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

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Date of Decision: 18.11.2022

+ **RFA 581/2022**

KAMAL SHARMA

....APPELLANT

Through: Mr. M.L. Sharma, Advocate

versus

PRAVEEN KUMAR SHARMA & ORS ...RESPONDENTS

Through:

CORAM:

HON'BLE MR. JUSTICE GAURANG KANTH

GAURANG KANTH J. (ORAL)

C.M. No. 49527/2022 (Exemption)

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

RFA 581/2022 and C.M. No. 49526/2022 (Stay)

3. The Appellant in the present Appeal is assailing the Judgment & Decree dated 18.08.2022 passed by the ADJ-02, South East, Saket District Courts, New Delhi in CS DJ No. 7922/2016 titled as *Praveen Kumar Sharma Vs Kamal Sharma & Ors* (“**Impugned judgement**”).

FACTS RELEVANT FOR THE CONSIDERATION OF THE PRESENT APPEAL ARE AS FOLLOWS:

4. The parties in the present Appeal are siblings, children of Late Sh. B.K Sharma. Respondent No.1 (Original Plaintiff) and Appellant

(Original Defendant No.1) are real brothers. Respondent Nos.2 & 3 (Original Defendant Nos.2&3) are real sisters of Respondent No.1 and the Appellant.

5. Late Shri B.K Sharma was the owner of the property bearing House No.964, Arjun Nagar, Kotla Mubarakpur, New Delhi (“**Suit property**”), built up property on an area of 56 sq. yards comprising of ground, first and second floors. Late B.K Sharma during his lifetime sold the ground floor of the said property. Hence at the time of his death, he was the owner of first and second floor of the suit property. Late B.K Sharma died intestate on 25.10.1995 leaving behind the Appellant and Respondents as his legal heirs. His wife predeceased him.

6. Late Shri B.K. Sharma was a lawyer by profession, and he was the licensee of Chamber No.142, Patiala House Court, New Delhi allotted by New Delhi Bar Association. Respondent No.1 is also a lawyer by profession and hence after the death of his father, Respondent No.1 became the licensee of the said chamber, i.e, Chamber No. 142, Patiala House Court, New Delhi.

7. After the death of Late Shri B.K Sharma, the Appellant and Respondent No.1 entered into a Family Settlement Deed dated 28.07.1996 (Exhibit PW1/3). As per the said Settlement Deed, the suit property was divided into two shares i.e. Respondent No.1 was allotted the second floor along with terrace and Appellant was allotted the first floor and one room over the terrace of the second floor.

8. Respondent No.1’s wife was allotted Government accommodation in the year 1998 and hence Respondent No.1 shifted to the Government

accommodation. However he retained the possession of his part of the suit property.

9. Later Appellant and Respondent No.1 mutually agreed to inter change their respective shares/ parts in the suit property. Hence the Appellant came into possession of the second floor along with terrace and Respondent No.1 came into possession of the first floor and one room over the terrace of the second floor.

10. Respondent No.1 rented out his portion of the suit property to a tenant whereas the Appellant and his family were occupying their portion of the suit property, i.e, second floor along with terrace.

11. It is the case of Respondent No.1 that he visited the suit property on 09.07.2012 and found that the locks of his premises were changed by the Appellant. Matter was reported to the police. Later both the parties arrived at a compromise. The possession of Respondent No.1 was restored back qua his share of the suit property, i.e, the first floor and one room over the terrace of the second floor.

12. Again on 22.07.2012, Respondent No.1 went to the suit premises for renovation of his first floor. However, the Appellant and his family objected to the same. This led to a fight between both the siblings and hence, FIR No.159/2012 was registered against the Appellant and his family members with Police Station Kotla Mubarakpur on 22.07.2012 under Sections 323/341/448/34 IPC (Exhibit PW1/5).

13. It is the case of Respondent No.1 that the Appellant took forcible possession of Respondent No.1's share of the suit property and rented it out to a third party. The Appellant is getting a monthly rent of Rs.8,000/- from the said portion.

