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

BEFORE

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

+ **RSA 208/2018 & CM APPL. 52231/2018**

Between: -

SH. RAMESH KUMARAPPELLANT NO. 1
SON OF LATE SH. MANGALI RAM,
RESIDENT OF H. NO.272, MOHALLA KILOD,
VILLAGE BADLI, DELHI

SH. RAJ KUMARAPPELLANT NO. 2
SON OF LATE SH.MANGALI,
RESIDENT OF H. NO.272, MOHALLA KILOD,
VILLAGE BADLI, DELHI

(Through: Ms. Suman Chaudhary, Advocate)

AND

SH. BALBIR SINGH
S/O LATE SHRI MAM CHAND,
R/O H.O. NO.272, MOHALLA KILOD,
VILLAGE BADLI, DELHI

....RESPONDENT

(Through: Mr. Praveen Suri and Mr. Jayesh, Advs.)

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Reserved on: 11.11.2024
Pronounced on: 09.12.2024

JUDGMENT

The instant appeal has been filed by the

appellants/plaintiffs under Section 100 of the Civil Procedure Code, 1908 ("CPC"), being aggrieved by the judgment and

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decree of reversal dated 02.08.2018, passed by the Court of the Additional District Judge-03 (Central District), Tis Hazari Court, Delhi in Regular Civil Appeal No.13/17/15 (New RCA No.61368/16), allowing the appeal preferred by the respondent/defendant against the judgment and decree dated 11.08.2015 by the Court of the Civil Judge-09, (Central), Tis Hazari Court, Delhi in Civil Suit No.1356/2006, whereby, the suit for partition and permanent injunction was decreed in favor of the appellants /plaintiffs.

2. The facts manifest in the instant appeal are that one Late Mam Chand had two sons, Mangli Ram (father of the appellants/plaintiffs) and Balbir Singh (respondent/defendant) and the dispute concerns an ancestral property measuring 77 square yards (sq.yds) located in the Old Lal Dora area of Village Badli, Delhi (suit property). The appellants/plaintiffs, herein are the nephews of the respondent/defendant.

3. It is the case of the appellants/plaintiffs that the respondent/defendant started construction on the property without their consent, thereby compelling the appellants/plaintiffs to institute a suit for partition and permanent injunction to prevent further construction. Before the Trial Court, appellants/plaintiffs stated that both the parties held equal ownership of the property and no partition by metes and bounds had ever taken place with respect to the suit property. The respondent/defendant disputed the said averment and stated that the suit property had already been partitioned 20 years ago and claimed sole ownership, citing various improvements and utility connections made by him. He further disputed the valuation of

the suit and the cause of action claimed by the appellants/plaintiffs.

4. The Trial Court passed a preliminary decree of partition and permanent injunction on 11.08.2015. Aggrieved thereto, the decree of the Trial Court was assailed by the respondent/defendant before the first Appellate Court and the first Appellate Court reversed the decree of the Trial Court. Therefore, the appellants/plaintiffs have preferred the instant appeal.

5. Learned counsel appearing for appellants/plaintiffs has submitted that the findings of the first Appellate Court are against the well-settled principles of law of partition. He also submits that in the present case, it is an admitted fact that the property in dispute was an ancestral property. It is further submitted that the father of the appellants/plaintiffs had $\frac{1}{2}$ share and the appellants/plaintiffs cannot be deprived of their share. It is also contended that the first Appellate Court has illegally held that the respondent/defendant was in possession of the suit property as the respondent/defendant did not produce any legal backing or evidence to prove his possession and the contrary has been proved by the appellants/plaintiffs on the basis of evidence by way of the testimonies of PW-1, PW-2 and PW-3, before the Trial Court.

6. Learned counsel also submitted that both the parties were in possession of the suit property and the respondent/defendant has completely failed to prove his exclusive possession. It is also averred by him that the first Appellate Court gravely erred with regard to the allotment of 108 sq. yds. excess land to the

respondent/defendant without applying its mind to the facts of the case.

