

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

% Date of Reserve: 09th September, 2022

Date of Decision: 06th January, 2023

+ **CS(OS) 1627/2012**

Sh. SURAJ BHAN ARYA

R/o 18/2 Masihgarh,
New Delhi-110025

..... Plaintiff

Through: None.

versus

1. **Sh. POORAN CHAND ARYA**

R/o 18/2 Masihgarh,
New Delhi-110025

2. **Sh. KISHAN SINGH ARYA**

R/o 18/2 Masihgarh,
New Delhi-110025

3. **Sh. LAKHAN SINGH ARYA**

R/o 18/2 Masihgarh,
New Delhi-110025

4. **SMT. MURTI DEVI**

R/o Moolchand Market,
Main Bazar, Loni,
Ghaziabad

5. **SMT. RAMKALI**

R/o 18/2 Masihgarh,
New Delhi-110025

..... Defendants

Through: Mr. Deepak Kumar Vijay &
Mr. Shubham Shivansh,
Advocates for D-1.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G E M E N T

NEENA BANSAL KRISHNA, J

1. A family litigation was commenced by the plaintiff Sh. Suraj Bhan Arya, for Partition, Declaration and Permanent and Mandatory Injunction against his three brothers Sh. Pooran Chand Arya, Sh. Kishan Singh Arya, Sh. Lakhan Singh Arya, sister Smt. Murti Devi and mother Smt. Ramkali who are the defendants in respect of house bearing no. 18, Masihgarh, New Delhi-110025 constructed on a plot of 600 sq. yards of which the father Late Sh. Kishan Lal was the exclusive owner and in possession.

2. The plaintiff and the defendants were married and happily living together with their respective families. The case of the plaintiff is that in the year 1995, plaintiff and defendant nos. 1 to 3 by mutual agreement had occupied one portion each of the property in question without their being any actual and final division of the property. By virtue of this Arrangement, defendant no. 4 sister and defendant no. 5 mother did not get the possession of any part of the property, though as per the law of inheritance and succession, they were entitled to a share in the property being Class I legal heirs. Shri Kishan Lal during his lifetime had constructed two shops, in addition to the four shops that already existed on the outer side of the house for an additional income. The plaintiff and the three defendants kept one shop each. Two shops were retained by late Sh. Kishan Lal for his own sustenance and survival, which were later bequeathed by late Sh. Kishan Lal to his grandson, Khushal Singh Arya, son of the plaintiff as he was taking care of late Sh. Kishan Lal and defendant no. 5 during their lifetime. The

plaintiff has asserted that defendant no. 5, the mother, lived with Sh. Khushal Arya, son of the plaintiff all through her life.

3. It is further asserted that as per the Family Arrangement, the *gali* which was 6 feet wide and about 80 feet in length which connected to the main road, had the main gates of the portions of plaintiff and defendant nos. 2, 3 and 4, opening in it for free ingress and egress. The defendant no. 1 had gotten more area in his share, and thus agreed not to use the *gali* and had a separate entry to his portion. The plaintiff demolished his shop in order to get more access to the main road, and to have sufficient parking for the ground floor.

4. It is asserted that pursuant to this Arrangement between the parties, they have been in occupation of their respective shares for about 16 years. Somewhere in May, 2011, defendant no.1 without informing other parties and without obtaining their consent, arbitrarily, malafidely and to the prejudice of the interest of the plaintiff and other defendants, had entered into a Collaboration Agreement with one builder to develop and convert his part of portion into a multi-storey building. The defendant no.1 indented to construct the market on the lower floors and flats on the upper floors with an open balcony and windows opening towards the *gali* which was otherwise agreed to in exclusive use of plaintiff and defendant nos. 2 and 3.

5. Being aggrieved by this illegal and unauthorized construction undertaken by defendant no. 1, a Civil Suit for Permanent Injunction was filed in the Court of Senior Civil Judge, Saket Courts, New Delhi. The defendant no. 1 appeared and did not deny the factum of construction undertaken by him, but asserted falsely and wrongly that all the defendants were owners of their respective shares as the property had been partitioned

and divided by their father during his lifetime, and each of them were in possession of their separate portion. A General Power of Attorney was executed in favour of defendant no. 1 and was witnessed by the son of the plaintiff. However, mere perusal of GPA reveals that it is a fabricated document. The learned Civil Judge declined to grant interim injunction by observing that there appeared to be specific demarcation of the property and it was not construed to be in joint possession.

