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

+ CS(OS) 81/2007

% *Judgment dated 08.05.2014*

SH. POONAM CHAND GOEL & ORS.

THROUGH LEGAL HEIRS Plaintiffs

Through: Mr.Anil Sapra, Sr. Advocate with
Mr.Sandeep Sharma and Mr.Ankur Goel, Advs

versus

SH. HANUMAN DASS GOEL & ANR Defendants

Through: Mr.S.B. Tripathi, Advocate along
with defendant no.1 in person

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. The plaintiff No.1 has filed the present suit for partition, claiming 1/5th share in the suit property bearing no.17-A, New Colony, Model Basti, New Delhi -110 005, ad measuring 200 sq. yrds. Parties to the suit are brothers. During the pendency of the suit, defendants no.3 and 4 were transposed as plaintiffs.
2. As per the plaint, a plot of land was purchased by all the parties to the suit on 19.1.1968 from one Sh.Kashi Nath Khemka and registered the same on 31.1.1968. Since the property was purchased by all the parties, thus they are entitled to 20% share each in the property.
3. The written statement was filed by defendants no.1 and 2. As per their written statement, the suit property was purchased out of earnings of defendant no.1 and 2. But as per the desire of their father, the suit plot was purchased in the name of all the five brothers. It was agreed that the

payments made for the purchase of the plot would be reimbursed by all the brothers to defendant no.1. The defendant no.1 as an obedient son carried out the wishes of his father and paid the entire sale consideration and got the plot registered in the name of all brothers. Except for defendant no.2, the plaintiff, defendants No.3 and 4 (now transposed as plaintiffs) did not pay the price of the plot, resultantly the plaintiff filed a suit for declaration being CS(OS)No.602/1971 and a decree of declaration was granted in favour of the defendants no.1 and 2, holding that they alone are the owners and in possession of the suit property. The defendant no.1, who appears for himself and for defendant no.2 submits that the plaintiffs have been residing at the suit property as tenants, for which they are paying rent to defendants. It is the case of the plaintiff that the suit filed was only to enable the defendant no.1 to take loan for building the property.

4. On the pleadings of the parties the following issues were framed:

- “(i) Whether the plaintiffs are entitled to partition of the suit property? **OPP**
- (ii) Whether defendants no.1 and 2 are the absolute owners of the suit property on the basis of judgment and decree passed on 28.9.1971 in C.S.No.602/1971? **OPD**
- (iii) Whether the suit of the plaintiffs is barred by limitation? **OPD**
- (iv) Whether the suit of the plaintiffs is without any cause of action and thus liable to be dismissed under Order VII Rule 11 of the CPC? **OPD**
- (v) Relief.”

5. The onus to prove issue no.(i) was on the plaintiffs, while the onus to

prove issue nos.(ii), (iii) & (iv) were on the defendants. While affidavits by way of evidence have been filed by all the three plaintiffs, no evidence has been led by the defendant.

6. In support issue no.(i) all the three plaintiffs i.e. **PW-1**, Mr.Poonam Chand Goel; **PW-2**, Mr.Bhagwan Dass Goel; and **PW-3** Mr.Subhash Chand Goel have filed affidavits by way of evidence. Affidavit by way of evidence has also been filed by Mr.Sanjeev Goel, son of Mr.Poonam Chand Goel, who died during the pendency of the suit.
7. As per the evidence of all the three plaintiffs, the suit property was purchased by all the parties, which is evident from the registered sale deed dated 19.1.1968 **Ex.D-1**, as per which the suit property stands in the name of all the five brothers. **PW-2**, Mr.Bhagwan Dass Goel has testified that the sale deed dated 19.1.1968 **Ex.D-1** was filed by defendant nos.1 and 2 and on the basis of the said document alone a decree for partition can be passed. It has further been testified by **PW-2** Mr.Bhagwan Dass Goel that a building was constructed on the plot out of joint funds of all the brothers and upon completion of the building all the parties occupied the building and have been in occupation of the same in their own right, although in disproportionate portions as per their requirements till date. It has also been deposed that before raising the constructions, the defendants wanted to raise funds by taking a loan and for the said purpose they wished to mortgage the property in question and to enable them to mortgage the property the plaintiffs agreed to the request of the defendants in good faith and the defendants executed indemnity bonds-cum-undertaking to secure the interest of the plaintiffs [**Ex.PW-2/1 and Ex.PW-2/2**], but the plaintiffs never appeared in any court or ever received any summons or engaged any lawyer for appearing of their behalf in any Court proceedings. It has also been testified by the plaintiffs that the defendant