7. I have heard learned counsel for the appellants/plaintiffs on admission and have perused the record.

8. A glance at the judgment and decree passed by Trial Court indicates that on completion of pleadings, the following issues were framed *vide* order dated 05.08.2010:

- “1. Whether the plaintiffs and defendant are co-owners of the suit property measuring 77 Sq. Yards? OPP*
- 2. Whether the plaintiff is entitled to decree of partition and separate possession of half share in the suit property as prayed for? OPP.*
- 3. Whether the plaintiff is entitled to decree of permanent injunction? OPP.*
- 4. Whether the suit of the plaintiff is not properly valued for the purpose of Court fees and jurisdiction? OPD.”*

9. The Trial Court, while adjudicating on the aforementioned issues and decreeing the suit in favour of the appellants/plaintiffs, held that the appellants/plaintiffs and the respondent/defendant were co-owners of the suit property measuring 77 sq. yds. The Trial Court also held that the appellants/plaintiffs had been able to substantiate their claim through the testimonies of PW2 and PW3, proving that the suit property was never partitioned by their common ancestor. Additionally, the Court noted that the respondent/defendant's inability to justify the allocation of a larger portion of the land to him during the alleged partition further corroborated the appellants/plaintiffs' claim. The findings of the Trial Court on issue No.1 are reproduced as under :-

“11....It is not in dispute between the parties that Sh. Mam Chand, their common ancestor was the owner of the suit property -measuring 77 Sq. Yds. The plaintiffs claim half share in the said 77 Sq. Yds. being the sons of Late Sh. Mangali, brother of the defendant and one of the sons of Late Sh. Mam Chand. The defendant has not disputed this fact that Sh. Mangali was his brother and they were two brothers only. The plaintiffs have sought partition and

possession of their half share while it is the case of the defendant that Sh. Mam Chand, during his lifetime had partitioned his properties including the suit property and the suit property was given to the defendant in the said partition. The said fact has been denied by the plaintiffs. In support of the fact that the suit property was never partitioned, the-plaintiffs have examined PW2 and PW3 who are the residents of the same village. The said witnesses PW2 and PW3 have stated that they knew the parties and that Sh. Mam Chand was the owner of the properties including the suit property. They deposed that the suit property was never partitioned by Sh. Mam Chand and that it was left unpartitioned for the common usage of the parties.

12. On the other hand, the defendant apart from himself had not examined any other witness nor had he placed on record a material to show that the suit property was ever partitioned between the parties or their predecessors In interest. In his cross examination dated 30.5.2015, the DW1 stated that out of 580 Sq. Yds. of property No. 272 belonging to Late Sh. Mam Chand, he was allotted 235 Sq. Yds. In addition to another plot measuring about 180 Sq. Yds. He admitted that Sh. Mangali Ram (father of the plaintiffs) was allotted only 270 Sq. Yds. of land as against 415 Sq. Yds. allotted to the defendant. No explanation has been furnished as to why the plaintiffs' father was allotted a land having area 145 Sq. Yds. lesser than that allotted to the defendant by the father of the defendant. Even otherwise, once the suit property has been admitted to be belonging to Sh. Mam Chand, it was incumbent for the defendant to show that it was partitioned by Sh. Mam Chand and was given to the defendant in said partition. The defendant has failed to do so in the present case.

13. The plaintiffs, as noted above, have been able to prove before the Court through the witnesses PW1 and PW2 that the suit property was never partitioned, by Late Sh. Mam Chand. It is also corroborated from the fact that in the alleged partition, without any explanation, the defendant was allotted 145 Sq. Yds. of land in excess to what was allotted to the father of the plaintiffs. Being a beneficiary of an excess allotment which excluded the suit property, it was for the defendant to explain the circumstances which made his Late father to act so favourably to the defendant while depriving the father of the plaintiffs of an equal share. Thus, the Court Is of a conclusion that the plaintiffs and the defendant are co-owners of the suit property measuring 77 Sq. Yds”

10. Subsequent to deciding the first issue, i.e., the co-ownership status in favour of the appellants/plaintiffs, the Trial Court held that the appellants/plaintiffs were also entitled to partition and separate possession of half of the property. Furthermore, it was held that the appellants/plaintiffs, being the co-owners as decided *vide* issue no.1, were also entitled to a decree of injunction. The first Appellate Court was of the opinion that allowing the respondent/defendant to continue to erect a permanent structure would infringe upon the rights of the appellants/plaintiffs, unless the suit property is partitioned by metes and bounds. Based on the abovementioned ratio, a preliminary decree of partition and permanent injunction was passed by the Trial Court.

