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

+ **CS(OS) 225/2023 & I.A. 42525/2024**

VANITA MEHRA

.....Plaintiff

Through: Mr. Akshay Makhija, Senior
Advocate with Mr. S.P. Mehta, Adv.

versus

AKSHAY MEHRA

.....Defendant

Through: Mr. T.K. Ganju, Sr. Adv., Mr. Aquib
Ali, Mr. Anish Lakhanpal, Ms.
Amreen Khaliq, Mr. Pranay Lakhan
Pal, Advocates

CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

ORDER

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18.12.2024

CS(OS) 225/2023 and I.A. 42525/2024 (for passing final decree for partition in respect of the suit property by plaintiff)

1. I.A. 42525/2024 is an application filed by the plaintiff seeking passing of the final decree for partition in respect of suit property i.e., Farm House No.22, Road No. I, Silver Oak Farm House at Village, Ghitorni, Mehrauli, Delhi bearing Khasra No. 466, 493, 506/1, 506/2, 533/1 and 533/2 admeasuring 2.75 acres ('suit property')
2. It is stated that vide order dated 29.05.2024, this Court appointed a Local Commissioner for demarcation of the 40 feet passage so as to enable independent ingress and egress to the portion which has fallen to the share of the defendant. The said passage was carved out by the Local Commissioner



and report of the Local Commissioner dated 09.07.2024 has been filed on record ('second LC Report').

3. It is stated that thereafter, on 22.07.2024, the said Local Commissioner was re-appointed for effecting the physical partition of the suit property on the spot so as to enable handing over to the plaintiff herein, the exclusive possession of her one (1) acre portion as per the site plan dated 09.07.2024 filed with the second LC Report.

4. It is stated that further as per the order dated 22.07.2024 defendant was permitted to construct boundary wall of his portion in accordance with the demarcation carried out by the Local Commissioner and defendant was permitted to install a new gate at the front entrance of the 40 feet passageway.

5. It is stated that the directions issued by this Court vide order dated 22.07.2024 have been complied with by both the parties and the Local Commissioner in its final report dated 08.10.2024 has recorded these facts ('final LC Report').

6. It is stated that as such physical partition of the suit property is effectively completed and nothing remains to be tried in the suit.

7. It is stated that the suit property already stands mutated in the joint names of the parties in the ratio of 60% and 40% ratio of defendant and plaintiff respectively. The said mutation enables the parties to pay property tax as well as receive rent from the previous tenant.

8. It is stated that an appropriate serial number be allotted to the plaintiff and defendant's distinct portions in the suit property for identification and address purposes.

9. In addition, it is stated that the parties have also completed the



partition of Ram Lal Mehra and Sons HUF and the said HUF as well stands partitioned and dissolved. It is stated that parties undertake to complete the requisite formalities for dissolution of the said HUF and communicate the dissolution to the concerned competent authorities including the Income Tax Department.

10. The plaintiff seeks a direction to the defendant to handover all her belongings and furnishing in accordance with the packing list dated 12.12.2022 listed with the LC Report dated 14.05.2024 pursuant to the order dated 02.05.2024 passed by this Court. ('first LC Report')

11. The plaintiff also seeks a direction to the defendant to handover title documents corresponding to the portion which has fallen to the share of the plaintiff as defendant has no use for the same. The details of the title deeds in possession of the defendant are enlisted in paragraph 4 of this application.

12. Lastly, the plaintiff seeks a recordal of the fact that the right of pre-emption reserved in favour of the defendant under the Will dated 09.04.2018 stands exhausted and the plaintiff is not bound to inform the defendant prior to any offer of future sale with respect to the plaintiff's portion in the suit property.

Submissions on behalf of learned senior counsel for parties

13. Learned senior counsel appearing for the defendant states that defendant has no objection to the passing of a final decree for partition with respect to the suit property in terms of the maps enclosed with the second LC Report at pages 173, 174, 177 and 178 of the said Report.

13.1 He states that defendant proposes that the portion which has fallen to the share of the plaintiff herein of the suit property be assigned as serial number 22-A for its identification and defendant's portion be identified by



the original serial number 22.

