

(2008) 07 DEL CK 0129

In the Delhi High Court

Case No : Regular First Appeal (OS) 17 of 2008 and C.M. No"s. 3802, 3803 and 3805 of 2008

Abhay Sapru

APPELLANT

Vs

Chitralekha Bukshi

RESPONDENT

Date of Decision : 18-07-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 41 Rule 2, 96
Delhi Co-operative Societies Act, 1972 — Section 26
Delhi High Court Act, 1966 — Section 10

Citation : (2008) 106 DRJ 589

Hon'ble Judges : V.K. Shali, J;Mukul Mudgal, J

Bench : Division Bench

Advocate : Sanjay Jain Jayant Tripathi and A. Ahmad, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Shali, J.—This is an appeal filed by the appellant u/s 96 of the CPC read with Order 41 Rules 1 and 2 and Section 10 of the Delhi High Court Act, 1966 against the preliminary decree dated 7th January, 2008 passed by the learned Single Judge in case titled as Abhay Sapru v. Chitralekha Bukshi and Anr. bearing No. CS (OS) 192/1999.

2. By virtue of the impugned judgment, the learned Single Judge has held that both the plaintiff and defendant No. 1 have equal shares i.e. - share in the property bearing No. 16A, Westend, New Delhi and further that they are bound by the family settlement Ex.D1/3 till the time the final decree for partition is not passed by metes and bounds by the Court.

3. Briefly stated the facts leading to the filing of the present appeal are that property No. 16A, Westend, New Delhi measuring 1205 sq. yards was sub-leased to Late Lt. General B.M. Kaul by Diplomatic Enclave Extension Cooperative House Building Society Ltd. Lt. Gen. Kaul built a single storied house on the said piece of land and passed away on 18th April, 1972 leaving behind his widow Smt. D.K.

Kaul and two daughters namely Smt. Chitrlekha Bukshi respondent and Smt. Anuradha Sapru both being defendant Nos. 1 and 2 in the suit. It may be pertinent here to mention that after the death of Lt. Gen. Kaul, the leasehold rights of the aforesaid plot in question were mutated in the name of Smt. D.K. Kaul and her two daughters namely Smt. Chitrlekha Bukshi, respondent (defendant No. 1 in the suit) and Smt. Anuradha Sapru (defendant No. 2 in the suit) (since deceased) on 20th November, 1978. The Diplomatic Enclave Extension Cooperative House Building Society also carried out necessary mutations in respect of the aforesaid plot in the name of the aforesaid three persons. Since Lt. Gen. Kaul had not made any Will accordingly and the aforesaid three legal heirs i.e. his widow and two daughters namely Smt. D.K. Kaul, Smt. Chitrlekha Bukshi and Smt. Anuradha Sapru (since deceased) had inherited the aforesaid property in the proportion of 1/3rd share each according to the Hindu Succession Act. The plaintiff further stated in the plaint that Smt. D.K. Kaul who happened to be his maternal grand mother had made nomination in favour of the appellant herein to the extent of her respective share which was to the tune of 1/3rd each. Smt. D.K. Kaul died intestate on 25th November, 1993 and accordingly it was claimed by the appellant that he became the owner of 1/3rd share in the suit property being the only nominee of Smt. D.K. Kaul in terms of Section 26 of the Delhi Co-operative Societies Act, 1972 and the bye-laws framed thereunder. The Society on the request of the appellant however refused to accede to the request of the appellant to substitute his name as a legal heir to the extent of 1/3rd share so far as the deceased Smt. D.K. Kaul was concerned. This resulted in filing of the suit for partition by the appellant claiming his share to the extent of 1/3rd in the suit property.

4. The respondent (defendant No. 1 in the suit) who happened to be the Masi (real sister of the mother of the appellant) filed her written statement and took a plea that an oral family settlement was arrived at on 12.2.1998, i.e., after 16 years from the date of the death of their father Lt. Gen. Kaul. According to the said family settlement, the respondent had got exclusive possession of the entire ground floor except common facilities/areas and the right of access to the first floor so far as defendant No. 1/respondent is concerned. It was denied that so far as the appellant is concerned, he had become the owner of 1/3rd share being the only nominee of Late Smt. D.K. Kaul, and also the owner to the extent of 1/3rd share of his mother Smt. Anuradha Sapru (since deceased) who was the defendant No. 2 in the suit and thereafter expired during the pendency of the suit itself. Thus in effect, the appellant/plaintiff was claiming 2/3rd share in the suit property as against 1/3rd share being held by the respondent. So far as the defendant No. 2 Smt. Anuradha Sapru, mother of the appellant is concerned, she contested the claim of the appellant to the extent that the appellant had become the owner of 1/3rd share of the suit property in his own independent capacity and in the capacity as the nominee of Smt. D.K. Kaul. She had admitted that there was a family settlement and according to the said settlement she along with her mother Smt. D.K. Kaul was entitled to the ground floor of the suit

property while as in terms of the family settlement, her sister was given the right to raise the construction on the first floor and above.