14. Respondent No.1 in the year 2012 filed a suit for partition, declaration and permanent injunction, being CS No.136/2012 but when Respondent No.1 came to know that the Appellant had taken forcible possession of the suit property, Respondent No.1 vide order dated 17.04.2014 withdrawn the said suit with liberty to file a fresh suit.

15. Despite repeated requests, the Appellant was not honoring the family settlement, hence Respondent No.1 filed the present Suit for Partition, Declaration, Damages and Permanent Injunction against the Appellant and Respondent Nos.2&3 (Sisters).

16. Appellant filed the written statement raising preliminary objection of limitation. The Appellant in his written statement admitted the fact that the father of the parties, Late Shri B.K. Sharma died intestate. The Appellant admitted that the Appellant and Respondent No.1 entered into a family settlement dated 28.07.1996 and partitioned the suit property amongst themselves. According to the Appellant, the funds for the marriage of Respondent No. 3 (sister) was arranged by the Appellant himself and also from the money left behind by the deceased father of the parties which was generated from the sale of the ground floor of the suit property. The Appellant further stated that Late Shri B.K Sharma was also having Chamber No.142 at the Patiala House Courts. Hence parties entered into an oral agreement whereby it was agreed that Respondent No.1, being a lawyer will retain the Patiala House Court's Chamber in his exclusive possession and in lieu of this, he will transfer his share of the suit property to the Appellant. The Appellant further submitted that Rs.3,00,000/- being the sale consideration received after the sale of the first floor of Chamber No. 142, Patiala House Courts was distributed

equally to all the Respondents in cash. It is the contention of the Appellant that since then he was in exclusive possession of the entire suit property. The Respondents have no right, title or interest in the suit property.

17. Based on the pleadings of the parties, learned Trial Court framed the following issues:

- “1. Whether suit is not properly valued for the purpose of court fees and jurisdiction? OPD-l.*
- 2. Whether the suit is barred by limitation? OPD-l*
- 3. Whether in an oral settlement it was decided that plaintiff would retain the chamber belonging to the father of the parties at Patiala House Courts in lieu of the second floor of the property in question and the said floor would fall exclusively in share of defendant no.1? OPD-L*
- 4. Whether the defendant no.1 paid the money to the plaintiff and other co-sharers in lieu of his share exclusive share of the second floor in the property in question? OPD-l.*
- 5. Whether the plaintiff is entitled to the decree of declaration, as prayed for? OPP*
- 6. Whether the plaintiff is entitled to the decree of partition, as prayed for? OPP*
- 7. Whether the plaintiff is entitled to the decree of damages, as prayed for? OPP*
- 8. Whether the plaintiff is entitled to decree of permanent injunction as prayed for? OPP*
- 9. Relief”.*

18. Respondent No.1 stepped into the witness box as PW-1 and Head Constable Mr. Uttam Chand was examined as PW-2. The Appellant and Respondent Nos. 2&3 stepped into the witness box as DW-1, DW-2 and DW-3 respectively. Sh. Ajay Nigam, an officer from Punjab National Bank was examined as DW-4, Sh. Ashok Shashni, Clerk from UCO Bank was examined as DW-5, Sh. Jaibier @ Sunny, the tenant of

Respondent No.1 was examined as DW-6, and Ramesh Sharma, husband of Respondent No.2 who wrote the family settlement was examined as DW-7, Sh. Devender Kumar, Alhmad from the Court of Smt. Nupur Gupta, MM was examined as DW-8 and Sh. Rahul, Asst. Manager, UCO Bank was examined as DW-9.

19. Based on the evidence placed before it, the learned Trial Court, vide impugned Judgment & Decree dated 18.08.2022 was pleased to decree the suit in favour of Respondent No.1. The relief clause of the Impugned Judgment reads as follows:

“37. The suit of the plaintiff is decreed against the defendants and it is held that plaintiff is entitled to declaration to the effect that the Family Settlement Deed Ex.PW-1/3 with (inter change) is binding upon all the parties and plaintiff is entitled to share of the first floor of the suit property with one room at the terrace of the second floor as per Family Settlement Ex.PW-1/3.