13.2 He states that the sale deeds which the plaintiff seeks are not in possession of the defendant and the said sale deeds have been lost. He relies upon the averments made at para II of the reply and affidavit filed as Document D-7 to the reply of the captioned application.

13.3 He states that the defendant has objection to handing over the belongings and furniture as listed in first LC Report and prayed for at prayer clause (c) of the captioned application on the ground that the said articles and movables belong to the mother of the parties and therefore, plaintiff cannot retrieve the same.

13.4 He states that defendant does not concede to the submission of the plaintiff with respect to the right of pre-emption reserved under the Will dated 09.04.2018 having become non-binding. He states that defendant reserves his right to exercise the said right in future. He states that this plea of the plaintiff is beyond the scope of these pleadings.

13.5 He states that lastly defendant reserves its right to initiate appropriate proceedings seek reimbursement from the plaintiff for the expenses of Rs. 42 lakhs borne by the defendant.

14. In reply, learned senior counsel for the plaintiff states that plaintiff has no objection to the final decree of partition for the suit property being passed in terms of the maps enclosed with the second LC Report as contended by the defendant in its reply.

14.1. He states that the plaintiff is also agreeable to the assignment of serial number 22-A for plaintiff's portion in the suit property and serial number 22 for the defendant's portion in the suit property .

14.2. He states that with respect to the stand of the defendant for the title



documents, the plaintiff will rely upon the contents of the affidavit dated 12.11.2024 filed on record as Document D-7 with the reply of the captioned application.

14.3. He states that in view of the stand taken by the mother of the parties qua the movables, he is not pressing for the said reliefs.

14.4. He states that the stand of the defendant qua the right of pre-emption continuing to exist is incorrect. He states that prior to filing this suit in 2023, the plaintiff on 27.11.2022 had offered the defendant the option to purchase plaintiffs share at market price. However, the defendant had categorically declined the said offer on the plea that he does not have the funds to buy her share. In addition, the defendant declined the plaintiff's request to divide the suit property. He also relies upon the stand of the defendant in the written statement in para-wise reply to paragraph 14 of the plaint.

Findings and Analysis

15. This Court has considered the submissions of the parties and perused the record.

16. In view of the consent of the parties, the relief of final decree of partition sought at prayer clause (a) of the captioned application is allowed with the modification as contended by the defendant, which modification has been accepted by the plaintiff. It is, accordingly, directed that the suit property i.e., Farmhouse No.22, Road No. 1, Silver Oak Farm House at Village, Ghitorni, Mehrauli, Delhi consisting of Khasra No. 466, 493, 506/1, 506/2, 533/1 and 533/2 admeasuring 2.75 acres is hereby finally partitioned. The plaintiff is the absolute owner of one acre of land as per Will dated 09.04.2018 and Annexure A thereto executed by late Dr. A.C. Mehra. The plaintiff is in exclusive possession of the said one acre marked as PLOT



AREA-A in the south side of the consolidated plan of the suit property and marked by red lined which has also been show at page nos. 173 and 178 with the Local Commissioner's report dated 09.07.2024 therein. So also, the defendant is the absolute owner of the property shown in the consolidated plan marked as 'PLOT AREA-B' in the north side of the suit property and marked by violet lines which has also been separately shown at page no. 174 and 177 of the Local Commissioner's report dated 09.07.2024. The suit property stands partitioned between the parties and neither party has any right on the land of the other party. The plaintiff and the defendant are at absolute liberty to deal with their individual portion of the land in the manner they deem fit.

17. With the consent of the parties, it is directed that the portion of the suit property which has fallen to the share of plaintiff will be identified as 22-A and portion of the suit property which has fallen to the share of defendant will be identified as 22. Since the area has been notified as an urban area by a notification issued under Section 507(a) of Delhi Municipal Corporation Act, 1957, the parties will be at liberty to have the said municipal number recorded with the concerned statutory authority.