no.1 has been filing property-tax returns in the name of all the brothers; copies of the returns filed for the financial year 1997-98 and 1994-95 have been exhibited as *Ex.P-3* and *Ex.P-4*. The house-tax assessment order dated 25.1.1972 and house-tax bills pertaining to the year 1974-75, 1976-77, 1978-79, as per which the deponent has been shown as one of the co-owners of the suit property, has been exhibited as *Ex.PW-2/3* to *Ex.PW-2/6*. The house-tax receipts have been exhibited as *Ex.PW-2/7* and *Ex.PW-2/8*. Letters addressed by defendant no.1 to the MCD on behalf of all the brothers dated 4.5.1977 and 6.1.1978 have been exhibited as *Ex.P-1 & P-2* respectively. It has also been testified that the property in question stands in the name of all the brothers, including the plaintiffs and has never been mutated in the names of the defendants on the basis of an alleged decree dated 29.8.1971, which was neither acted upon, nor was ever intended to be acted upon.

8. It has also been testified that a telephone was installed at the premises in the name of all the brothers. Telephone bills have been filed and exhibited as *Ex.PW-2/9* to *Ex.PW-2/13*. The witness has also testified that the defendants in fact never denied the share of the plaintiffs till a suit was filed in the year 1998 in the court of Senior Civil Judge, Delhi wherein for the first time defendants asserted that a decree had been passed in their favour and claimed that they are the only owners of the suit property.
9. It is submitted that as per mutual understanding, the suit was simply filed with a view to facilitate a loan transaction for the purpose of raising construction and it is at that stage that the indemnity was signed by the defendants in favour of the plaintiffs.
10. It is also the case of the plaintiffs that they contributed proportionately towards the cost of construction by depositing the amount in the family

concern M/s.Haryana Sudh Ghee Bhandar by cheques. The details of cheques have been extracted in the affidavit and reproduced below:

<u>DATE</u>	<u>CHEQUE NO</u>	<u>AMOUNT (IN RS.)</u>
02.03.1972	166781	2,000/-
17.05.1972	166782	1,000/-
11.08.1972	166783	1,000/-
30.10.1972	166784	1,000/-
15.03.1973	166785	1,800/-
20.04.1973	166786	1,000/-
27.12.1973	166788	2,500/-
24.04.1974	166790	1,500/-
05.06.1974	642231	1,000/-
10.08.1974	642232	1,000/-
01.04.1975	642235	1,920/-

<u>DATE</u>	<u>CHEQUE NO</u>	<u>AMOUNT (IN RS.)</u>
24.06.1975	375282	3,000/-
02.12.1975	375284	3,000/-
13.04.1976	375285	3,000/-
01.03.1979	213382	10,000/-

11. Some of the extracts of the books of account showing payments having been made, have been exhibited as *Ex.PW-2/14* collectively. It has also been deposed that the share of the plaintiffs have been admitted in present Court proceedings which is reflected in the order dated 22.10.2003 and

also in proceedings before the Mediator.

12. **PW-3**, Subhash Chand Goel has supported the case of his brother and has relied upon the affidavit of Sh.Bhagwan Dass Goel.
13. As during the pendency of suit, Mr.Poonam Chand Goel expired, his son Mr.Sanjeev Goel has also filed an affidavit, who has also testified on the lines of the affidavit of his father's brother (**PW-2**). PW-1, Mr.Sanjeev Goel was cross-examined by the defendant no.1 for himself and on behalf of defendant no.2. Mr.Bhagwan Dass Goel was also cross-examined by defendant no.1 for himself and on behalf of defendant no.2.
14. It is pointed out by counsel for the plaintiffs and defendant no.1, who appears in person that arguments were heard and the judgment was reserved on 4.3.2010 and thereafter on 23.7.2010 an order was passed stating that part III file (documents file) has been inadvertently tagged along with some other judicial file and parties were directed to place photocopies of the documents on record, which was to be verified by the Joint Registrar. The Joint Registrar had passed the following orders on 13.12.2010 and 4.2.2011:

“13.12.2010

Present: Mr. Lalit Gupta counsel for the plaintiff no.1 Mr. Ankur Goel counsel for the plaintiff no. 2 and 3 Mr. Hanuman Dass, defendant no. 1 in person

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Defendant no. 1 is present in court and he is also appearing for the defendant no. 2. He has filed the photocopies of the documents today in the court as per the index (page no. 1 to 30), the same are taken on record. The copies of the same are supplied to the counsel for the plaintiffs who inform that except document no. 1 to 8 which are written submissions

only, other documents are correct photocopies of the documents previously filed by the defendant no. 1 and 2 in this suit. On the other hand, the defendant no. 1 who appears in person for himself as well as for defendant no. 2 admits that the photocopies of the documents filed by the plaintiff are the correct copies of the documents previously filed by the plaintiff no. 1 to 3 herein.

Let the matter be placed before the Registrar (Original Side) on 20th December, 2010 in terms of order dated 29.10.2010 passed by the Hon'ble Court.”

“04.02.2011

Present: None.

CS(OS) 81/2007

By order dated 29th October, 2010, the Hon'ble Court directed the undersigned to hold an enquiry regarding missing Part – III of CS(OS)No.81/2007 and also to check the authenticity of the copies of the documents filed by the respective parties for reconstruction of missing Part –III. The Hon'ble Court also directed the parties to file photocopies of their respective documents filed by them earlier.

Pursuant to the above directions of the Hon'ble Court the plaintiffs and defendant no.2 filed photocopies of their respective documents before the Joint Registrar. Both the parties admitted the photocopies of the documents filed by their respective opposite party to be correct copies of the documents filed & placed in original Part –III of the case file earlier.

The enquiry regarding missing Part –III is in progress and the report thereon may be permitted to be submitted as soon as the enquiry is concluded.”

15. Counsel for the plaintiff submits that plaintiff and the defendants both have filed a copy of the sale deed, which shows that the property stands in favour of all the parties.

16. No evidence has been led by the defendants. During the course of hearing, the defendant no.1 appeared for himself and for defendant no.2, when the matter was heard in part, defendants were also represented through counsel, Mr.S.B. Tripathi, Advocate. Strong reliance has been placed on a decree passed by the trial Court dated 28.9.1971, by which the plaintiffs in the said suit (defendants herein) were declared the owners in possession of the plot of land measuring 200 sq. yrds and thus it is contended that the defendants (plaintiffs herein) would have no right, title or interest or claim in the said plot. Counsel for the plaintiffs submits that defendants have failed to lead any evidence and has thus failed to discharge the onus to prove issue No.(ii) to (iv). It is further submitted that no reliance can be placed on the decree dated 28.9.1971, as the defendants have failed to prove the same in accordance with law, as only a photocopy of the decree has been placed on record.
17. I have heard counsel for the parties, perused the evidence placed on record and considered their rival submissions. The onus to prove issue no.(i) was fixed on the plaintiffs. Issue No.(i) reads as under:

“(i) Whether the plaintiffs are entitled to partition of the suit property?
OPP

18. The onus to prove issues no.(ii), (iii) and (iv) was on the defendant. In the absence of any evidence and in the absence of defendant nos.1 and 2 not even producing certified copy of the decree, the defence sought to be raised by the defendants, cannot be looked into.
19. In order to discharge the onus fixed to prove issue No.(i), three affidavits have been placed on record. The plaintiffs have placed reliance on Ex.D-1, sale deed, a copy of which has been placed on record. The sale deed to show that the property was purchased jointly in the name of all the five