38. The suit property stood divided between the parties as per the settlement Ex PW-1/3 and plaintiff is therefore, entitled to be put into possession of his share i.e. the first floor along with one room at the terrace of the second floor of the suit property.

39. It is held that the plaintiff is entitled to use and occupation charges @ Rs.2700/- per month w.e.f. July 2012 till the possession of the same is handed over by the defendant no.1 to the plaintiff. Plaintiff is also entitled to 10% annual increase (over the last paid immediately) on the said amount of Rs.2700/- per month till its realization.

40. The plaintiff is entitled to decree of permanent injunction and defendants or anybody on their behalf are restrained from creating any third party interest in the portion which fell to the share of the plaintiff. Parties to bear their own costs. Decree sheet be prepared. File be consigned to Record Room”.

20. Being aggrieved by the impugned Judgment dated 18.08.2022, the Appellant preferred the present Appeal.

SUBMISSION ON BEHALF OF THE APPELLANT

21. Mr. M.L. Sharma, learned counsel for the Appellant argues that the learned Trial Court failed to appreciate the oral agreement between the Appellant and Respondent No.1. Learned counsel further submits that the Respondent filed the suit for Partition, Declaration, Damages and permanent injunction. However, no Court fee was filed for the relief of Damages. Hence the suit filed by Respondent No.1 was defective. Learned counsel for the Appellant again submits that no evidence was led by the parties to prove the damages, however, the learned Trial Court erroneously granted damages in favour of Respondent No.1.

22. It was further submitted by learned counsel for the Appellant that as per the family settlement between the parties, Respondent No.1 was entitled for the second floor along with terrace. However, in the impugned Judgment, learned Trial Court erroneously granted First Floor of the suit property with one room at the terrace to Respondent No.1.

23. With these prayers, learned Counsel for the Appellant prays for the dismissal of the suit.

LEGAL ANALYSIS

24. This Court heard the arguments advanced by learned counsel for the Appellant and perused the documents placed on record by the Appellant.

25. A perusal of the record reveals the following facts:

- (i) The Appellant admitted the fact that Late Shri B.K Sharma was the absolute owner of the suit property and

he died intestate leaving behind his 4 children as his legal heirs.

- (ii) The Appellant also admitted the fact that Respondent No.1 and the Appellant entered into a family settlement dated 28.07.1996 (Exhibit PW1/3).
- (iii) The said family settlement dated 28.07.1996 is a handwritten document written by Sh. Ramesh Sharma, husband of Respondent No.2.
- (iv) Sh. Ramesh Sharma stepped into the witness box as DW-7 and stated categorically that the family settlement was written by him, and it bears his signatures. He further stated that Respondent No.1 stayed on the second floor of the suit property till 1998. After 1998, he shifted out from there and rented out the second floor to a tenant. He further stated that after 1998, Appellant and Respondent No.1 interchanged their respective portions. Thereafter, the first floor was in possession of Respondent No.1 and second floor was in possession of Appellant.
- (v) DW-2/Smt. Anita Sharma and DW-3/Smt. Anuradha Vashisht reiterated the stand of DW-7. DW-2 and DW-3 categorically stated that there was no oral partition between the Appellant and Respondent No.1 regarding property left by the Late Shri B.K Sharma.
- (vi) DW-6, Jaibier, the tenant of Respondent No.1 stepped into the witness box and categorically stated that he

was tenant of Respondent No.1 and first floor of the suit property was rented out to him from 2011 to June-July 2012. He further deposed that he handed over the possession of the First Floor of the suit property to Respondent No.1 in the presence of one of his sisters.

(vii) Appellant stepped into the witness box as DW-1 and deposed that *'I am not aware as to when the plaintiff orally relinquished his share in the suit property in my favour. (Vol. It was relinquished after the marriage of my sister Anuradha).'*

26. The Appellant admitted the fact that the family settlement dated 28.07.1996 (Exhibit PW1/3) was executed between the parties and they acted upon it. From the evidence of DW-2, DW-3 and DW-7, it is proved that the Appellant and Respondent No.1 interchanged their respective portions. From the evidence of DW-6 and DW-3, it is evident that Respondent No.1 was in possession of the first floor of the suit property till June-July 2012. From Exhibit PW1/5 (FIR Dated 22.07.2012), it is evident that the Appellant on 22.07.2012 forcibly taken over the possession of Respondent No.1's portion of the suit property and put his lock & key.