18. With respect to prayer clause (b) of the captioned application, the same is disposed of taking on record the affidavit dated 12.11.2024 filed by defendant as Document No. 7 to the reply of I.A. No. 42525/2024. The defendant is bound down to the contents of the said affidavit and the statement made at paragraph II (a) and (b) of the reply to I.A. No. 42525/2024 wherein the defendant states that the title documents have not been transacted upon. The original of the said affidavit shall be handed over to the plaintiff by the registry. The plaintiff will be at liberty to take such



further proceedings including filing of a non-cognizable report ('NCR') relying upon the said affidavit as well as the contents of paragraph II (a) and (b) of the reply to I.A. No. 42525/2024.

19. With respect to prayer clause (c), the said prayer is disposed of as not pressed.

Right of pre-emption of the defendant

20. With respect to the prayer of the plaintiff that the Court may record the fact that defendant does not have any further right of pre-emption qua her portion of suit property; this Court has considered the submissions of the parties.

21. The parties have inherited the suit property under the Will dated 09.04.2018 and the relevant portion of the Will which records the pre-emption right reads as under:

"I also wish that at any time If my daughter Vanita will sell her share in the Farm House then my son Akshay will have a preemptive right to buy the said share either In his own name or in the name of any member of his family."

22. In view of the aforesaid it will be relevant to refer the WhatsApp messages exchanged between the parties on 27.11.2022 which read as under:

"Dated:27.11.2022

Vanita: "Either you buy my share on market price or divide it and I do what I want with my share"

Akshay: "**I do not have the money to buy, and your share will be illegal**"

"Dated:27.11.2022

Vanita: "Akshay then you don't intent to ever divide the farm"

Akshay: "Vanita I don't want to discuss this further as I will not sell at present""

(‘Emphasis Supplied’)



23. The relevant portion of the written statement of the defendant reads as under:

“14. That the contents of Paragraph No.14 are false, malafide, wrong and denied. That it is humbly submitted, Defendant has no intention to create any such third-party rights. It is incorrect to state that the Defendant is exploring ways to create third party rights and interests in the suit property. Further it is also malafide and wrong to state that, the Defendant is in negotiations for sale or leasing out the suit property to defeat the rights of the Plaintiff. It is submitted, the Defendant has never denied and it is not disputed that vide the will of the father dated 09.04.2018, the Plaintiff is entitle to 1 acre of the suit property [which is around 40% but not 40%]. That the Plaintiff herself has been keen to sell her share of the suit property. That it is submitted, the Plaintiff has messaged Defendant about this on few occasions. Initially defendant was not keen to sell but seeing the concern/desperation of the Plaintiff to sell the suit property, the Defendant had agreed and therefore without prejudice to his rights and safeguarding the Plaintiff's rights contacted agents to look for interested party with no intention to defeat the right of the Plaintiff. Now the plaintiff has again changed her stance. It is again reiterated, Defendant has never denied and it is not disputed that vide the will of the father dated 09.04.2018, the Plaintiff is entitle to 1 acre of the suit property [which is around 40% but not 40%]. That it is further submitted, the request that the Defendant had made was that the Tehsildar should do the measurements and draw the maps in presence of both parties in Delhi, as per Annexure-A of the will.”

(‘Emphasis Supplied’)

24. It is a matter of record in view of the aforesaid pleading that defendant never disputed plaintiff's 40% undivided share in the suit property. It is also admitted that the plaintiff requested the defendant for either purchasing her 40% undivided share at market value or agreeing to divide the share so that she is at liberty to sell her share in the market. It is a matter of record that defendant declined the said offer of the plaintiff. In these facts, the plaintiff was compelled to approach this Court for seeking a



partition of the suit property so as to enable her to obtain possession. The said facts are clearly set out in paragraph 20 of the plaint which reads as under:

“20. It is stated that that the cause of action to file the present suit arose on the death of the father of the parties on 2.12.2018. It also arose when the suit property was mutated in the joint names of the Plaintiff and the Defendant in the Municipal records. It also arose on each day and time when the Plaintiff called upon the Defendant to divide/partition the suit property in accordance with the last Will of their father. It also arose on each occasion when the Defendant has failed to divide/partition the suit property in accordance with the last Will of their father. The cause of action also arose on 27.11.2022 when the Defendant in reply to Plaintiffs request on whatsapp message for partition/division of her share, the Defendant replied he shall not allow division and will take steps to stop the same. It also arose on 10.01.2023 when the Plaintiff demanded partition in writing. The cause of action is subsisting.”

