(2009) 01 DEL CK 0181

In the Delhi High Court

Case No : C.S. (OS) No. 84 of 2004

Devendra Garg APPELLANT

Vs

Yogender Kumar Garg and Another RESPONDENT

Date of Decision : 20-01-2009

Acts Referred:

Citation : (2009) 01 DEL CK 0181

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Neha Gupta, for the Appellant; H.S. Arora, for the Respondent

Judgement

Shiv Narayan Dhingra, J.—plaintiff, who is brother of Defendants No. 1 to 5 filed this suit for partition, rendition of accounts and permanent injunction seeking a decree of partition in respect of ground floor of property No. BK-1/21 East Shalimar Bagh, Delhi between himself and his brother Shri Yogender Kumar Garg in equal shares and seeking partition of gold jewellery and silver coins, which he alleged in the suit, were handed over and entrusted to defendant No. 2 (Shri Mahavir Prasad Garg) by the mother of the parties. He also prayed that defendant No. 2 be directed to render accounts of shop No. 4635-36 Deputy Ganj, Sadar Bazaar w.e.f. 1st April, 1982 i.e. after death of father of the parties.

2. The case put up by the plaintiff is that the property No. BK-1/21 East Shalimar Bagh was purchased out of the sale proceeds of property No. 1160, Baradari, Behind Novelty Cinema, owned by the grandmother of the parties. Defendants No. 1 to 3 and plaintiff were living in this property together with their mother and mother divided this property in four equal parts before her death in a oral family settlement and gave ground floor to the plaintiff and defendant No. 1 and first floor to defendants No. 2 & 3. Regarding shop, he submitted that the shop was being run in the name of M/s Sat Narayan Ravinder Kumar by the father of the plaintiff and defendants and after death of the father in 1982, the shop was looked after all alone by defendant No. 2 Shri Mahavir Prasad Garg and no account of earnings of the shop have been given by defendant No. 2. The total

profit earned from the shop from 1982 till filing of the suit was about Rs. 33,00,000/- and share of the plaintiff would come to Rs. 8,25,000/-. plaintiff had deposited Rs. 35,000/- as property tax of the house, which defendants No. 1 to 3 were to share equally but they refused to share. plaintiff also invested approximately Rs. 1,00,000/- in the shop by purchasing goods for the shop and for paying Rs. 15,000/- towards sales tax. plaintiff had also spent around Rs. 2,00,000/- on the construction of a room on the second floor. When the plaintiff asked defendants No. 1-3 for his share in the shop and share in the property, defendant No. 1 refused to partition the ground floor in equal share and refused to give back the money spent by plaintiff on construction and defendant No. 2 refused to account for the earnings of the shop. He also submitted that mother of the parties had entrusted gold jewellery and silver coins worth Rs. 8,00,000/- and Rs. 12,500/-respectively with defendant No. 2 and his wife and the same was also not accounted for and divided.

3. Defendants No. 4 & 5 were sisters of the parties and they were made proforma defendants by the plaintiff.

4. In the WS filed by the defendants 1, 2, 4 & 5, it was stated that Smt. Ram Dulari, mother of the parties had executed a Will dated 8.5.1986 and bequeathed property No. BK1/21, East Shalimar Bagh to her four sons in equal shares. The claim of the plaintiff that there was an oral family settlement effected by the mother was denied. Regarding shop it was stated that defendant No. 2 was the tenant in the shop in his individual capacity and the landlord was issuing rent receipts in favour of defendant No. 2. plaintiff had no right over the shop. It was further submitted that after death of the father in 1982 mother of the parties became proprietor of the firm M/s Sat Narayan Ravinder Kumar in the year 1982, however, no work was done in the firm from year 1987 onward as sale of the firm became nil. The mother of the parties had suffered a paralytic attack in the year 1985 and ever since remained on bed and she ultimately died on 29.9.1998. M/s Sat Narayan Ravinder Kumar stopped its work from the year 1993-94. All earlier assets of the firm had been utilized in the treatment of the mother and not a single paisa was left. There was nothing left to be distributed among the family members. After closure of earlier business, it was defendant No. 2, who had been running the shop in his individual capacity. The assertion made by the plaintiff that the firm earned profits of Rs. 33,00,000/- between 1982-1997 was denied and it was submitted that defendant No. 2 was doing petty business of selling utensils in the shop and the goods lying in the shop were on the credit basis. It was denied that the plaintiff spent any amount on the construction of the house. It was stated that a room and bathroom were constructed on the second floor of the house from the joint funds and the plaintiff had not spent anything from his individual funds. It was denied that plaintiff deposited Rs. 35000/- as property tax of the house or he made any other payment. It is submitted that the house was only built on 72 sq. m. and the annual property tax was Rs. 1320/-. Even if the entire house tax from the date of construction was counted, the same would not come to Rs. 35000/-. It

was also denied that plaintiff invested Rs. 1 lac in the shop or paid any sales tax of the shop. It was denied that plaintiff was entitled for any accounts of the shop or he was entitled to receive any amount.