27. It is the case of the Appellant that there was an oral agreement between the Appellant and Respondent No.1 whereby the Respondent No.1 relinquished his share of the suit property in favour of the Appellant. The Respondent No.1 disputed this fact. Hence the burden of proof is on the Appellant to prove that there was an oral agreement between the parties. In order to prove the said oral agreement, the

Appellant/DW-1 deposed that *'I am not aware as to when the plaintiff orally relinquished his share in the suit property in my favour. (Vol. It was relinquished after the marriage of my sister Anuradha).'* There is no evidence adduced by the Appellant to prove that an 'oral agreement' was entered between the parties. The Appellant failed to disclose any details of the said oral agreement. There is not even a single witness to the said oral agreement. Whereas the other family members, DW-2 and DW-3 categorically stated that there was no oral partition between the Appellant and Respondent No.1.

28. A learned Single Judge of this Court in **CS (OS) No.819/2016** titled as *Aditi Upadhyaya Vs Lalit Kumar* has held that *'If there was an oral family settlement, the best way in which this oral family settlement would have been proved is by showing that the parties acted upon pursuant to this oral settlement'*. In the present case, the Appellant never tried to mutate Respondent No.1's share of the suit property in his name. Exhibit D-1, the electricity Bill of the First Floor of the suit property shows that the same is still in the name of Respondent No.1. Exhibit PW1/1, the election I card of the Respondent No.1 still bears the address of the suit property. Exhibit PW1/ 4 (Complaint filed by the Respondent No.1 on 09.07.2012 with the police station) and PW1/5 (FIR No.159/2012) shows that the Appellant forcefully taken over the possession of Respondent No.1's share of the suit property. DW-2 and DW-3 categorically deposed in their evidence that there was no such oral agreement between the parties. Hence the evidence adduced by the parties clearly indicates that there was no such oral agreement between the parties.

29. Learned Trial Court dealt with these aspects in detail in the impugned Judgment, which reads, inter alia, as follows:

- “21. It is not in dispute that the suit property devolved upon the plaintiff as well as all the three defendants after the death of their father Sh. B. K. Sharma on 25.10.1995 who died intestate. It is also admitted fact that thereafter, the plaintiff as well as defendant no. 1 entered into family settlement deed dated 28.07.1996 Ex.PW-1/3 as per which the first floor and a room on the terrace of the second floor fell to the share of defendant no. 1 and entire second floor fell to the share of the plaintiff. Not only that, the defendant no.1 the main contesting-defendant i.e DW-1 admitted in his cross examination that he swapped his portion with the plaintiff. This is also the stand of the plaintiff that the floors were inter changed later on as well as the possession.*
- 22. The stand of the plaintiff is that he had inducted tenants in his first portion upto 09.07.2012 when the locks to his portion were changed by defendant no. 1 and the matter was reported to the police also and a compromise was arrived at. Further, again on 22.07.2012, defendant no. 1 and his wife restrained the plaintiff and dispossessed the plaintiff from his first floor portion, regarding which FIR No.159/12 PS: Kotla Mubarakpur was registered.*
- 23. On the other hand, the stand of the defendant no. 1 is that their father Sh. B. K. Sharma also had a chamber no. 142 at Patiala House Court and after the family settlement took place, the plaintiff relinquished his share in the suit property after an oral settlement was entered into between them as it was decided that plaintiff who was an advocate would need the chamber for his practice and would retain the same in lieu thereof the first floor of the suit property would fall to the share of the defendant no.1 and since then, the said portion of first floor is also in exclusive possession of the defendant no. 1.*
- 24. The two sisters i.e. defendant no.2 and 3 had also entered the witness box. DW-2 Smt. Anita Sharma in her cross examination had stated that she as well as defendant no. 3 Smt. Anuradha agreed to the settlement between the brothers i.e. plaintiff and defendant no.1. Even defendant no. 3 DW-3 Smt. Anuradha Vashisth in her cross examination had stated*

that though the settlement Ex.PW-1/3 does not bear her signature but she had no objection to the said settlement.

