

(2008) 03 DEL CK 0276

In the Delhi High Court

Case No : Regular First Appeal (OS) 116 of 2006 and CM 2884 of 2008

Dr. Sukhdev Singh Gambhir

APPELLANT

Vs

Amrit Pal Singh Gambhir, Shri Inderjit Singh Gambhir and
Shri Jawahar Singh Gambhir

RESPONDENT

Date of Decision : 17-03-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18
Partition Act, 1893 — Section 2

Citation : (2008) 106 DRJ 574 : (2008) 2 ILR Delhi 953

Hon'ble Judges : S.L. Bhayana, J; Mukul Mudgal, J

Bench : Division Bench

Advocate : Madhu Mukul Tripathi, for the Appellant; Sanjay Jain Nitika Mangla, for R 1 and 2 and Maninder Acharya, for R 3, for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—This appeal arises out of the judgment dated 07th August, 2006 delivered by the learned Single Judge declaring the plaintiff-appellant to be the owner of 1/4th share of the suit property.

2. The facts of the case briefly stated are as follows:

a. The appellant and respondent No. 1, 2 and 3 are related to each other. Respondent No. 3, Sh. Jawahar Singh Gambhir, is the father of the appellant and the respondents No. 1 and 2. The appellant and the respondents No. 1 and 2 are brothers.

b. The Respondent No. 3 was the absolute owner of suit property bearing No. 6/88, WEA, Karol Bagh, New Delhi (hereinafter referred to as the "suit property").

c. The Respondent No. 3, the father, voluntarily and out of love and affection for his children made a gift of 1/4th share in the suit property having a 2 1/2 storeyed house constructed thereon, in favour of the appellant and respondents No. 1 and 2 and respondent No. 3 also retained 1/4th share in the suit property.

d. For the purpose of giving effect to the said gift made by respondent No. 3 in favour of the appellant and respondents No. 1 and 2, a gift deed dated 29th March, 1979 was executed by the respondent No. 3 and was accepted by the appellant and on behalf of respondent No. 1 and 2 by the mother Smt. Parkash Kaur Gambhir, since at the time the respondent Nos. 1 and 2 were minors. The said gift deed was, duly registered in the office of the sub-Registrar, Delhi at Entry No. 3107 in Additional Book No. 4144 on pages 89 to 93 on 26th July, 1979.

e. The particulars of the said property are as under:

Address : 6/88, WEA, Karol Bagh, New Delhi-110005.

Measuring: 230 Sq. Yds. Being 20 1/2 Sq. Yds. In length and 11 1/4 Sq.Yds. in breadth; bearing Municipal House No. 10235-36, Ward No. XVI an Khasra No. 1761/1258, Karol Bagh, New Delhi-5 bounded by-

North : House on plot No. 89. South : House on plot No. 87. West : Lane. East : Road.

f. The said gift having been duly accepted by the plaintiff, the plaintiff also assumed joint possession of the said property together with respondents No. 1, 2 and 3.

g. The appellant has since been continuously in possession of the said property together with the respondents.

h. The appellant is also jointly in possession of property bearing No. 13A/6A, measuring 160 sq. yards, WEA, Karol Bagh, New Delhi with the respondents No. 1 and 2. The appellant and respondents No. 1 and 2 are having 1/3rd share in the same. Suit No. 371/1998 for partition of the property No. 13A/6A, WEA, Karol Bagh, New Delhi was also filed by the appellant and is pending before this Court.

i. The appellant thereafter filed the present Suit No. CS(OS) No. 703/1998 for partition of the suit property at 6/88, WEA, Karol Bagh, New Delhi and for the peaceful enjoyment of the above mentioned 1/4th share. The Hon''ble Single Judge of this Court by his judgment dated 7th August, 2006 concluded as follows:

In view of the statement made by the defendants, I decree the suit declaring the plaintiff to be the owner of 1/4th share of the suit property and separate his share by directing that 1/4th land comprised in the suit property abutting plot No. 6/87, would be the portion of the plaintiff. Since it is admitted that front of plot is 34 ft., portion falling to the share of the plaintiff would be as marked "A" on the site plain Ex.C-1.

j. It is against this judgment and decree dated 7th August, 2006 that the appellant has filed the present appeal.

3. The impugned judgment being brief is reproduced below:

% 07.08.2006

Present: Mr. P.S. Sharda for the plaintiff

Mr. Sanjay Jain, Senior Advocate with Ms. Nitika Aggarwal for defendants 1 & 2

Ms. Maninder Acharya for the counter claimant.