5. It may also be pertinent here to mention that Respondent had set up a counter claim also so far as her case is concerned. In the counter claim she had claimed that a declaration be issued to the extent that she is the owner of the first floor and above in respect of the suit property and further that if the family settlement is not made the basis of the claim of defendant No. 1 even then she is entitled to 1/2 share in the suit property.

6. On the basis of the pleadings of the parties, following three issues were framed:

(a) Whether the act of nomination by the predecessor-in-interest with the Cooperative Society is over ridden by the provisions of Hindu Succession Act, 1956 or not?

(b) Whether the cost of construction of the first floor of the suit property was paid by Defendant No. 1 or? If so its effect.

(c) Whether the family settlement was ever effected by the plaintiff and by the deceased Smt. Dhanraj Kishore, if so to what effect?

(d) Relief.

(e) On 3.2.2003 an additional issue was framed which is as under: Whether the provisions of the family settlement dated 12.2.1988 operates as a will if so to what effect?

7. After framing of the issues, none of the parties adduced their evidence. On the contrary, the parties contended that since the facts are not in dispute, therefore, the Hon"ble Court may pass appropriate order with regard to the claim of the appellant. The learned Single Judge after hearing arguments of the parties has decided the matter holding that both the appellant and the respondent have 1/2 share in the suit property and accordingly passed a preliminary decree to that effect.

8. The Learned Single Judge held that the nomination of the appellant by his maternal grandmother did not amount to making a will in his favour or the fact that he was the sole inheritor. The appellant was held only to be a trustee qua the other legal heirs. Thus the issue Nos. (a) & (e) were decided against him. So far as issues Nos. (b) and (c) were concerned the Learned Single Judge came to the finding that the cost of construction of first floor was borne by the respondent herself and that there was a family settlement though there was no formal partition by metes and bound. As regards the relief the Learned Single Judge passed a preliminary decree finding the shares of the parties as 1/2 each.

9. The appellant by virtue of the present appeal has challenged the said preliminary decree. The appellant has argued in person. As is the normal case when the party appears in person his version of facts and the law gets blurred

and in most of the cases he makes incoherent and ambivalent submissions. In the instant case also we did not get much of the assistance from the appellant. The appeal is also verbose and against the practice and the procedure prescribed by the CPC. The pleadings must contain only the material facts and not the law, yet copious reference to the law has been made. The sum and substance of the submission made by the appellant is to the effect that he does not have 1/2 share in the suit property but on the contrary he has 2/3rd share in the property. This submission is advanced on the basis of the fact that after the death of Lt. Gen. Kaul, there were three legal heirs who had succeeded to his estate namely the widow Smt. D.K. Kaul and the mother defendant No. 2 Smt. Anuradha Sapru (since deceased) and defendant No. 1 Smt. Chitralekha Bukshi. Each one of them had 1/3rd share in the property. Since Smt. D.K. Kaul had nominated to the Cooperative Society, the name of the appellant, therefore, in the capacity of the legal heir of Smt. D.K. Kaul he got 1/3rd share. The other 1/3rd share which originally belonged to defendant No. 2 (since deceased) in the suit and the mother of the appellant namely Smt. Anuradha Sapru, also fell to the share of the appellant on account of her death and therefore, by adding these two 1/3rd shares the appellant was claiming 2/3rd share in the property while the remaining 1/3rd share was to the account of Respondent namely Smt. Chitralekha Bukshi. Although, it has been recorded in the judgment of the learned Single Judge that originally the appellant had even denied the existence of the oral family settlement reduced into a memorandum, which is Ex.DW1/3, but during the course of hearing, the appellant had admitted that the said oral family settlement which had clearly specified that so far as the ground floor of the suit property is concerned, that would have fallen to the share of Late Smt. D.K. Kaul and the mother of the appellant namely Smt. Anuradha Sapru while as defendant No. 1 namely Smt. Chitralekha Bukshi had been given the right to raise construction on the first floor and above and after having such a right she had actually raised the construction thereupon on the first floor.

10. The finding of the learned Single Judge, was to the effect that although there was an oral family settlement reduced into writing by way of Ex.DW1/3 however, as no partition by metes and bounds had taken place, accordingly after apportioning the shares in the proportion of 1/2 share each between the appellant and the respondent, the learned Single Judge had proceeded to appoint an Officer of this Court as a Court Commissioner for the purpose of suggesting the actual modalities of physical partition of the property which is still pending before the learned Single Judge.

