effect on the demise of one of the five children viz. Shiv Kumar Arya of the testator Parmanand Arya. The prohibition on claiming partition is only on the five children and not on their heirs. Once one of the five children has died, the property, even under the said Will, has become partible.

31. The counsel for the defendants no.1,2,6 and 7 has then drawn attention to the document at pages 1 to 8 of Part-III(B) file titled “Details of : Oral Mutual Family Settlement – OMFS - : (made in 2008):” to contend that the property has already been partitioned between the parties. However, on enquiry from the counsel for the defendants no.1,2,6 and 7 that if it is the case of the defendants no.1,2,6 and 7 that the property has already been partitioned, are they not falling in the trap laid down by them themselves in the application under Order VII Rule 11 of the CPC, of partition disentitling the person seeking partition of their share in the property, the counsel for the defendants no.1,2,6 and 7 states that it is not a partition but only a user agreement.

32. The counsel for defendants no.1,2,6&7 with respect to the bar under Section 114 states, that the vesting has not been delayed only a

condition has been imposed; with respect to Section 117, it is argued that the same is with respect to movable property only; Sections 119, 127, 138 and 139 are argued to be not applicable. It is also suggested that the Will shows the intent to convert the property into a Joint Hindu Family property.

33. However, on enquiry whether not a Joint Hindu Family is also partible, no answer is forthcoming.

34. I may in this regard mention that though ancient Hindu law, even after codification, deprived a married daughter from a claim for partition of the property and entitled such daughter to a share only on partition being effected by others but the said law was changed in the year 2005 and the same also shows the legislative mandate of entitling even a married daughter to a right of partition.

35. I am also unable to agree with the counsel for the defendants no.1,2,6 and 7 that the clause aforesaid is covered by Section 122 of the Indian Succession Act. The purport of what is meant by an onerous bequest therein is evident from the illustration thereto i.e. whether the bequest is accompanied with a liability. The bequest in the present case by the father Parmanand Arya to all his children, of equal share in the property, does not become onerous by the desire expressed by the father to have all his children reside together as members of the family in the house. Alas! the same is not happening. From what is informed, it is quite evident that each of the children's families have separate kitchen and are cooking separately and there is no common kitchen of the entire family. The defendants no.6 and 7, being females, as per custom are residing in their matrimonial home

and they cannot possibly enjoy the property in common along with the rest of the family, as has been desired by the father.

36. I thus do not find any issue of fact or law to be arising for adjudication in the present suit.

37. Thus a preliminary decree for partition of property No.A-135, Priyadarshini Vihar, New Delhi is passed, declaring the plaintiff Ramesh Arya, defendant no.1 Pavan Arya, defendant no.2 Satish Arya and defendant no.7 Anju Nijhawan to be having $1/5^{\text{th}}$ undivided share each therein and the defendants no.3 Raj Kumari Arya, defendant no.4 Sunil Arya, defendant no.5 Saurabh Arya and defendant no.6 Sonali Arora together having remaining $1/5^{\text{th}}$ undivided share in the property.

38. Preliminary decree for partition be drawn up.

39. While the counsel for the plaintiff and the counsel for the defendants no.1,2,6 and 7 on enquiry state that the property is not partible by metes and bounds, the counsel for the defendants no.3 to 5 states that he will have to study the plan to answer the question.

40. Considering the size and construction of the property and the number of shareholders in the property, the property is not found to be partible by metes and bound and it is not deemed necessary to issue a commission or to await the response of the defendants no.3 to 5 to the query made.

41. The counsel, when appears in the Court, ought to have been ready with the said aspect in view of the admitted position as emerged.

42. Thus, a final decree for partition of property No.A-135, Priyadarshini Vihar, New Delhi is also passed, of sale thereof and of

distribution of sale proceeds amongst the parties as per their shares in the preliminary decree for partition.

43. It is however made clear that the parties shall be entitled to make *inter se* bids, with the party/s bidding the highest, acquiring the share/s of other/s against payment of consideration, execution of requisite documents and delivery of possession.

44. If any of the party/s fails to deliver possession of the portion of the property in his / her possession / occupation to the purchaser or to the highest bidder, such party/s shall be liable to be dispossessed from the property as if in pursuance to a decree for recovery of possession of immovable property.

45. Till the execution of the decree, all the parties are restrained from alienating, encumbering or parting with possession of and/or creating any third party right in and/or from making any additions, alterations, constructions, demolitions in the property.

46. The parties to bear their own costs.

47. Final decree for partition be drawn up.

SEPTEMBER 05, 2019

‘gsr’

RAJIV SAHAI ENDLAW, J