Therefore, it is clear that after the death of Sh. B. K. Sharma, the father of the parties on 25.10.1995, the plaintiff and defendant no.1, the two brothers with the intervention of the other family members entered into family settlement Ex. PW-1/3 and defendants no.2 and 3 the two sisters did not object to the said settlement. In fact, Sh. Ramesh Sharma who is the husband of defendant no.2 and also DW -7 was one of the witnesses to the said settlement agreement Ex PW-1/3. Therefore, it is clear that the two sisters knowingly permitted the two brothers i.e. plaintiff and defendant no. 1 to divide the suit property between themselves, to their exclusion. It is also admitted by both the brothers that later on, they interchanged their portions. Being the admitted fact, there is no need to delve further into this fact as to when this interchange happened.

25. *Now the question is whether, after this family settlement dated 28.07.1996 Ex PW-1/3 and subsequent interchange, there was any other oral family settlement between the plaintiff and defendant no. 1 whereby the plaintiff relinquished his share in the suit property in lieu of retaining the chamber no. 142, Patiala House Courts, Delhi which was in the name of father Sh. B.K. Sharma. The defendant no. 1 in his written statement as well as in his affidavit of evidence Ex. DW-1/A has nowhere stated as to when the said oral family settlement took place. Further, the place where the said settlement took place, whether any person was witness to the said oral family settlement and or not is also nowhere stated. In this regard, prior conduct of the parties inter se dealing between them need to be appreciated. In the year 1996, the family settlement was reduced into writing and perusal of the said family settlement dated 29.07.1996 Ex. PW-1/3 reflects that family settlement bears the signatures of four more persons, apart from the plaintiff and defendant no. 1. Their conduct reflected that in order to divide the property, the parties always had in mind that the terms of the agreement be reduced into writing and to be witnessed by the witnesses. It being so, the contention of the defendant no. 1 that later on, in lieu of chamber at Patiala House Courts, Delhi, the plaintiff relinquished his share in the suit property is nothing but a self serving statement. Further, the two sisters i.e.*

defendant no. 3 and defendant no.2 had denied that any such subsequent oral settlement had taken place between the plaintiff and defendant no.1.

26. *Further, even during his cross examination, the DW-I had deposed that he was not aware as to when the plaintiff orally relinquished his share in the suit property in his favour but voluntarily stated that it was relinquished after the marriage of sister Anuradha. DW-3 Smt. Anuradha Vashisth stated that she had married on 14.02.1997. The contention of the defendant no. 1 regarding the relinquishment of the share of the plaintiff is vague, disputed and without support' of any documentary or oral evidence which could support the stand of the defendant no.1 in this regard. Non providing of any date, time and place and persons in relation to such subsequent oral agreement is fatal to this stand of the defendant no. 1.*
27. *Therefore, considering the totality of the evidence on record and in the given facts and circumstances, it is held that defendant no 1 has failed to prove there was any subsequent oral settlement whereby it was decided that the plaintiff would retain the chamber belonging to the father of the parties at Patiala House Court, Delhi in lieu of second floor of the suit property and that the second floor would exclusively fall to the share of defendant no. 1. The defendant no. 1 being a non advocate could not have been entitled to the chamber and had used it as an excuse to usurp the share of the plaintiff in the suit property. Therefore, the issue no.3 is accordingly decided in favour of the plaintiff and against the defendant no. 1”.*

30. In view of the detailed discussion made herein above, this Court is in agreement with the findings arrived at by the learned Trial Court. The Appellant miserably failed to prove the ‘oral Agreement’ between the Appellant and Respondent No.1 and hence in view of the Family settlement arrived at and acted upon by the parties, the learned Trial Court rightly decided the Issue Nos.3,5,6,7 and 8 in favour of Respondent No.1.

