

(2009) 02 DEL CK 0175
In the Delhi High Court
Case No : CS (OS) No. 1079 of 1998

Shri Shambhu Dayal

APPELLANT

Vs

Shri Maan Singh and Others

RESPONDENT

Date of Decision : 25-02-2009

Acts Referred:

Hindu Succession Act, 1956 — Section 22

Citation : (2009) 02 DEL CK 0175

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Dinesh K. Bhardwaj, for the Appellant; Nemo, for the Respondent

Judgement

Anil Kumar, J.—This suit for partition and permanent injunction has been filed by the plaintiff against his brothers and sisters in respect of the property of his father being House No. 16/628-E, situated at Tank Road, Bapa Nagar, Karol Bagh, New Delhi-110005 constructed on a plot of about 100 sq.yards.

2. The plaintiff has contended that Shri Umrao Singh was the owner of the suit property and he died on 30th January, 1982 leaving behind plaintiff and defendants No. 1 to 8 as his legal representatives. Defendants No. 1 to 6 are the brothers of plaintiff and defendants No. 7 and 8 are the married sisters. According to the plaintiff, he is residing in the suit property along with other defendants. The plaintiff has asserted that the mother of the plaintiff and defendants had pre- deceased their father Shri Umrao Singh who had died on 30th January, 1982.

3. The defendants No. 7 and 8 are stated to be residing separately with their husbands in their matrimonial homes. The plaintiff has also contended that he is in possession of one room in the property in dispute which was locked by him after he moved to House No. F-1/431, Sultanpuri, Delhi, which plot was allotted in the name of his wife and on which a house was constructed by the plaintiff.

4. Since the rights in the property being House No. 16/628-E, situated at Tank

Road, Bapa Nagar, Karol Bagh, New Delhi-110005 had devolved upon plaintiff and defendants No. 1 to 8, the plaintiff sought partition of the said property. However, according to the assertions of the plaintiff the defendants have refused to partition the property and has rather threatened the plaintiff that they will sell the property and buy a new house out of the sale consideration of the property. Defendants No. 4, 5 and 6 are also alleged to have inducted tenants in the property whose partition is sought by the plaintiff.

5. In the circumstances, plaintiff has filed the present suit seeking partition of the suit property being House No. 16/628-E, situated at Tank Road, Bapa Nagar, Karol Bagh, New Delhi-110005 measuring about 100 sq.yards and a decree of permanent injunction seeking restraint against the defendants and any other person acting through defendants from selling, alienating, or disposing of the suit property.

6. The defendants were served with summons of the suit and the written statement has been filed only by defendants No. 1 and 4. Defendant No. 1 in his written statement dated 27th January, 1999 has admitted that the property has devolved upon plaintiff and defendants No. 1 to 8 from their father, late Shri Umrao Singh. However, it is contended that the plaintiff never sought partition of the suit property. The defendant No. 1, however, admitted that some tenants have been inducted in the portion of the suit property and rent from these tenants were charged by defendants No. 4, 5 and 6 and the rent is not shared with defendant No. 1 and the plaintiff.

7. The claim of the plaintiff for partition and for permanent injunction is challenged by defendant No. 4 who filed the written statement on 25th January, 1999 contending inter alia that the plaintiff is not in physical possession of the suit property or any part thereof. It has been alleged by the defendant No. 4 that the plaintiff had left the house in the year 1970 during the lifetime of the parties. father and has never come back to the property in dispute. It is stated that the plaintiff had received his share from the parties. father, Shri Umrao Singh, when he left the house in 1970 and consequently plaintiff has no right, title or interest in the property nor is he entitled to seek partition of the said property.

