

(1998) 08 DEL CK 0073

In the Delhi High Court

Case No : S. No. 2835 of 1994 and I.A. 10797 of 1994

Dr. Puran Chand Kaushik

APPELLANT

Vs

Smt. Prem Wati Kaushik and Others

RESPONDENT

Date of Decision : 06-08-1998

Acts Referred:

Citation : (1998) 75 DLT 378

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : C.L. Narasimhan, for the Appellant; Nemo, for the Respondent

Judgement

M.K. Sharma, J.—The present suit has been instituted by the plaintiff seeking for a decree of specific performance and mandatory injunction. The plaintiff is the son of late Shri Om Prakash Kaushik and defendant No. 1 is the wife of said late Shri Om Prakash Kaushik. The persons who were impleaded as defendants 2 & 3 in the suit were the other sons of late Shri Om Prakash Kaushik. Late Shri Om Prakash Kaushik was given a lease in respect of a plot of land bearing No. 17 measuring an area of 200 sq. yds. at 17, Vasudha Enclave, Pitam Pura, Delhi-110034 and the deed of Perpetual Sub-Lease in respect thereof was registered as document No. 5985 on 7.11.1978 in the office of Sub-Registrar, Delhi. Late Shri Om Prakash Kaushik being the sub-lessee of the said plot of land appointed the defendant No. 1 as his nominee, and thereafter he expired on 11.7.1991. On his death the aforesaid plot of land was mutated in favor of and in the name of defendant No. 1.

2. By selling another property which was known as Narela property an amount of Rs. 51,000/- was received by defendant No. 1 and the three brothers. With the aforesaid amount of Rs. 51,000/- and personal contributions of about Rs. 30,000/- made by each of the three brothers construction was made on the aforesaid plot of land located at 17, Vasudha Enclave, Pitam Pura, Delhi. For making such construction necessary permission was obtained by getting the plan sanctioned by the Delhi Development Authority. Upon completion of construction

necessary occupancy certificate was granted by Delhi Development Authority.

3. The plaintiff and the defendants entered into a settlement in respect of the aforesaid property and in terms thereof a Deed of Settlement was executed on 17.3.1994, in terms whereof the plaintiff was to pay to his two brothers Rs. 70,000/- each subject to possession and relinquishment of the rights of the said brothers in the ground floor. As per the said settlement deed the entire existing ground floor of the building except the portion earmarked and demarcated for use and occupation of the defendant and the gate, car porch and stair-case would belong to and be owned by the plaintiff. In terms thereof the plaintiff also paid to his two brothers namely -- defendants 2 & 3 Rs. 70,000/- each. In the aforesaid settlement deed it was further provided that in lieu of the exclusive rights and interest of defendants 2 & 3 in the ground floor of the property which they relinquished in favor of plaintiff on receipt of Rs. 70,000/- each, the plaintiff relinquished his rights and interests in the floors above the ground floor on which construction was to be made by said defendants. The defendants 2 & 3 completed construction on first floor and the second floor portion upon the then existing ground floor portion of the said property and they sold out their properties to third parties and for that reason their names were deleted from the array of defendants. Therefore, the suit at present is between the plaintiff and the defendant, who is his mother.

4. Upon service of summons on the defendant none appeared on behalf of the defendant No. 1 nor any written statement was filed on her behalf and accordingly, it was ordered that the suit would proceed ex parte as against the said defendant No. 1. At the request of the plaintiff, he was allowed to lead evidence by filing an affidavit which was filed and is on record. The documents filed by the plaintiff were also given exhibit marks which also are on record.

5. The plaintiff has filed the present suit for passing a decree for specific performance of the said agreement dated 17.3.1994 relating to family settlement dated 17.3.1994 and also for perpetual injunction restraining the defendant from disposing of, alienating, selling or creating any third party interest in respect of the suit property. At the time of issuance of summons an ad interim temporary injunction was also granted by this Court in favor of the plaintiff restraining the defendant No. 1 from disposing of, alienating, selling or creating any third party interest in the portion allotted to the plaintiff on the basis of the alleged settlement on the ground floor of the suit property.

6. The relief sought for by the plaintiff rests on the family settlement dated 17.3.1994. In terms thereof the defendants No. 2 and 3, who were later on deleted from the array of parties, received Rs.70,000/- each from the plaintiff for relinquishing their rights in respect of the suit premises. The right that accrued to the said defendants 2 & 3 under the deed of settlement to make construction above the ground floor was exercised by both of them. After construction was made by them on the first floor and second floor the said defendants have sold out the said properties to third parties thereby relinquishing all their rights in

respect of the properties situated at House No. 17, Vasudha Enclave, Pitam Pura, Delhi. The defendant No. 1 also a signatory to the aforesaid family settlement. On consideration of the said family settlement dated 17.3.1994 I am of the considered opinion that the said document is in fact and for all practical purposes a deed of settlement amongst the parties partitioning their properties. The averments made in the plaint and the evidence led by the plaintiff by way of affidavit remain unchallenged and go unrebutted. Since the plaintiff has already carried out his part of the obligations as stipulated in the agreement it is conclusively proved and established that he is entitled to the share in the property as stipulated in the said family settlement. The plaintiff has stated in his evidence that he is in possession of the property in respect of which he has sought for a decree in the present suit.

7. The issue, Therefore, that arises for my consideration now is as to what is the nature of the decree that could be passed in the facts and circumstances of the present case. The family settlement dated 17.3.1994 is an un-registered document and pith and substance of the said document indicates that the same is in reality a deed partitioning the family property. In the suit however, the plaintiff has not sought for any decree for partition or for confirmation of his possession. Therefore, I am to consider as to whether I should be moulding the relief so as to give proper and effective relief to the plaintiff.

8. In *Bhagwati Prasad Vs. Shri Chandramaul*, it was held by the Supreme Court that if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. It was further held that although it is the general rule that the relief should be founded on pleadings made by the parties but where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case.

9. Since the plaintiff has pleaded and has also set out in the plaint the terms and conditions of family settlement which more or less effect the partition in respect of the suit property, and has also led evidence in respect thereof, I am of the considered opinion that the plea of claiming partition in respect of the suit property and confirmation of possession thereof are specifically made and evidence has been led thereon and in order to do justice, I consider it to be fit case where the relief could be moulded.

10. Accordingly, as stipulated in the family settlement, I grant a decree for partition in favor of the plaintiff declaring him as owner of the suit premises which is divisible and identified and marked in colour blue in the plan placed on record. A decree of confirmation of possession of the plaintiff in respect of the said property is also passed. A copy of the aforesaid plan shall also form part of

the decree. There shall, however, be no order as to costs.