6. An Appeal bearing MCA No. 45 of 2011 preferred by the plaintiff before the learned District and Sessions Judge, Saket Court did not meet any success as it was dismissed *vide* Order dated 28.04.2012 with an observation that if the plaintiff was aggrieved by the act of the defendant, he needs to file a suit for partition.

7. The plaintiff has asserted that no partition has taken place between the parties till date. The GPA allegedly executed in favour of defendant no. 1 appears to be a fabricated document and even if the same was actually executed by the late father, then the same was only executed to enable him to obtain electricity and water connection in his own name in respect of the portion occupied by him. The GPA in favour of defendant no. 1 is in respect of 143.5 sq. yards while there is no Power of Attorney in favour of other defendants.

8. It is claimed that unless the property is partitioned by metes and bounds amongst the plaintiff and all the defendants, they continue to be the co-owners and in joint possession. It is also asserted that defendant no.1 has constructed 6 floors including the basement and has openly threatened and declared that he would make extension of roof (*chajja*) towards the main *gali* which would infringe the rights, interest and entitlement of plaintiff and

other defendants. It is asserted that defendant no. 1, as per his desire, cannot raise any new construction or build an additional structure upon any portion of the house without the consent of other co-sharers the property until and unless the property is partitioned as per law.

9. The plaintiff has claimed that he and the defendants are entitled to inherit 1/6th share each in the suit property except the two shops which were bequeathed by late Sh. Kishan Lal to his grandson as mentioned above. The plaintiff has thus sought relief of Partition by metes and bounds, a decree for Declaration for declaring the GPA in favour of defendant no. 1 as illegal, sham and fabricated document; a decree for Permanent Injunction to restrain defendant no.1 from raising any kind of construction in the suit property without obtaining necessary permission from the competent authority; and a decree of Mandatory Injunction for directing defendant no. 1 to demolish the construction raised by him in the portion of the property.

10. The **defendant no. 1 in its written statement** took the preliminary objection that the suit does not disclose any cause of action since the property in question already stands divided between the plaintiff and defendant no. 1 to 3 way back in the year 1995 during the life time of their father Shri Kishan Lal, and since then they are in possession of their respective shares. It is asserted that except defendant nos. 4 and 5 i.e. the sister and mother, plaintiff and defendant nos. 1 to 3 each got approximately 1100 sq. ft. of property by inheritance through their father. It is admitted that Shri Kishan Lal had got constructed two shops on the outer side towards the main road from his own money for sustenance of himself and his wife. After the partition in 1995, the father retained these two shops for his own sustenance. The parties built their own respective shares from their own

resources after the partition. The defendant no. 4, sister was married in 1978 and had been given enough at the time of marriage and she has never demanded any share in the property. Defendant no. 5 has been living with defendant no.1 who is a doctor by profession and has been taking care of the parents till the demise of their father. She also did not claim any share at the time of partition and thus, no share was given to her. The parties are in possession of their respective shares since 1995, and thus, the plaint does not disclose any cause of action.

11. It is further submitted that the plaintiff had filed a suit for Injunction on the similar cause which has already been withdrawn by the plaintiff on 06.08.2013. The relief so claimed is barred by *res-judicata*. It is claimed that the plaintiff in collusion with the son who is advocate by profession, has been trying to re-open the Family Arrangement which had taken place way back in 1995.

12. The learned Appellate Court while dismissing the Appeal against the Order of learned Civil Judge dismissing interim injunction application of the plaintiff, had observed that “*family arrangement was not temporary in nature rather seemingly it was a final settlement of the property*”. Further while deciding the Appeal against the dismissal of the application under Order XXXIX Rule 1 and 2 of the Civil Procedure Code (*hereinafter referred to as “CPC”*), the Appellate Court observed that out of the six shops, two shops which the father had retained for himself, have been in possession of son of the appellant, and the appellant in his plaint while mentioning that the two shops were in possession of Sh. Khushal Singh Arya, did not specify that he was his own son. The plaintiff had concealed

that his own son was in possession of the share falling to the share of the father of the parties.