11. On an appeal preferred by the respondent/defendant, the first Appellate Court reversed the judgment and decree of the Trial Court. The first Appellate Court relied upon the decision of the Supreme Court in ***Kesharbai vs. Tarabai Prabhakar Rao Nalawade & Ors***¹ to hold that despite the permissibility of partial partition with the agreement of all coparceners, where joint family property is partitioned, it is presumed that such a division is complete with respect to both the members and the *onus probandi* to prove otherwise is on the person alleging partial partition of joint family properties. In paragraph No. 11, the first Appellate Court held as under:-

“11. Plaintiffs/respondents contend that although there had been a partition in year 1984 of the properties between their father and the defendant/appellant, yet the suit property measuring 77 square yards was left joint for common use and common enjoyment. Thus, what the plaintiffs/respondents are essentially contending is that the

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¹ (2014) 4 SCC 707

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partition effected in 1984 was a partial partition and not a complete partition. Under Hindu Law, moment a partition is effected, there is a division or splitting up of a joint Hindu Family. It is in essence disruption of undivided coparcenary in a joint family, Partition involves severance of community of interest and severance of status, However, there may as well be a partial partition. All coparceners may, with consent, partition a portion of property, dividing it amongst themselves, and at the same time, maintain a joint status with respect to rest of the property (Ramalinga vs. Narayana, AIR 1922 PC 20; Jagmohan vs. Ranchhodas, AIR 1946 Nagpur .84), However, despite the permissibility of partial partition by agreement among all coparceners, where a partition in a joint family takes place, the presumption will be that it is a complete partition, both with respect to its members as well as its properties and where a person alleges that it was a partial partition regarding property or persons, it is he who will have to prove it. In the case, of Kesharbai vs. Tarabai Prabhakar Rao Nalawade & Ors., (2014)4 SCC 707 it was observed, "In this case, the trial court, as well as the High Court, held that there was a complete partition in the year 1985, Therefore, the presumption would be that there was a complete partition of all the properties. Consequently, the burden of proof that certain property was excluded from the partition would be on the party that alleges the same to be joint property." Therefore, in the case hand, the presumption would be that complete partition of all the properties had been effected way back in year 1984 and it would be for the plaintiffs/respondents to rebut this presumption"

12. Therefore, the first Appellate Court held that since the appellants/plaintiffs alleged that the partition of 1984 was partial i.e, the suit property was excluded; they bore the burden to prove that the suit property was intentionally left out for common use. It was also held that the evidence adduced by the appellants/plaintiffs did not support their case. The witnesses PW-2 and PW-3, who were examined on behalf of the appellants/plaintiffs, had no direct knowledge of the execution of the partition and could not confirm that the suit property was intentionally excluded from the partition done by the common

no.1/plaintiff no.1) also made inconsistent statements, including denial of partition in a separate case instituted amongst family members. In the opinion of the first Appellate Court, it was implausible that a specific property would be left out without a reason when a partition of all family properties was being conducted.

13. Before both the Courts below, the appellants/plaintiffs also argued that the partition of 1984 was inequitable, with the respondent/defendant allegedly receiving more land than they did. On this aspect, the first Appellate Court noted that unequal distribution alone does not imply an incomplete partition, and if the appellants/plaintiffs genuinely believed that the distribution was inequitable, on the preponderance of probabilities, the suit property would logically have been included in the original partition to even out any perceived imbalances. In addition, the first Appellate Court also observed that the partition in 1984 was never challenged by the appellants/plaintiffs or their father in any Court of law. The relevant paragraphs of the judgment of the first Appellate Court are reproduced herein:-

“11. Plaintiffs/respondents have been able to rebut this presumption. Taking into account the evidence led before Ld. Trial Court, what is clear is that plaintiffs/respondents have miserably failed to rebut this presumption. In the very first place, there is absolutely no explanation as to why the suit property was left out of the partition effected in 1984. After all, where a partition is being effected of the properties and disruption of undivided coparcenary takes place, there would have to be some reason for excluding a particular property from the ambit of partition. In other words, it is difficult to comprehend as to when partition is being effected of all the properties, a particular property would be excluded from partition sans any plausible reason/explanation. In the case at hand, plaintiffs/respondents offer no explanation whatsoever to say as to why the suit property in particular was left out of partition way back in year 1984 when all other properties were partitioned, The self serving ipse dixit of plaintiff no.1