25. The defendant while not disputing the said assertions of the plaintiff has baldly denied that its inaction/inability to purchase the plaintiff's share on 27.11.2022 has no consequence in law.

26. Before, expressing an opinion on the aforesaid contention of the parties, it would be relevant to note the law laid down by Supreme Court and the Coordinate Bench of this Court on the limited nature of the pre-emption right.

27. The Supreme Court in **Raghunath v. Radha Mohan**¹ has categorically held that a right of pre-emption is not a right in perpetuity. It further held that such a right can be exercised by the pre-emptor only once and if the pre-emptor chooses to waive such a right, the said right is not available on a subsequent transaction pertaining to the immovable property.

¹ (2021) 12 SCC 501



The Supreme Court while so holding also considered the fact that the right of pre-emption is a weak right and cannot be strengthened by making it a right in perpetuity. The relevant portion of the judgment reads as under:

“22. The moot point is whether such a right of pre-emption is a recurring right i.e. every time the property is sold, the right would re-arise, in a case the pre-empting plaintiff himself has chosen not to exercise such right over the subject immovable property when sold to another purchaser earlier.

23. In our view, it would not be appropriate or permissible to adopt legal reasoning making such a weak right, some kind of a right in perpetuity arising to a plaintiff every time there is a subsequent transaction or sale once the plaintiff has waived his right or pre-emption over the subject immovable property. The loss of right mandated under Section 9 of the Act is absolute. A plain reading of the said provision does not reveal that such right can re-arise to the person who waives his right of pre-emption in an earlier transaction. To do so would mean that a person, whether not having the means or for any other reason, does not exercise the right of pre-emption and yet he, even after decades, can exercise such a right. This would create, if one may say, some sort of a cloud on a title and uncertainty as a subsequent purchaser would not know, when he wants to sell the property, whether he can complete the transaction or not or whether a co-sharer will jump into the scene. This is not contemplated in the 1966 Act. This is bound to have an effect on the price offered by a purchaser at that time because he would have an impression of uncertainty about the proposed transaction.

24. We are in agreement with the consistent view taken in the judgments earlier of the Rajasthan High Court. So far as *Kutma Bibi* [*Kutma Bibi v. Baikuntha Chandra Dutta*, 1960 SCC OnLine Gau 16 : AIR 1961 Assam 1] is concerned, the factual basis of that decision does not fit with the legal controversy involved in this proceeding. In that case, by a previous transaction the entire land had been sold. It was held in that perspective, that the plaintiff's right as a co-sharer had become disputed in absence of challenge to the previous transaction. We are of the opinion that such a right is available once — whether to take it or leave it to a person having a right of pre-emption. If such person finds it is not worth once, it is not an open right available for all times to come to that person. The aforesaid being the position, this would itself be an impediment in exercise of the right of pre-emption in a subsequent transaction. This is so since, we find the right of waiver under Section 9 of the said Act is



relatable to the transaction and also the person. These provisions may not impede the right of pre-emption in that particular transaction by a particular pre-emptor and the factum of not having exercised such a right to an earlier transaction would amount to the surrender of the right of substitution to such intended pre-emptor.

25. The judgments referred to by the respondent, of *Bishan Singh* [*Bishan Singh v. Khazan Singh*, AIR 1958 SC 838] and *Barasat Eye Hospital* [*Barasat Eye Hospital v. Kaustabh Mondal*, (2019) 19 SCC 767 : (2020) 4 SCC (Civ) 810] are only for the proposition that the right of pre-emption is a right of substitution—no doubt exists over this proposition. **The question is whether this right of substitution can be exercised recurringly or only once. Our answer to the query is “only once”.**

26. We may also notice another judgment of this Court in *Indira Bai v. Nand Kishore* [*Indira Bai v. Nand Kishore*, (1990) 4 SCC 668] . Once again in relation to the said Act (it appears that there is a frequent exercise of this right in Rajasthan apart from West Bengal and Bihar!) The question which was framed for decision in the case was : (SCC p. 670, para 1)

“1. Is estoppel a good defence to “archaic” [*Atam Prakash v. State of Haryana*, (1986) 2 SCC 249] right of pre-emption which is a “weak right” [*Bishan Singh v. Khazan Singh*, AIR 1958 SC 838] and can be defeated by any “legitimate” method [*Radhakisan Laxminarayan Toshniwal v. Shridhar Ramchandra Alshi*, AIR 1960 SC 1368] ?”