13. The authenticity and genuineness of the undated Will relied upon by the plaintiff, has been questioned on the ground that it does not bear the signatures of late Sh. Kishan Lal and its existence was never revealed to the answering defendant or any other person in the locality after the death of Sh. Kishan Lal on 26.06.2007. Moreover, the property had been admittedly inherited by the father from his forefathers and thus, he had no right to bequeath it and the alleged Will is nothing but the sham document. Further, the four shops also need to be partitioned in case the partition that had taken place in 1995 is re-opened, as is claimed by the plaintiff.

14. The defendant no. 1 has claimed that after the demise of the father, the plaintiff has been illegally collecting the rent of the shops from the tenant and has not been giving it to defendant no. 5, the mother who is supposed to get the same as per the Family Settlement of 1995. The plaintiff should give an account of the same from 2007 and deposit the rent in the Court.

15. Defendant no.1 has further asserted that he has sold his share to NPS INFRA, Partnership firm of Mr. Shakeek Ahmed Khan and Mr. Pramod Kumar on 26.11.2011 through a registered Sale Deed; therefore, the suit deserves to be dismissed for non-joinder of necessary parties.

16. An objection has also been taken that the suit is barred by limitation. Also, as the parties are in occupation their respective shares since 1995, the plaintiff is required to pay *ad-volerem* court fees, failing which the suit is liable to be dismissed.

17. **On merits**, the averments as made in the preliminary objections are re-affirmed and it is denied that no partition had taken place in the year 1995.

18. **Defendant nos. 2 to 4** refused to accept the service of summons and none appeared on behalf of the defendant no. 5 despite service. They were all proceeded *ex-parte vide* Order dated 22.10.2013.

19. The **plaintiff in the Replication** has re-affirmed his assertions as made in the plaint.

20. Defendant no. 5 had expired during the pendency of the suit. While considering the Application for bringing her legal heirs on record, it was observed that all her legal heirs were already on record and in case she is held entitled to any share, the same would be equally divided amongst the parties to the suit being her legal heirs. Accordingly, name of defendant no. 5, Smt. Ram Kali was deleted, *vide* Order dated 11.03.2016.

21. The **Issues** on the basis of pleadings were framed on 11.03.2016 as follows:

- (i) *Whether the plaintiff is entitled to partition of the suit property no. 18/3 Masihgarh, New Delhi-110025 or that this property already stood partitioned between the parties as per the settlement of the year 1995 as stated by the defendant no. 1? Onus put on parties.*
- (ii) *Whether the suit is barred by limitation? OPD*
- (iii) *Relief.*

22. The plaintiff **PW1, Sh. Suraj Bhan Arya** tendered his affidavit of evidence as Ex. PW1/A and the documents on which he placed reliance as PW1/1 to PW1/3. He was duly cross-examined by defendant no.1.

23. The only contesting Defendant no. 1 **Sh. Pooran Chand, who appeared as DW1** tendered his affidavit of evidence DW1/A. He was duly cross-examined by the plaintiff.

24. The **plaintiff submitted his written argument** and asserted that pursuant to the Family Arrangement in 1995, the plaintiff and defendant nos. 1 to 3 had come into possession of their respective portions of the property and they are residing therein since 1995, however, no partition took place. This is evident as the daughter and the mother, defendant nos. 4 and 5 respectively, were equally entitled to shares on partition of the property which was never given to them. The plaintiff is thus entitled to partition by metes and bounds in accordance with the law of inheritance.

25. **Defendant no.1** had argued that the suit does not disclose any cause of action as the parties are in possession of their respective share since 1995, and a suit for Injunction was filed, which was later on withdrawn by the plaintiff on 06.08.2013, wherein it was observed by the learned Appellate Court that the family arrangement was a final settlement of the property. It was also argued that he had sold his share to NPS INFRA, Partnership firm on 26.11.2011 through a registered Sale Deed, and therefore, NPS INFRA should have been impleaded as a party. Moreover, the suit is barred by limitation as the parties are in occupation of their shares since 1995 due to which, the plaintiff should have paid *ad-volerem* court fees. Hence, the present suit is liable to be dismissed.