31. The Appellant raised an issue of Court fee during the course of the argument. It is the submission of learned counsel for the Appellant that Respondent No.1 has not paid the requisite Court Fee for the relief of Damages. A specific issue, i.e. Issue No.1 was framed on this aspect by the learned Trial court. It will be helpful to reiterate the finding of the learned Trial Court on this issue:

“36. The plaintiff has valued the suit for relief of declaration at Rs.200/- and for the relief of partition and possession for his specific share at Rs.4,25,200/-, with value of suit property at Rs. 17 Lakhs and calculated the court fees for damages @ Rs.8000/- per month and valued for the relief of permanent and mandatory injunction at Rs.260/- and paid the total court fees of Rs.8250/-. Onus to prove this issue was upon the defendant. The defendant has failed to specify as to what is the value of the suit property or failed to lead any evidence to prove this issue or to cross examine the plaintiff on this aspect. The suit being filed in the year 2012 and area of the suit property is about 56 sqr. Yards, in my considered opinion, this issue is decided against the defendant no. 1 and in favour of the plaintiff”.

32. Learned Counsel for the Appellant failed to point out the error in the findings of the learned Trial Court. This Court finds no perversity or impunity in the findings of the learned Trial Court. Hence the objection raised by the Appellant in this regard is rejected.

33. Learned counsel for the Appellant argues that as per the family settlement between the parties, Respondent No.1 was entitled for the second floor along with terrace, whereas, in the impugned Judgment, the learned Trial Court erroneously granted First Floor of the suit property with one room at the terrace to Respondent No.1. It is the Appellant's own case that the Appellant and the Respondent No.1 interchanged their

portions with mutual consent. DW-2, DW-3 and DW-7 supported this fact in their respective evidence. Hence this Court is of the considered view that learned Trial Court rightly granted the possession of the First Floor of the suit property with one room at the terrace to Respondent No.1

34. Learned counsel for the Appellant argues that no evidence was led by the parties to prove the damages, however, the learned Trial Court erroneously granted the damages in favour of Respondent No.1. Learned Trial Court examined this point in Issue no.6. The relevant portion, reads, inter alia, as follows:

“34. Since the defendant no.1 has failed to prove that the subsequently, the plaintiff had relinquished his share in the suit property, therefore, considering the totality of the facts and circumstances, it is held that the plaintiff was dispossessed from his portion in July 2012 and therefore, he is entitled to use and occupation charges/damages since then. However, the plaintiff has claimed the damages/mesne profits @ Rs.8000/- per month from defendant no. 1. However, DW-6 Sh. Jaibir @ Sunny had deposed that he was tenant of the plaintiff in the suit property during the period 2011 in June till 2012 and used to pay rent @ Rs.2700/- per month.

Though no other document has been placed on record by the plaintiff to show that the use and occupation charges of the said property was Rs.8000/- per month. In his cross examination, the plaintiff had stated that he was receiving rental @ Rs.2700/- per month from Sunny @ Jaypee and there is no suggestion contrary to this.

Therefore, it is held that the plaintiff is entitled to use and occupation charges @ Rs.2700/- per month w.e.f. July 2012 till the possession of the same is handed over by the defendant no.1 to the plaintiff. Plaintiff is also entitled to 10% annual increase on the said amount of Rs.2700/- per month till its realization”.

35. The Appellant was in possession of Respondent No.1's share of the suit property from July 2012. Hence, the Appellant needs to

compensate Respondent No.1. DW-6, who was the tenant of Respondent No. 1, in the year 2012 was paying Rs.2700/- as rent to him. Hence based on this deposition, the learned Trial Court fixed the monthly rent at Rs.2,700/-. Even though the said rent amount is very less compared to the market rent, this Court is in agreement with the learned Trial Court as the dispute is between two brothers. Hence the objection of the Appellant is hereby rejected.

36. In view of the detailed discussions herein above, this Court finds no illegality or perversity in the impugned Judgment and Decree dated 18.08.2022. Hence the impugned Judgment & Decree is hereby upheld and the present Appeal is dismissed. Pending application is accordingly disposed off. Parties are left to bear their own cost.

GAURANG KANTH, J.

NOVEMBER 18, 2022