5. Preliminary objections were taken about the maintainability of the suit, it was stated that no suit for partition lies in respect of movable assets. The plaintiff had not valued the suit properly for the purpose of Court fees and jurisdiction. Since plaintiff claimed a share in the cumulative profits of the firm of Rs. 33,00,000/-, 1/4th share alleged being Rs. 8,25,000/-, he was obliged to pay Court fees on this amount but he had not paid Court fees on this amount. He had also not paid the Court fees on his share of alleged jewellery and silver coins worth Rs. 8,12,000/-, as claimed by him. It was further submitted that the suit was barred by limitation, even according to plaintiff since father of the parties died in 1982 and the suit in respect of shop was filed in the year 2004 i.e. after 22 years. It was further stated that the plaintiff was working as private accountant in Azadpur and he was not getting more than Rs. 5,000/- as salary. He was not in a capacity to spend either on the house or to invest in the shop. Even for his marriage a sum of Rs. 25,000/- was taken as loan from Vaish Cooperative New Bank Limited Kamla Nagar.

6. Defendant No. 3 filed separate WS and supported the claim of the plaintiff regarding 1/4th in the property and also supported his claim regarding the shop. Defendant No. 3 claimed that he also looked after the business after the death of his father along with defendant No. 2 for some time. However, the entire business was in custody of defendant No. 2 so he had no knowledge about the accounts.

7. Following issues were framed:

1) Is the suit for partition maintainable in respect of movable assets?

2) Is the suit properly valued for Court fee and jurisdiction?

3) Does the plaintiff have any interest in shop No. 4635-36, Deputy Ganj, Sadar Bazar, Delhi?

4) Is any part of the plaintiff?s suit barred by limitation?

5) Has there been any oral family settlement between the parties? If so, to what effect?

6) Did the mother of the parties bequeath property No. BK-1/21, East Shalimar Bagh, New Delhi by registered Will dated 8.5.1986?

7) Does the plaintiff have any interest in property No. BK-1/21, East Shalimar Bagh, New Delhi?

8) Is the plaintiff entitled to rendition of accounts as claimed in the plaint?

9) Is the plaintiff entitled to a decree for partition of property No. BK-1/21, East Shalimar Bagh?

10) To what relief, if any, is the plaintiff entitled?

Issues No. 5, 6, 7 & 9.

8. After conclusion of evidence, Counsel for the plaintiff made a statement that the plaintiff did not dispute the Will propounded by the defendants No. 1, 2, 4 & 5. Even during arguments, the Counsel for the plaintiff submitted that the plaintiff did not dispute the genuineness of the Will of Smt. Ram Dulari. In view of this stand taken by the plaintiff issue No. 5, 6, 7 & 9 are disposed of in terms of the Will. The Will is on record as Mark ?A?. Since it has been admitted by the plaintiff and by the defendants, the Will can be relied upon and exhibited and is treated as a proved document. As per the Will all the four sons have been granted equal shares in property No. BK-1/21, East Shalimar Bagh therefore, plaintiff and defendants No. 1, 2 & 3 are entitled to 1/4th share in the property No. BK-1/21, East Shalimar Bagh.

Issue No. 1

9. A suit for partition can lie only for immovable property where the property can be partitioned by metes and bounds or otherwise. If a party claims any share in the movable assets, the party can claim the value of his share by filing a suit for recovery and no suit for partition of the movable assets would lie. However, if there are movable articles having sentimental value to the parties and they are priceless, as far as monetary value is concerned, and can be divided, a suit for partition for such movable assets would lie. A suit for partition of normal movable assets, where the assets can be evaluated and the apportionment of such assets is possible, would not lie.

10. The plaintiff has failed to prove that there existed any movable assets of sentimental value. The plaintiff claimed partition of jewellery and silver coins. However the plaintiff miserably failed to show that mother of the plaintiff was in possession of any such jewellery or silver coins. It is the case of the plaintiff in the plaint that mother, during her lifetime, made a family settlement dividing the property in four equal shares. If she had any movable assets or jewellery or silver coins, she would have divided the same also. It is not the case of the plaintiff that she divided movable assets. Moreover, it has come in evidence that mother had undergone a paralytic attack and was bed-ridden and all the brothers were spending on her treatment jointly or severally. Had the deceased Smt. Ram Dulari been having jewellery worth Rs. 8 lac and silver coins, this jewellery and silver coins would have been utilized for treatment of her ailment. But the testimony of the parties show that she had not left behind any movable assets and claim of the plaintiff was just in the air. Issue is decided against the plaintiff.

Issue No. 3 & 8.