26. **Submissions heard.**

27. My **issue wise findings** are as under:

Issue No. 1: Whether the plaintiff is entitled to partition of the suit property no. 18/3 Masihgarh, New Delhi-110025 or that this

property already stood partitioned between the parties as per the settlement of the year 1995 as stated by the defendant no. 1? Onus put on parties.

28. The admitted facts are that the suit property is an ancestral property which has been inherited from one generation to another and was last owned by Shri Kishan Lal who died on 25.06.2007 and is survived by four sons who are the plaintiff and defendant No.1 to 3, daughter/defendant No.4 Smt. Murti Devi and wife/defendant No.5 Smt. Ram Kali (who has expired during the pendency of the suit). It is also not in dispute that the parties to the suit had inherited the suit property, and are the co-owners. It is further not in dispute that in the year 1995, the suit property was divided in four portions between plaintiff and defendant nos. 1 to 3 and each got approx. 1100 Sq. Ft. and since then, they have been living separately in their respective portions. It is also not in dispute that Shri Kishan Lal had got constructed two shops on the outer side of the house towards main road from his own money in addition to the four shops which already existed in the property in question. While one shop each was taken by the plaintiff and defendant nos. 1 to 3 as part of their respective portions, the two newly constructed shops were taken by Shri Kishan Lal for sustenance and welfare of himself and his wife. It is further not in dispute that defendant No. 4 Smt. Murti Devi got married in 1978 and since then, she has been living in her matrimonial home and has never demanded any share in the suit property. The Site Plan indicating the respective portions of plaintiff and defendant nos. 1 to 3, which is Ex.PW1/1.

29. The fact of plaintiff and defendant nos. 1 to 3 living separately in their respective portions which are demarcated and shown in the Site Plan as

Ex.PW1/1, is not in dispute. While the plaintiff has claimed that it is only a mutual arrangement and not a partition, the defendant No.1 who is the only contesting defendant, has asserted that in fact an oral partition had taken place pursuant to which plaintiff as well as defendant No. 1 to 3 had taken possession of their respective portions. The only aspect which needs to be determined is whether the physical separation of the parties in the year 1995 amounted to partition.

30. In Sita Ram Prasad v. Mahadeo Rai & Ors. AIR 1980 Pat 254, it was observed that under the Hindu law there can be an oral partition and once the partition is alleged, then the law shall presume unless something is proved to the contrary, that there was a complete partition between the members of the family.

31. It was a partition which happened during the life time of father and as per the terms of that Family Arrangement, the father took his share by way of two shops and the remaining portions were divided equally amongst plaintiff and defendant No. 1 to 3. It is further significant to note that the parties have been residing in their respective separate portions by virtue of this Arrangement since 1995.

32. It is the case of the plaintiff himself that in the year 2011, defendant No. 1 had undertaken construction in his portion against which he has filed a suit for Permanent Injunction. His application under Order XXXIX Rule 1 and 2 of CPC for injunction against raising of construction was denied and there was an observation made by the Trial Court that “*the family settlement was not temporary in nature rather seemingly it was final settlement of the property*”. An Appeal was preferred against this Order under Order XXXIX Rule 1 and 2 of CPC which was dismissed *vide* Order dated 13.09.2013. It is

evident that the partition had been effected pursuant to family arrangement in 1995 or else the defendant No.1 could not have undertaken the reconstruction of his share of property or sold it to third party *vide* a registered Sale Deed. It is evident that the manner in which the property was being dealt by the parties, clearly established that partition took place in 1995.

33. The plaintiff had claimed that it was a case of Family Arrangement and not a partition by asserting that mother and sister were also entitled to a share and they could not have been deprived of their respective share by virtue of that Family Arrangement. In this regard, it may be observed that oral partition took place in the year 1995 during the lifetime of Shri Kishan Lal who was admittedly the exclusive owner of the suit property. So being the case, defendant no. 5, mother (wife of Shri Kishan Lal) was not entitled to a share in the property during the lifetime of her husband.

