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

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Date of decision: July 27, 2022

+ RFA(OS) 13/2022, CM APPL. 32691/2022 (delay) & CM APPL. 32692/2022 (stay) CM APPL. 32693/2022 (exemption)

RAKESH JAIN

..... Appellant

Through: Mr. Rajesh Kumar Agnihotri,
Advocate

Versus

JINESH JAIN & ORS.

..... Respondents

Through: None

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T (oral)

1. By virtue of instant appeal, appellant / defendant no.2 impugns preliminary decree of partition dated 28.03.2022 (hereinafter referred to as “impugned judgment”) passed by learned Single Judge in suit bearing CS(OS) 60/2021 (hereinafter referred to as “suit”) instituted by respondent no.1 / plaintiff against (i) respondent no.2 / defendant no.1, (ii) respondent no.3 / defendant no.3, (iii) respondent no.4 / defendant no.4 and (iv) appellant, for partition of property bearing no. 56, area measuring 300 square yards, Block B-2, Ashok Vihar, Phase-II, Wazirpur, Delhi-110052 (hereinafter referred to as “property”) claiming 1/5th share in it, as it belonged to their father, who had died intestate on 09.10.2019. The appellant and respondent nos.1 to 3 are siblings born out of same father, Late Shri



Hem Chand Jain (hereinafter referred as “siblings”) and respondent no.4, their deceased mother.

2. The stand of parties before the learned Single Judge was that they were in joint possession of the property and respondents no.1 and 3 were agreeable for a preliminary decree of partition qua 1/5th share each, but contrary to that appellant sought his 1/4th share in the property. However, the appellant never disputed about his father dying intestate or qua the share of the parties in respect of the property before the Learned Single Judge.

3. The learned Single Judge vide impugned judgment passed a preliminary decree of partition declaring 1/5th share of all the parties, including their deceased mother. However, since the property cannot be divided by metes and bounds, therefore, on the submissions of the learned counsel for the parties, the suit is pending adjudication before the learned Single Judge to work out the modalities for its sale or purchase of share *inter se* parties. Being dissatisfied with the impugned judgment and decree passed by the learned Single Judge, appellant has challenged the same by virtue of this appeal.

4. Learned counsel for the appellant contends that while passing the impugned judgment and granting 1/5th share to each of the parties, the learned Single Judge has overlooked the Will of late father of siblings. It is further submitted that learned Single Judge has overlooked the Partition Deed dated December, 2010, *inter se* the siblings and their deceased mother. Lastly, it is contended that the learned Single Judge has not given opportunity to the appellant for proving any documents in the form of additional evidence.

5. Upon perusal of the Will in question, we find that it is not a finally



concluded document, as it is undated; contains corrections and does not bear details / signatures of witnesses. As per settled legal position, a Will has to be executed by the Executor in terms of Section 63 of the Indian Succession Act, 1925. The Will being an incomplete document, is non-existent and has no sanctity in the eyes of law. At best, the said Will contains the desire which were not affirmed and executed by the late father of the siblings. Thus, the appellant is barred in facts and law from placing any reliance thereupon.

6. Similarly, on perusal of the Partition Deed in question, we find that even it does not bear signatures of any of the siblings or the deceased mother; is undated (the date is incomplete and has been stuck off); and contains corrections.

7. As per settled position of law, for a valid contract, parties have to be *ad-idem*. The Hon'ble Supreme Court in **Mayawanti Vs. Kaushalya Devi** (1990) 3 SCC 1 has held that "*It is settled law that if a contract is to be made, the intention of the offeree to accept the offer must be expressed without leaving room for doubt as to the fact of acceptance or to the coincidence of the terms of acceptance with those of the offer. The rule is that the acceptance must be absolute, and must co-respond with the terms of the offer. If the two minds were not ad idem in respect of the property to be sold*".

8. The said Partition Deed being an incomplete document is not a valid contract and is neither final nor binding and the mere preparation thereof without signatures does not tantamount to acceptance of the terms by the parties therein. It is non-existent and has no sanctity in the eyes of law. Thus, the appellant is barred in facts and law from placing any reliance



thereupon.

9. In view of aforesaid, this Court is of the opinion that as there was neither any Will nor any Partition Deed before the learned Single Judge, they have rightly not been considered by the learned Single Judge.

10. So far as the contention of appellant that the learned Single Judge did not grant opportunity to prove any document by leading additional evidence, we find that the appellant had not made any effort to bring any such evidence on record. It is not the case of appellant that an application seeking permission to file any document or bring evidence on record was filed before the learned Single Judge or that the same was not considered or was rejected. Before us also the appellant has not filed an application under the provisions of Order XVI rule 27 of the Code of Civil Procedure, 1908 seeking permission to file any additional evidence in the form of documents. Hence, at this belated stage, this plea deserves to be out-rightly rejected.

11. In view of what has been observed by us hereinabove, we find no reason to interfere in the impugned judgment dated 28.03.2022 and this appeal fails.

12. The appeal is accordingly dismissed. Pending applications are disposed of as infructuous.

(SURESH KUMAR KAIT)
JUDGE

(SAURABH BANERJEE)
JUDGE

JULY 27, 2022/rr/r