In the aforesaid context, in para 5, it has been observed that the Act does not debar the pre-emptor from giving up his right. Rather in case of its non-exercise within two months, may be for the financial reasons, the right stands extinguished. “It does not pass on to anyone”. It was further observed : (SCC p. 672)

“5. ... No social disturbance is caused. It settles in purchaser. Giving up such right, expressly or impliedly cannot therefore be said to involve any interest of community or public welfare so as to be in mischief of public policy.”

These observations, once again, in our view, are based on the right being weak.

Conclusion

27. We suppose that the aforesaid answers the dilemma i.e. whether the right of pre-emption can be enforced for an indefinite number of transactions or it is exercisable only the first time. We opine that it is only exercisable for the first time when the cause of such a right arises, in a situation where the plaintiff pre-emptor chooses to waive such right



after the 1966 Act becoming operational. Section 9 of the said Act operates as a bar on his exercising such right on a subsequent transaction relating to the same immovable property. We also wonder what really remains of this right of pre-emption after so many years in the facts of this case when the purchaser has been enjoying it for more than four decades!”

(‘Emphasis Supplied’)

28. A Coordinate Bench of this Court in **Y.K. Mehta v. R.K. Mehta**² after considering various judicial pronouncement while considering a similar plea by a party relying upon Section 22 of the Hindu Succession Act, 1956 held that a right of pre-emption can be exercised only in the first instance and cannot be claimed at the subsequent stage. The relevant portion of the judgment reads as under:

“131. The next question which thus, arises for consideration is whether the preferential right continues to exist at the time of first intended sale or is available at the time of every subsequent sale as well.

132. Similar facts were considered in the case of *Ghulam Jilani v. Hassan Khan*, PLR (1905) 6 P&H 338, wherein it was observed that it is only the first sale which can be objected to and once the option has not been exercised, it cannot be held to be in perpetuity and the right for preemptory can be exercised in respect of the subsequent sales as well.

133. In *Mangti Ram v. Onkar Sahai*, 1994 SCC OnLine Raj 662, it was observed that the right of pre-emption was held to have been given up on account of an earlier compromise deed with respect to the sale of the suit property to which the plaintiff did not object.

134. The waiver of right to pre-emption was discussed in the case of *Ghanshyam v. Chand Bihari*, 2008 SCC OnLine Raj 826. It was observed that where a co-sharer does not exercise his option to show his willingness to purchase the property that is to be sold by the other co-sharers, when the other sharers transfer their right to a third party, sought to transfer their share to a third party, then he cannot subsequently claim

² 2023 SCC OnLine Del 7709



a right of preemption or to avoid a sale by his conduct, he has waived the right to claim pre-emption.

135. Likewise, in the case of *Rukmani Devi v. Prabhu Narayan*, 2007 SCC OnLine Raj 472, it was held that once the plaintiff waives or gives up a right without raising any objection when the property is intended to be sold to a third party where the plaintiff cannot seek any subsequent right to exercise the right of pre-emption.

136. The above cases were referred to in the case of *Prahlad Kumar v. Kishan Chand*, 2009 SCC OnLine Raj 796, though in the context of a right of pre-emption. It was observed that the plaintiff is estopped from claiming his right of pre-emption, if he has waived his right when the property was sold at an earlier date and the right of pre-emption was not exercised.

137. The legal preposition which thus, emerges from the aforesaid judgments is that the preferential right is not available every time when a co-sharer intends to sell the property. ***Indeed, it can be exercised only in the first instance when the property is intended to be sold; if such right is not exercised then, it cannot be claimed at any subsequent stage.***

138. As already noted above, in the present case, Lt. General Y.K. Mehta, Lt. General R.K. Mehta and Ms. Veena Puri had jointly entered into the MoU dated 06.06.2008 to sell the property to a Builder. Having once expressly intended to sell the property and not to purchase the share of each other/co-owners, their preferential right to purchase the property came to an end.”