34. In so far as the defendant No. 4, the daughter is concerned, it may be observed that late Shri Kishan Lal was the exclusive owner of the suit property and during his lifetime, a partition was effected in which the defendant no. 4, daughter was not given any share. The partition having been effected by the father during his lifetime in respect of his separate property way back in 1995, did not *ipso facto* give any right to the daughter to a share. The situation may have been different had the property been coparcenary property and no partition had taken place and the succession had opened after the demise of the father. Section 6 and 8 of Hindu Succession Act, 1956 would then have entitled her by law to a share along with her brothers and mother, but the property was already divided amongst the father and the sons way back in 1995. Further, sub-section 5 of the

amended Section 6 of the Hindu Succession Act, 1956 clearly provides that the daughter as coparcener, cannot claim re-opening of a partition which has taken place before 20.12.2004. Moreover, in the present case there is nothing to infer that the sent property was HUF property giving a right to claim a share to the coparceners including the daughter, after the amendment of Section 6 of Hindu Succession Act, 1956. As already observed, the partition having taken place in 1995 during the lifetime of father, does not create any right of share in the suit property in favour of the daughter defendant no. 4, Smt. Murti Devi.

35. Also, Defendant No. 4, sister never came forth to claim her share in the property or challenge the factum of partition since 1995. She has not even come forth to contest the present suit despite service to assert or challenge the partition. Rather, the conduct of defendant no. 4 also reinforces of division of property by metes and bounds by the father of the parties, to their satisfaction which has been accepted and the parties have accordingly, enjoyed and also dealt with their respective portions as exclusive owners with no objection by the other siblings.

36. It may also be not over looked that according to the plaintiff himself the father constructed two shops which he retained for himself and subsequently bequeathed it to the son of plaintiff. There is no denial that the rent of two shops is being collected by the son who is enjoying the property in the capacity of owner. Had the partition not been effected, the two shops could not have come to the son of plaintiff. Incidentally, the Will by which the property was bequeathed to the grandson has not been produced by the plaintiff. The only inference for withholding this document/ Will can be that it may have contained recitals which could be adverse to the claim of the

plaintiff. The plaintiff on one hand has been enjoying the fruits of partition since 1995, while on the other hand has tried to disturb the settled title/possession for reasons best known to him.

37. It is evident from the admitted facts and the evidence on record that an oral partition took place in the year 1995 which was acted upon and the four brother i.e. plaintiff and defendant nos. 1 to 3 and the father who was alive at that time, divided the property in the manner as mentioned earlier, with respective portions coming to the exclusive share of four brothers and two shops to the share of the father. It is thus, held that the property stood partitioned between plaintiff and defendant nos. 1 to 3 in the year 1995 as asserted by defendant No.1.

38. The issue is decided accordingly.

Issue No. 2: Whether the suit is barred by limitation? OPD

39. The defendant No.1 has taken a plea that since the partition had taken place way back in the year 1995, the present suit which has been instituted in the year 2012, is barred by limitation.

40. The claim raised by the plaintiff is that according to him the Family Arrangement which was arrived at between plaintiff and defendant nos. 1 to 3 in 1995 was more in the nature of family arrangement and not a partition. It is a legal incidence whether the oral arrangement amounted to partition or not. The challenge to the legal status of the suit property first arose only in 2011 when the defendant no.1 raised extensive construction and sold his portion and plaintiff asserted that there was no partition by metes and bounds. The suit is held to be not barred by limitation.

41. The issue is decided in favour of the plaintiff.

Relief

42. In view of the finding on Issue Nos. 1 & 2 it is hereby held that the suit property was partitioned between plaintiff and defendant nos. 1 to 3 by virtue of oral partition in the year 1995 and the respective shares of plaintiff and defendant nos. 1, 2 & 3 are as demarcated in the Site Plan Ex.PW1/1.

43. The decree sheet be prepared and registered on payment of requisite Stamp Duty/ Court Fee in accordance with law. Parties to bear their own costs.

(NEENA BANSAL KRISHNA)
JUDGE

JANUARY 6, 2023
pa/va

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