Ramesh (PW1) that partition effected in 1984 was only a partial partition would not suffice. PW-2 and PW-3 can hardly be witnesses of the fact that the suit property measuring 77 sq. yards had been excluded from the partition in 1984. The partition of 1984 was not effected in the presence of PW-2 and PW-3. PW-2 and PW-3 do not in their evidence state that the partition of 1984 had taken place in their presence. Further, PW-2 and PW-3 conceded in their respective cross-examinations that they were not aware 'about any case filed by the defendant against the adjacent neighbourers namely Sumer Singh and Sube Singh for closing the Parnalas, The Trial Court record reflects that a litigation between appellant / defendant on the one hand and his neighbours Dalip Singh, Sumer Singh and Sube Singh on the other hand had commenced in July 1992 and this is evident from the certified copy of the plaint Ex.PW-1/D- 14 : Mark-A, It does appear that by way of this litigation defendant /appellant had sought to restrain his neighbours from raising construction in the property adjoining the suit property. A perusal of the certified copy of the plaint Ex.PW-1/D-14 : Mark-A also reflects that in 1977, there had been a litigation between father of defendant/appellant and the neighbour Dalip Singh for closing the parnalas. The fact of the matter therefore is that PW-2 and PW-3, residents of the same village, being unaware of the litigations between the defendant/appellant and his father on the one hand and his neighbours on the other hand only goes to show that their assertion that partial partition had taken place in 1984 wherein the suit property had been left out cannot be believed upon. Here, it may also be mentioned that plaintiff no. 1 Ramesh (PW-1) been economical with truth. Before Ld, Trial Court he gave evidence to the effect that partial partition had taken place in 1984; whereas in another litigation initiated by his aunt / bua Smt. Bimla Devi for partition of properties he gave written statement inter alia to the effect that no partition of the suit properties had taken place. Further, in his cross-examination he stated that he did not file his written statement in the civil litigation initiated by his aunt / bua Smt. Bimla Devi. However, in later part of his cross-examination, when confronted with certified copy of his written statement (Ex.PW-1/D-13) he admitted that the same bore his signatures. Therefore, taking a holistic view of the material / evidence available on the Trial Court record, this Court is of the view that the plaintiffs / respondents failed to rebut the aforesaid presumption.

measuring 580 sq. yards and the entire property (larger plot) measuring 580 sq. yards bears house no. 272. The entire plot measuring 580 sq. yards, therefore, seems to be a common plot. The present suit is for partition of only 77 sq. yards. If the partition effected in 1984 was not done in an equitable manner as alleged, it is difficult to comprehend as to why partition of the entire plot of 580 sq. yards was not sought.

14. The first Appellate Court also made pertinent observations with respect to the claim of the appellants/plaintiffs that the respondent/defendant was allotted an excess portion of the common plot during the family partition in 1984, receiving 342 sq. yds. while appellants/plaintiffs were allocated 286 sq. yds. The Court found that the aforesaid claim does not advance the case of the appellants/plaintiffs as the alleged unequal distribution of land in 1984 should have necessitated the inclusion of the entire plot within the ambit of the partition to ensure fairness. It was observed that in partitions of joint family property, equal land distribution among coparceners is not always imperative, and instances of unequal allotment are not uncommon. Referring to the precedent set by the Supreme Court in *Apoorva Shantilal Shah, HUF v. Commissioner of Income Tax Gujarat-1, Ahmedabad*², the Court emphasized that a partial partition by the father between himself and his sons is not invalidated by unequal distribution among coparceners. The Court further emphasized that if such a partition prejudices any coparceners, its validity can be challenged in a proper proceeding and until such a partial partition is deemed invalid by a competent court, it remains valid. Thus, the first Appellate Court held that the appellants/plaintiffs failed to provide any substantial evidence to substantiate the claim and the presumption remained

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that the 1984 partition was complete. It was also observed by the first Appellate Court that the appellants/plaintiffs had never challenged the validity of the partition in 1984 and are now estopped from taking the plea of unequal distribution as they have done in their replication. The relevant paragraph is reproduced as under:-

