
(2010) 11 DEL CK 0058

In the Delhi High Court

Case No : Regular Second Appeal No. 247 of 2008 and C.M. 17418 of 2008

Indira Sharma

APPELLANT

Vs

Kusum Shukla and Others

RESPONDENT

Date of Decision : 11-11-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 6 Rule 17

Citation : (2010) 11 DEL CK 0058

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Kuldip Singh, for the Appellant; R.K. Bedi, for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.—This appeal has impugned the judgment and decree dated 2.7.2008 which had endorsed the finding of the trial judge dated 29.3.2007. The dispute is a family dispute. The Appellant is the daughter of late Sh. Bala Parshad Sharma and sister of Respondent No. 2 i.e. Gopal Parshad.

2. The Appellant/plaintiff had filed a suit for partition, rendition of accounts and injunction. Averment was that her father late Sh. Bala Parshad Sharma who died on 17.4.1987 had left a will dated 4.4.87 by virtue of which certain part of the estate had fallen to the share of the Appellant/plaintiff.

3. The trial judge had framed 14 issues. After examination of the oral and documentary evidence, the purported will dated 4.4.1987 was disbelieved. The court had also drawn a conclusion that the tenanted premises where late Sh. Bala Parshad Sharma and his sons were residing in part and carrying on business is a tenancy not exclusively in the name of late Sh. Bala Parshad Sharma. It was in the name of M/s Bala Parshad Sharma and Sons. Trial judge had held that there was no estate of late Sh. Bala Parshad Sharma capable of partition; the tenancy rights were not in the personal name of late Sh. Bala Parshad Sharma. Suit of the plaintiff was dismissed.

4. In the appeal this finding of the trial judge was endorsed by the Additional District Judge. The relevant finding in this regard in the impugned judgment inter alia read as follows:

5. In view of the evidence on record, the Id.trial court came to the conclusion that tenancy was in the name of M/s Bala Pd. Sharma and Sons. The Defendants had stated that there was no business conducted in the ground floor shop. The shop on the first floor, was being used by M/s Vandana Textiles and M/s Super Cloth House from which commission was given to late Sh. Bala Parsad Sharma. The Id.trial court came to the conclusion that as the tenancy was in the name of Sh. Bala Parsad Sharma and Sons no partition of the tenancy rights could be made in respect of tenancy rights. The citations relied upon by the Ld.counsel for the Appellant are of little help and are not applicable to this facts of this case. The premises under tenancy of late Bala Pd. is not such that it could be divided by metes and bounds to be enjoyed by the co-sharers/co-lessees. The Appellant may or may not inherit the tenancy rights, which is not being adjudicated in the present case, but this tenanted portion cannot be partitioned.

6. The Will has not been proved in accordance with law. No details of any other tangible assets were provided by the plaintiff for which division could be ordered. In view of the same, the Ld.trial court dismissed the suit of the plaintiff.

7. I, therefore find no reason to interfere with the impugned order. Appeal is therefore dismissed.

5. The counsel for the Appellant has urged that this finding is incorrect and the courts below had not correctly appreciated the evidence; the application of the plaintiff under Order 6 Rule 17 of the CPC (hereinafter referred to as "the Code") had been dismissed summarily on 17.2.1996 which was a incorrect and illegal order. Admittedly, this order dated 17.2.1996 was never challenged by the plaintiff; he had appropriate remedy but he chose not to resort to the same. As such this order dated 17.2.1996 dismissing his application Under Order 6 Rule 17 of the Code has since attained a finality.

6. In the body of the appeal five substantial questions of law have been formulated; they inter alia read as under :

(i) Whether the application filed by the Appellant U/o 1 R 10 r/w 6 R.17 CPC was rightly dismissed by the Trial Court on 17.2.1996, on the ground that it is belated, though even issues in the said civil suit has not been framed by then and the suit was still at the initial stage? Issues of the suit were framed on 13.8.1998.

(ii) Whether the order dismissing the said application could be challenged in appeal filed against the final judgment?

(iii) Whether the first Appellant court was bound to decide the validity of the order dated 17.2.1996 in the appeal filed against the final judgment on 29.3.2007?

(iv) Whether the first appellate court has not appreciated the evidence properly while holding that the only asset to be divided amongst the brothers and sisters was tenancy rights and it has led to the miscarriage of justice as it was available on record that there were other additional assets in the form of Fixed Deposit Receipts of the deceased of Rs. 20,000/- as well as the business of the deceased and the goodwill for which the evidence was also available on record?

(v) Whether the commercial rights of the tenanted premises at Chandni Chowk, Near Central Bank, Delhi-110006 of the deceased Sh. Bala Parsad Sharma can be partitioned amongst brothers and sisters?

7. They are all fact based. In no manner it can be said that they raise any substantial question of law which is the only ground on which a second appeal can be entertained by this Court. Hands of this Court are otherwise tied. No such substantial question of law having been arisen, this appeal as also the pending application is dismissed in limine.