11. As against this the submissions made by the appellant, Sh. Sanjay Jain, the learned Senior counsel appearing for the respondent has very fairly conceded that although according to the family settlement, the ground floor had fallen to the share of the appellant, the first floor and above has fallen to the share of the respondent as it was built by her in terms of the aforesaid memorandum of settlement and therefore it belonged to her. So far as the shares which have been fixed by the learned Single Judge in the proportion of 1/2 share each both

for the appellant and respondent are concerned, the learned Senior counsel did not assail the same and urged that the learned Single Judge has rightly held that on account of death of Smt. D.K. Kaul, her 1/3rd share would devolve in equal proportion to both the daughters namely Late Smt. Anuradha Sapru and Smt. Chitralkha Bukshi and thus both of them had 1/2 share in the suit property. The learned Senior counsel further fairly conceded that notwithstanding the fact that the first floor and the portion above the first floor which will be built by the respondent would be owned by the latter in accordance with the memorandum of settlement Ex.DI/3, if at all the second floor or the portion above it, will ever be built by the respondent in accordance with the Building bye-laws, the same would be shared in the proportion of 1/2 shares each between the appellant and the respondent.

12. We have considered the submissions of the respective sides and perused the records. The first and foremost contention of the appellant to the effect that he has 2/3rd share in the suit property is totally devoid of any merit. No doubt the property was originally owned by Lt. Gen. Kaul but on account of death of Lt. Gen. Kaul the property devolved on three legal heirs namely the widow Smt. D.K. Kaul and two daughters. The property was thereafter mutated in the name of the aforesaid three persons both in the records of DDA as well as the Cooperative Society. No doubt Smt. D.K. Kaul, the widow of Lt. Gen. Kaul had in the year 1985 made the appellant as a nominee in the records of the society and thus shown her intention that the appellant is the nominee to take the charge of the share of Smt. D.K. Kaul after her death, but according to the legal position, the nominee is only a trustee of the property of the deceased and he cannot usurp the share of the deceased to his own advantage completely and to the exclusion of the other legal heirs. Meaning thereby that even though a person may be shown to be a nominee in the records of a particular society or organization, but the role of nominee is only that of the trustee to ensure that the clear devolution of the property takes place to the legal heirs. This legal position has been expounded and duly supported by the judgments in the detailed order of the learned Single Judge to which we need not refer. However, one judgment is more than sufficient to reiterate this position as has been referred to by the Learned Single Judge, i.e. Shri Vishin N. Kanchandani and Another Vs. Vidya Lachmandas Khanchandani and Another, which supports this proposition.

13. Thus on account of the death of Smt. D.K. Kaul, 1/3rd share would have devolved in equal proportion in favour of respondent No. 1 Smt. Chitralkha Bukshi and defendant No. 2 Smt. Anuradha Sapru (since deceased) and the mother of the appellant i.e. Smt. Anuradha Sapru thereby making their share as 1/2 each. As against this, the appellant under some erroneous assumption or mis-conception preferred to file the suit for partition that as he was shown to be as a nominee by his grandmother (Nani) he had 1/3rd share in the property making both his aunty and mother namely Smt. Chitralkha Bukshi and Smt. Anuradha Sapru as defendants 1 and 2 respectively. So far as 1/3rd share of Smt. Anuradha Sapru is concerned as she had died during the pendency of the

suit and the appellant was claiming himself to be the sole legal heir, therefore, he was claiming himself to be the owner of the 1/3rd share of his mother also by operation of law. As against this, the learned Single Judge has held that after the death of Smt. D.K. Kaul her 1/3rd share devolved of her two daughters namely Smt. Chitrlekha Bukshi and Smt. Anuradha Sapru who therefore, became entitled to 1/2 share in the suit property. In our opinion, there is no infirmity in the judgment of the learned Single Judge so far as the preliminary decree is concerned holding that both the appellant and respondent No. 1 have 1/2 share in the suit property. It has also been held by the learned Single Judge that although the appellant had originally denied the existence of memorandum of oral settlement, which was reduced in the shape of a Memorandum Ex.DWI/3, but wisdom dawned on him during the pendency of the suit to admit the said memorandum of settlement according to which the appellant in the capacity of the successor in interest of the defendant No. 2 would be entitled to only the ground floor of the property while as, the respondent No. 1 has been under the said memorandum of settlement permitted to raise construction on the first floor and above that but as the learned Senior counsel has very fairly conceded that as on date only first floor is constructed therefore, any construction raised by the respondent No. , 1 over and above the second floor and in accordance with the building bye-laws will be shared in equal proportion between the appellant and respondent No. 1. This is a very fair concession of fact which has been made by the learned Senior counsel to the advantage of the appellant though neither his conduct justifies this nor has he any legal right to that effect.

14. In the light of the aforesaid facts and circumstances of the case, we find that there is no merit in the present appeal filed by the appellant accordingly the same is dismissed. However, no cost is imposed keeping in view the fact that the appellant is appearing in person in a family matter although we strongly feel that the appellant was unnecessarily dragging the respondent No. 1 in litigation for no rhyme or reason.