“15. Validity of the partition effected in 1984 was never challenged. On the appeal file, I find that both the plaintiffs herein alongwith their Aunts/ Buas had filed a suit in year 2001 against the defendant / appellant and which was rejected, under Order VII Rule 11, CPC vide order dt. 16.10.2008 Of Ld. Civil Judge. If the plaintiffs/ respondents could file such a suit, then it is difficult to comprehend as to why they never woke up from their slumber to challenge the validity of the partition of 1984. Alternatively, it may very well be asked as to why within a reasonable time the plaintiffs/ respondents never approached the Court with the plea that the partition was inequitable and that to even out the same the suit property be divided to put them on equal level. Rather the partition effected in 1984 is being put out as a partial partition without any explanation as to why the suit property, in particular, was left out from the ambit of partition. The argument that the area of land was unequally distributed in 1984 was in fact all the more reason not to exclude the suit property from within the ambit of partition way back in 1984 for this would have only evened out the scales between the co-sharers. That apart, at no point of time was the validity of the so-called partial partition effected in 1984 challenged before any forum. Further, PW-1 in his cross-examination admitted that compensation in respect of the acquisition of land was shared equally between his father and defendant /appellant. This- too only goes to show that there was complete partition. Further, the fact that a common passage (in yellow colour in the site plan Ex.PW1/D-1) having 'L' shape was earmarked goes a long way to establish that the partition effected way back in 1984 was complete and that the suit property was subject matter of that partition. The reason being that if the suit property measuring 77 sq. yards had to be left joint and for common usage of the parties, I see no reason as to why the 'L' shaped passage in yellow colour had to be kept aside. The fact that this 'L' shaped passage was earmarked only affirms the view that the partition of 1984 was complete. Further, perusal of the material / evidence on the Trial Court record would, on preponderance of probabilities, reflect that possession of the suit property measuring 77 sq. yards has been all along with the defendant / appellant. This aspect as regards possession of the

property measuring 77 sq. yards would be adverted to in later part of this judgment. The bottom line of this discussion so far is that the respondents / plaintiffs have miserably failed to rebut the aforesaid presumption under the law. Leave aside there being rebuttal of presumption, the material on record clearly suggest that there was no partial partition. Thus, on issue no. 1 this Court holds that plaintiffs/ respondents failed to prove that they are co-owners of the suit property measuring 77 sq. yards with the defendant/ appellant. Findings on issue no. 1 of Ld. Trial Court are accordingly reversed.”

15. Regarding the subsequent issues of possession of the suit property and injunction, the Court found that the respondent/defendant had maintained possession of the property since 1984 and appellants/plaintiffs presented no credible evidence of joint possession, and statements from witnesses regarding occasional use of the property by the appellants/plaintiffs for tethering animals were unsubstantiated. After taking all evidence into account, it was concluded that the appellants/plaintiffs had failed to rebut the presumption of a complete partition in 1984. Consequently, the Court reversed the findings of the Trial Court on the issue of co-ownership, determining that the plaintiffs/respondents were not entitled to a partition or separate possession of the suit property.

16. Upon considering the controversy involved in the instant appeal, it is clear that the finding by the first Appellate Court that the 1984 partition was complete and not partial, is well-supported by judicial precedents and the principles of law. Under law, a partition generally implies a complete division of property, and any assertion of partial partition requires clear and compelling evidence, which the appellants/plaintiffs have failed to provide. It is trite law that a partial partition must find a manifestation in a

d'etre behind this principle is that once partition takes place between the parties, it must be a culmination of the joint and several rights of the parties and scope must not be left out for further agitation of rights between the members of a family, unless some part of the joint estate is mutually left out. It is intended to maintain consistency of rights and social peace. Notably, no infirmity or error has been pointed out in this proposition of law and the application of this proposition to the facts of the case by the first Appellate Court also remains unassailed.

17. In light of the aforesaid, the judgment and decree of the first Appellate Court, reversing the Trial Court's findings and denying the appellants/plaintiffs' claims to co-ownership or a separate partition of the suit property, does not have any material illegality.

18. Therefore, no substantial question of law has arisen for the consideration of this Court in the exercise of its jurisdiction under Section 100 of CPC, and the instant appeal stands dismissed, alongwith pending application(s).

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

DECEMBER 09, 2024/p/MJo