(‘Emphasis Supplied’)

29. Keeping in view the aforesaid law, in the facts of this case, the plaintiff herein categorically offered to the defendant to purchase her 40% undivided share in the suit property on 27.11.2022. The defendant not only expressly declined the said offer to purchase 40% undivided share of the plaintiff but have also rejected the plea of partition of the suit property so as to enable the plaintiff to sell her distinct portion in the market to a third-party.



30. In these facts, plaintiff was prevented from realising the sale of her portion in the year 2022 and she was compelled to institute the present suit to compel the defendant for partition of the suit property. The final decree for partition is being passed by this order after two years, hence, evidencing that plaintiff lost two years in the bargain as defendant was unwilling to exercise his right of pre-emption.

31. The defendant himself in his written statement at paragraph 14 admits that he as well considered jointly selling the suit property to a third-party so as to enable the plaintiff to realise her share at market value.

32. In the aforementioned facts, this Court is satisfied that the defendant was duly granted a fair opportunity by the plaintiff to purchase her 40% share in the suit property in the year 2022 and the defendant was neither ready nor willing to purchase the plaintiff's share. This Court is thus, satisfied that the defendant having failed to exercise its right of pre-emption on 27.11.2022 has waived the said right and the relevant condition of the Will stands exhausted. Thus, the plaintiff is at liberty to sell her share to a third-party as per her discretion without any conditions.

33. The contention of the defendant that this relief is beyond the pleadings is incorrect. The fact that the 'offer' was made to the defendant is duly recorded in paragraph 20 of the plaint and its rejection is also recorded. Moreover, the fact is that the defendant is not ready and willing to purchase the plaintiff's share ever.

34. This relief has specifically prayed for as part of prayer of Clause a in the captioned application I.A. 42525/2024; and the defendant in its reply did not object to the said relief. In this regard, this Court would like to note that when this matter was first taken up on 17.12.2024, the defendant had not



objected to recordal of this fact in favour of the plaintiff and the orders were reserved. However, the matter was then, mentioned by the defendant subsequently to object to this request of the plaintiff and thus, the matter was taken up again on 18.12.2024. And on the said date, the counsel for the defendant submitted that defendant would prefer to reserve his right of pre-emption.

35. The flip-flop of the defendant shows that the objection is an afterthought since, in reply, to paragraph 20 of the plaint, in the written statement the defendant does not dispute the offer made by the plaintiff.

36. It is always the endeavour of the Court that all disputes between the parties should be settled fully and finally and therefore, since a decree of final partition is being passed in favour of the parties and keeping in view the acrimonious relationship between the parties, it is imperative that no issue is left unresolved so as to enable the parties to enjoy their respective portion fully and without any interference. The observations made by Supreme Court in **Raghunath v. Radha Mohan (supra)** at paragraph 23 are relevant and show that the right of preemption creates a cloud and this Court is satisfied that the plaintiff is entitled to have a clear title to deal with her partitioned share in this suit property.

37. Thus, it is hereby declared that the pre-emption condition of the Will dated 09.04.2018 qua the suit property stands acted upon by the parties and stands exhausted; and thus, the defendant has no pre-emptive rights qua the plaintiff's distinct portion in the suit property.

38. Accordingly, the final decree of partition qua the suit property stands passed in the aforesaid terms. The registry is directed to draw up a decree in terms thereof.



39. The defendant had handed over a copy of the original of the reply filed to I.A. No. 42525/2024. The Court Master is directed to send the original to the registry so as to enable the de-tagging of original affidavit filed as Document D-7 and handing over of the same to the plaintiff as directed hereinabove on or before 15.01.2025.

40. The second LC Report dated 09.07.2024 was handed over by parties during the course of hearing. The same is directed to be taken on record. The registry is directed to inform the concerned Local Commissioner dated 09.07.2024 to trace the report and ensure that the same is brought on record within two (2) weeks.

41. All pending applications stand disposed of.

42. Interim orders, if any, stand vacated.

MANMEET PRITAM SINGH ARORA, J
DECEMBER 18, 2024/msh/ms

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