brothers. It may be noticed that defendants have not denied the factum of the sale deed, but an explanation has been rendered that the sale deed was executed in the name of all the five brothers, as per the wish of their father, but in fact the sale consideration was provided by defendant no.1 with the understanding that all the brothers would re-pay to defendant no.1, but except defendant no.2 all the other brothers i.e. the plaintiffs herein did not pay their share of the sale consideration to defendant no.1. While no evidence has been filed by defendants, to support their case. The plaintiffs have placed on record copies of the telephone bills, Ex.PW-2/9, Ex.PW-2/10, Ex.PW-2/11, Ex.PW-2/12 and Ex.PW-2/13 pertaining to the year 1994, 1995, 1996 and 1997 to show that the telephone was installed at the premises in the name of Sh.Bhagwan Das and Brothers, Ex.PW-2/3. Copies of the pass-port issued to late Smt.Poonam Chand Goel and his wife have been filed as Ex.PW-1/5 and Ex.PW-1/6 respectively. Copies of the property-tax returns for the year 1994, 1995, 1997 and 1998, duly admitted by defendants Ex.P-3 and Ex.P-4 have been filed to show that the property was in the records of MCD continues to remain joint till date. Thus in my view, on the basis of the documents placed on record and the fact that the evidence of the plaintiffs have gone un rebutted and unchallenged, the plaintiffs have been able to discharge their onus successfully to prove issue no.(i).

20. The onus to prove issues No.(ii) to (iv) was fixed on the defendants. In the absence of any evidence having been led, the defendants have failed to discharge the onus fixed on them. During the course of hearing, however, an argument was raised with regard to the decree passed by the trial Court dated 28.9.1971 by which the plaintiffs in the said suit (defendants herein) were declared to be the owners of the property in question. The defendants cannot gain any advantage on the basis of the said decree:

firstly the defendants have failed to prove the same in accordance with law, as only a photocopy has been filed and secondly a decree which creates a new right, title or interest in presenti in immovable property is compulsorily registrable document under section 4 of the Registration Act. Section 47 of the Registration Act, reads as under:

“47. Time from which registered document operates. —A registered document shall operate from the time which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.”

21. It would be useful to reproduce paragraph 16 and 17 of the case **Bhoop Singh Vs. Ram Singh Major and Ors.** reported at (1995) 5 SCC 709:

“16. We have to view the reach of clause (vi), which is an exception to sub-section (1), bearing all the aforesaid in mind. We would think that the exception engrafted is meant to cover that decree or order of a court, including a decree or order expressed to be made on a compromise, which declares the pre-existing right and does not by itself create new right, title or interest in praesenti in immovable property of the value of Rs.100/- or upwards. Any other view would find the mischief of avoidance of registration, which requires payment of stamp duty, embedded in the decree or order.

17. It would, therefore, be the duty of the court to examine in each case whether the parties have pre-existing right to the immovable property, or whether under the order or decree of the court one party having right, title or interest therein agreed or suffered to extinguish the same and created right, title or interest in praesenti in immovable property of the value of Rs.100/- or upwards in favour of other party for the first time, either by compromise or presented consent. If latter be the position, the document is compulsorily registerable.”

22. It may also be noticed that during the pendency of this matter all the parties had made a statement in Court on 22.10.2003 which reads as under:

“Present : Mr.Lalit Gupta for the plaintiff with plaintiff in person.
Mr.M.L. Sharma for defendants 1-2 with Mr.Hanuman Dass Goel and Mr.Radhey Shyam Goel.
Mr.Mahender Singh for defendant nos.3-4 with Mr.Bhagwan Dass Goel and Mr.Subhash Chander Goel.

S.No.598/1999

Learned counsel for the parties submit that parties have now agreed that they have 1/5th share each, i.e., the plaintiff and the defendants 1-4 and therefore a preliminary decree for partition may be passed. In view of the earlier development in this case, I consider it expedient to require the parties to move a formal application supported by the affidavits of the parties within two weeks from today.

Renotify on 13th November, 2003.

Parties shall be present on the next date.”