IA. No. 7777-78/2006

Allowed. Order dated 13.7.2006 is recalled. Suit and counter claim are restored.

+CS(OS) No. 703/98 & Counter Claim No. 76/2001

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1. Statement of the defendant has been recorded in court today. To settle the disputes and buy peace, defendant No. 3 at whose instance counter claim No. 76/01 has been registered has withdrawn the counter claim.

2. Counter claim No. 76/01 is accordingly dismissed as withdrawn.

3. Suit seeks partition of property bearing No. 6/80, W.E.A. Karol Bagh, New Delhi admeasuring 230 sq. yards. plaintiff claims 1/4th share in the property.

4. Basis of the claim is that vide gift deed dated 29.3.1979, defendant No. 3 gifted 1/4th share in the property to the plaintiff.

5. Defendant No. 3 had opposed the partition by laying a counter claim seeking cancellation of the gift deed.

6. Defendant No. 3 has withdrawn the counter claim and has stated that partition may be effected.

7. Defendants 1 and 2 have likewise made statements that partition may be effected.

8. It is not in dispute that the building on the land is lying in a dilapidated condition and has no value. It is admitted that partitioning the dilapidated building would be an empty formality.

9. Thus, vacant land has to be partitioned.

10. I have an option to the plaintiff who is present in court to chose the side towards which he wants his separated 1/4th share.

11. Plot abuts Padam Singh Road towards its North and has a service lane on its Southern boundary. Western boundary is plot No. 6/89. Eastern boundary is plot No. 6/87.

12. plaintiff states that the suit property may be partitioned vertically i.e. along with the depth of the plot and draw of lots be held to allot 4 separated portions to each party.

13. I am afraid, plaintiff is attempting to play smart. For if, he were to get a strip in the center, his two brothers and father who want to live jointly would have to suffer.

14. In view of the statement made by the defendants, I decree the suit declaring the plaintiff to be the owner of 1/4th share of the suit property and separate his share by directing that 1/4th land comprised in the suit property abutting plot No. 6/87, would be the portion of the plaintiff. Since it is admitted that front of plot is 34 ft., portion falling to the share of the plaintiff would be as marked "A" on the site plan Ex.C-1.

15. No costs.

4. The counsel for the plaintiff- appellant has challenged the above judgment and has contended that the only appropriate course of action which should have been followed by the learned Single Judge would have been to sell off the property and not partition it as the value of the partitioned property gets reduced and the partition leading to the strip marked as "A" falling to the appellant's share is not capable of enjoyment by the appellant. The counsel for the respondents while opposing that plea contended that the other co-owners, who are the brothers and father of the plaintiff-appellant, do not want to sell off the property and also wish to continue to live jointly.

5. We have seen the plan of partition directed by the learned Single Judge which is as follows:

6. The plaintiff-appellant has also filed another Suit No. 371/98 in respect of the property situated at 13A/6A, WEA, Karol Bagh, New Delhi admeasuring 160 square yards. It is not in dispute that the present property is approximately 230 sq. yards and the 1/4th share of the plaintiff-appellant would not exceed 60 sq. yards in this property. The main thrust of the counsel for the appellant, Sh. Tripathi while not disputing the fact that the suit property falls in a busy commercial street, is that value of the property gets depressed because of the partition. This may be so but it is the appellant himself who had claimed partition and cannot be heard to complain about the result of the suit in his favour.

7. The counsel for the respondents, in addition, made an offer that for the sake of buying peace, the respondents are prepared to give the entire property situated at 13A/6A, WEA, Karol Bagh, New Delhi admeasuring 160 square yards which is residential in nature, which is less than a kilometer away from the present property to the appellant in lieu of his 1/4th share in the present property amounting to 60 sq. yards. Both the sides agree that the suit property is not suitable for residence as it is on a busy commercial street. The learned Counsel for the appellant submitted that the appellant in fact wanted the property for the purpose of residence. The counsel for the appellant has declined the offer of exchange of his share of approximately 60 sq. yds. for a 160 sq. yards plot in the vicinity of the suit property which is undoubtedly better suited for residential purposes. Reliance was also placed by the counsel for the

appellant on Order XX Rule 18 of the CPC which reads as under:

Decree in suit for partition of property or separate possession of a share therein.- Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then-

(1) If an in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazette subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;

(2) If an in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties, interested in the property and giving such further directions as may be required.

8. The reliance placed on the above provisions by the appellant is not justified as the present property is also assessable for revenue payable to the government and hence Sub-section (2) cannot come to the aid of the appellants.