11. In order to prove his interest in the shop, plaintiff examined himself as PW1. While in the plaint he has stated that after death of father in 1982 defendant No. 2 had been looking after the shop and cornering the profits, in his testimony, he

admitted that after death of his father his mother became proprietor of shop in 1982 but it was not in his knowledge that she remained proprietor only till 1993. He also admitted that after paralytic attack, his mother visited the shop on four or five occasions, he had no knowledge that if the firm M/s Sat Narayan Ravinder Kumar did any business at all after 1987 or its ?sale? after 1987 was nil. He had no knowledge if the business of the firm had stopped altogether in 1993- 94 and thereafter Mr. Mahavir Prasad Garg defendant No. 2 started business and the present business was his sole business. He admitted that the rent receipts of the shop were presently in the name of Shri Mahavir Prasad Garg (D-2). He also admitted that defendant No. 2 only deposited rent of the tenanted shop in the Court. He admitted that during lifetime of the mother or even after of her death of mother he was never involved in business of the shop and firm M/s Sat Narayan Ravinder Kumar and visited the shop only once on Diwali festival of 1993 or 1994. He admitted that the shop was in the occupation of Shri Mahavir Prasad Garg alone since 1993-94 and he was carrying business of selling utensils from that shop. He could not say if this business was of small scale. He could not produce any documentary proof of depositing Rs. 35,000/- either as property tax or Rs. 15,000/- as sales tax as claimed by him. He admitted that annual property tax of the property was Rs. 1320/- only. He admitted that a loan of Rs. 25,000/- was taken at the time of his marriage.

12. On the other hand DW-1 Yogender Kumar Garg testified that no business was being done in the shop after 1987 during the lifetime of mother and Mr. Mahavir Prasad Garg (D2) had filed ?nil? sales tax return showing nil sales. He testified that firm M/s Sat Narayan Ravinder Kumar stopped working since 1993-94, the business at the shop was being run by Shri Mahavir Prasad Garg (D2) and it was only a small business. Mr. Mahavir Prasad Garg appeared as DW-2 and testified that M/s Sat Narayan Ravinder Kumar was a proprietor firm of Smt. Ram Dulari from 1982-93. No work was done with the firm after 1987 and there was no sales. Smt. Ram Dulari suffered a paralytic attack in 1985 and ever since she remained on bed till she died on 29.9.1998. The firm stopped altogether from the year 1993-94 and since then, he started business with his own assets. No stock of the firm had remained, entire assets of the firm prior to 1993-94 had been utilized in the treatment of their mother Smt. Ram Dulari. The plaintiff had not made any investment in the shop. No accounts of the shop were being maintained, since it was a very small business. He (D-2) was not paying any income tax for the income from the shop.

13. Defendant No. 3 who had filed a separate WS, did not choose to appear in the witness box. It is clear from the testimony of the parties that the shop/firm M/s Sat Narayan Ravinder Kumar, being run by late father of the parties came under the ownership Smt. Ram Dulari in 1982, after death of her husband. Smt. Ram Dulari suffered a paralytic attack and could not run the business. None of the defendants also seemed to be interested in running the business at that stage and the business of M/s Sat Narayan Ravinder Kumar died its own death. plaintiff?s assertion that the shop had earned a profit of Rs. 33,00,000/- is

totally baseless and in the air. No basis has been disclosed in the plaint how this amount was arrived at by the plaintiff nor in the evidence, the plaintiff supported this claim, rather the plaintiff admitted that the shop was owned by his mother and his mother suffered paralytic attack and could hardly visit the shop. It is obvious that after death of father of the parties, the shop was not run as a joint family business, neither the other brothers participated in it in order to invest in it or run it. The claim of the plaintiff that he invested Rs. 1,00,000/- is baseless claim as no proof is given by the plaintiff of such investment. Neither, the plaintiff was in a capacity to make such investment in view of the admitted fact that he was earning a meager salary. I, therefore, hold that the plaintiff had no interest in the shop No. 4635-36, Deputy Ganj, Sadar Bazar and plaintiff is not entitled to rendition of accounts.

Issue No. 2

14. plaintiff has not valued the suit property. plaintiff claimed, though falsely, that mother left behind a jewellery and silver coins worth Rs. 8,12,500/- and the share of the plaintiff would be Rs. 2,04,125/-, he was supposed to pay Court fee on this amount. Similarly, plaintiff was supposed to pay Court fee on his alleged share of Rs. 8,25,000/- claimed out of alleged profits from business. The plaintiff cannot escape liability of paying Court fee on these two amounts on the ground that his claims did not find favour with the Court. Court fee provisions act as a deterent against frivolous claims and a litigant, who chooses to file suit on the basis of false and unfounded allegations, has to suffer loss of Court fee and also suffer costs. The plaintiff is therefore, liable to pay Court fee on Rs. 8,25,000/- and Rs. 2,04,125/-.

Issue No. 4

15. The claims of the plaintiff in respect of jewellery and shop were false. The issue of limitation would not arise. The claim for partition of the property made by the plaintiff is not barred by limitation.

Issue No. 10

16. As per the admission made by the defendants, the property has been bequeathed by late Smt. Ram Dulari to her four sons. The plaintiff is entitled for separate possession of his 1/4th share in the property. A preliminary decree is passed in favour of plaintiff holding that the plaintiff was entitled for 1/4th share in property No. BK-1/21, East Shalimar Bagh. The plaintiff shall pay Court fee as directed above under Issue No. 2 within two weeks. Preliminary decree be prepared on payment of Court fee by the plaintiff. Parties are directed to file their respective proposals regarding partition of this property by metes and bounds within one month from today.