23. After making the statement, the defendants sought to back-track, as neither a compromise application was filed and in fact counsel appearing in the matter for defendants had to seek discharge only after he made a statement which was recorded separately by the Court on 15.12.2003. Order dated 15.12.2003 and the statement made on the same very date, read as under:

“15.12.2003

Present: Mr.Lalit Gupta, advocate with plaintiff in person.
Mr.M.L. Sharma, Advocate with Mr.Hanuman Dass Goel and Mr.Rajesh Goyal, son of Sh.Radhey Shyam Goel-defendants 1 and 2.
Mr.J.K. Nayyar, Advocate.

Mr.Mahinder Singh, Advocate for defendants 3-4
with Mr.Subhash Chander Goel.
Mr.Sandeep Sharma, counsel for defendant.

S.No.598/99 and IA 11364/03.

Mr.Sharma submits at the outset that he would like to seek discharge from the case as the defendants 1 and 2 wish to resile from the statements made with regard to each of the party having 1/5th share. It is noticed that on 22nd October, 2003, the Court had recorded the submissions made by the parties that they had 1/5th share each and therefore a preliminary decree of partition could be passed. The Court had required the parties to move a formal application supported by affidavit. Subsequently, the application was not made and a submission was made that they are trying to avoid the same. Let the statement of Mr.M.L. Sharma be recorded.

December 15, 2003

Manmohan Sarin,J.

ORDER

This is a case where serious allegations are being levelled against the former advocate of acting without authority and against professional ethics. Now the defendants on whose behalf submission had been made in Court with regard to the extent of share available, are seeking to resile from the same. Question may arise as to whether these actions interfere with the due administration of justice and are actionable as contempt and those who are guilty should be proceeded against.

At this stage, Mr.Amarjit Singh Chandhiok, Senior Advocate, who happens to be present in Court has been requested and he has offered to use his good offices to see if conciliation between the parties can be reached, failing which he would submit his report within four weeks. Mr.Mahinder Singh, Advocate shall make available copy of the proceedings and pleadings as required by Mr.Chandhiok. A copy of the order be given to Mr.Chandhiok, Senior Advocate.

Renotify on 21st January, 2004. Parties to be present on the next date of hearing.”

“15.12.2003

Statement of Mr.M.L. Sharma, Advocate for defendants 1 and 2, without oath.

“I had been engaged by Mr.Hanuman Das Goel & Mr.Radhey Shyam Goel. It is correct that submission was recorded to the effect that each of the parties have 1/5th share. The submission was made on oral instructions given. The defendants no.1 & 2 had even signed a statement before Shri Mahinder Singh, Advocate to similar effect.”

24. Taking into consideration the sale deed, which is not disputed by the parties, as per which all the parties are joint owners and having regard to the fact that the plot was jointly constructed by all the parties out of common funds, some of the amounts deposited in the common bank account; and also taking into consideration that even after the alleged decree was passed, all the parties continue to reside in the house, which would show that the defendants never acted upon the decree, as the defendants never sought mutation of the property in their name in the record of the MCD, nor took any steps to evict the plaintiffs from the suit property; also taking into consideration the telephone bills, which show that the telephone was applied jointly by the parties after the passing of the decree, and the property-tax bills, which are also placed on record, other than that the defendants have not led any evidence and also there is nothing in the cross-examination, which would affect the case of the plaintiffs. The statement made by the defendants in Court and thereafter

having back-track, and also taking into consideration that the defendants have neither filed certified copy of the decree in order to prove the same and even otherwise, since as per the decree fresh rights to be created in praesenti in the immovable property, the decree having been not being registered, no reliance can be placed on this. Consequently, a preliminary decree is passed, defining the share of all the parties as 1/5th each.

25. Defendant no.1, who is present in Court for himself and for his brother defendant no.2 submits that the property cannot be divided by metes and bounds. Counsel for the plaintiffs also submits that the property cannot remain joint, neither it can be divided by metes and bounds, and accordingly a final decree be passed. Accordingly, three months time is granted to the parties to arrive at an arrangement for dividing the property or purchase shares of each others. In case no arrangement can be arrived at within three months, it would be open for any of the party to seek execution of the decree. Accordingly, a final decree is passed defining shares of the parties as 1/5th each. Decree-sheet be drawn up accordingly.

G.S.SISTANI, J

MAY 08, 2014
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