9. On the question of the powers of the Court to order sale instead of division in partition suits this Court in the case of Faquira Vs. Raj Rani and Another, held as under:

On hearing the learned Counsel, we find that there has been a complete misunderstanding of the procedure to be followed under the Partition Act, 1893, in the particular case. Section 2 of the Act is: "2. Power to Court to order sale instead of Division in partition suits.- Whenever in any suit for partition in which, if instituted prior to the commencement of this act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of shareholders therein, or of any other special circumstances, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

This Section clearly states that the Court can order a sale if one is demanded by the shareholders interested individually or collectively to the extent of half the property or more. Thus, the Court can only order a sale if requested to do so by the owners of 50 per cent share in the property or more and cannot order the same on its own. There seems to be a general belief that property subject to a partition suit can be sold even without any such request. In this connection, it may be recalled that the Partition Act of 1893 was passed only with the object of

giving the Court power to sell the property, if necessary. The following quotations from the statement of objects and reasons in the Act are self-explanatory:

...It is proposed in the present Bill to supply this defect in the law by giving the Court, under proper safeguards, a discretionary authority to direct a sale where a partition cannot reasonably be made and a sale would, in the opinion of the court, be more beneficial for the parties. But, having regard to the strong attachment of the people in this country to their landed possession, it is proposed to their landed possession, it is proposed to make the consent of parties "interested at least to the extent of a moiety in the property a condition precedent to the exercise by the Court of this new power. In order at the same time to prevent any oppressive exercise of this privilege, it is proposed to give such of the shareholders as do not desire a sale the right to buy the others out of a valuation to be determined by the court.

Thus, in view of the above position of law, the appellant who has only 1/4th share in the suit property measuring 60 sq. yards, cannot in any event, seek the sale of the suit property.

In view of the circumstances of the case, indicating that the partition or separation of the suit property can conveniently and justly be made as proposed by the learned Single Judge of this Court, there is no necessity for this Court to pass any order to sell off the suit property as the same will adversely affect the rights of the respondents as they are the co-owners in the capacity of brothers and father of the appellant and they do not want to sell off the property and wish to continue to live jointly. Besides this, the respondent's counsel had even made an offer of giving the choice to the appellant of the location of the 1/4th part of the land, provided the three co-owners i.e. the Respondents No. 1 Sh. Amrit Pal Singh Gambhir, Respondent No. 2 Shri Inderjit Singh Gambhir and the Respondent No. 3 Shri Jawahar Singh Gambhir, who wanted to continue to remain joint were given adjacent portions. Even this proposal was not found acceptable to the appellant.

10. We had also attempted to resolve the matter by asking the counsel for the parties to suggest a settlement and the settlement as noted above for grant by the Respondents of the entire 160 sq. yards in a nearby location suitable for residence, to the appellant, in lieu of his 1/4th share of suit property measuring 60 sq. yards was suggested by the counsel for the respondents to have complete separation so that there is no bitterness between the warring parties. However, this offer of the respondents was inexplicably spurned by the appellant. On the one hand, the appellant contends that he wants the suit property so as to construct his residence, whereas on the other hand he declined to give up about 60 sq. yards of the suit property in a commercial area so as to get a 160 sq. yards plot in the vicinity in a residential area. This clearly shows that the appellant's sole desire is to have the suit property sold. The appellant has backtracked from his own stand on any final agreement fructifying during the various stages in the process of the present litigation. The Mediation Report

dated 14th February, 2006 on a possible agreement between the parties was duly signed by all the parties including the appellant. However, the appellant backtracked on this agreement which can be seen from the order dated 20th February, 2006. The impugned judgment dated 7th August, 2006 recorded no-objection of all the respondents and consent of the appellant as to mode of partition, however, the appellant filed the present appeal thereafter. The order dated 2nd February, 2007 observed that the appellant's proposal was accepted by the respondents. However, the appellant failed to appear in the court on a number of occasions and later declined to stand by the offer given by himself.

11. Since the property has been shown to be divisible by metes and bounds as demarcated by the learned Single Judge and three out of four co-sharers want to stay jointly and do not want a sale, the judgment of the learned Single Judge cannot be faulted. Since the appellant is not prepared to accept that settlement, which in our view appears to be generous, or make any offer save the offer of the sale of the suit property, we see no reason as to why the impugned order should not be sustained. Indeed we are bound in law by the position of law in Faquira's case, which dictum does not give a party having less than half share to seek a sale of the family property. Accordingly, both on the law and the facts, there is no merit in this appeal.

12. Normally, the conduct of the appellant should have invited substantial costs against him. However, we decline to award costs against the appellant as this is a family matter. The appeal along with the pending applications is consequently dismissed with no orders as to costs.