8. The defendant No. 4 has also asserted that property was partitioned verbally and the defendant No. 4 is the owner and in physical possession of his share in the property as defendant No. 4 constructed his share on the ground floor in 1987, first floor in 1990, second floor in 1995 and 4th Floor in 1997 with his own funds without any interruption from anyone. The property in the share of defendant No. 4 is stated to be constructed on a piece of land measuring 25 sq.yards and defendant No. 4 is in possession of the property as has been shown in the plan alleged to have been filed with the plaint. On the basis of the pleadings and the documents of the parties, the court had framed the following issues on 22nd February, 2005:

1. Whether there was an oral partition of the suit property in the year 1970 as

alleged by defendant No. 4 and the same fell to the share of defendants 3 to 6 to the exclusion of others. OPD

2. Whether the plaintiff is in physical possession of a portion of the suit property? If not, its effect. OPP

3. Whether the plaintiff is entitled to a decree of partition and permanent injunction as prayed for? OPP

9. The defendant No. 1 was proceeded ex parte on 16th April, 2004. Defendants No. 2, 3, 5 to 8 were proceeded ex parte on 27th January, 1999. The defendant No. 4 was also proceeded ex parte on 26th September, 2007.

10. After the issues were framed, the plaintiff had filed his deposition on affidavit and none of the defendants cross-examined the plaintiff in respect of his deposition filed on affidavit.

11. Issue No. 2 is regarding physical possession of a portion of the suit property by the plaintiff. The onus to prove this issue was on the plaintiff. The plaintiff in his deposition dated 20th August, 2005 has categorically deposed that he is in possession of one room which was locked by him after his wife got a plot allotted in her name from Delhi Development Authority measuring about 25 sq.yards which was later on transferred by the wife of the plaintiff in the name of the plaintiff and the plaintiff constructed a small house on the said plot of 25 sq.yards bearing House No. F-1/431, Sultanpuri, Delhi. The plaintiff has proved the site plan as Ex.PW1/1 and the room shown in possession of the plaintiff is in yellow colour.

12. The plaintiff has categorically deposed that he even visits the portion of the property in his possession from time to time and stay in the room in the property in dispute whose partition has been sought by the plaintiff. The plaintiff has also stated that whenever he is not visiting his room in the property in dispute, the said room is locked by him.

13. The deposition of the plaintiff in the affidavit dated 20th August, 2005 has not been challenged as the plaintiff has not been cross- examined by any of the defendants. In the circumstances, the deposition of the plaintiff that he is in possession of the one room which is shown in yellow colour in Ex.PW1/1 remains unrebutted. The deposition of the plaintiff that he visits property in dispute and stay in the room and whenever he is not staying in the room he locks the said room remains un-rebutted.

14. In the facts and circumstances, the inevitable inference on the basis of the pleas and deposition of the plaintiff is that he is in possession of one room shown in yellow colour in the plan Ex.PW1/1. The issue is thus decided in favour of plaintiff holding that the plaintiff is in physical possession of the portion of the suit property.

15. The onus of issue whether there had been an oral partition of the suit

property in the year 1970 was on defendant No. 4. No evidence has been led on behalf of defendant No. 4 or any other defendants that there had been an oral partition of the suit property in the year 1970.

16. The plaintiff has rather refuted the averment that the property was orally partitioned in his deposition dated 20th August, 2005. The deposition of the plaintiff that the property was not partitioned orally has not been challenged as the plaintiff has not been cross examined. Since the defendant No. 4 has not led any evidence in support of his plea about the oral partition of the suit property and the plaintiff has denied that the property was orally partitioned which statement of the plaintiff has remained unrebutted, the inevitable conclusion is that the property in dispute was not orally partitioned in the year 1970, nor has the suit property fallen to the share of defendants No. 3 to 6 to the exclusion of others. Consequently, issue is decided against the defendants holding that the suit property was not orally partitioned in 1970 and that the suit property has not fallen in the exclusive share of defendants No. 3 to 6 to the exclusion of plaintiff and other defendants. The issue is decided accordingly.

17. The next issue is whether the plaintiff is entitled for a decree of partition and permanent injunction. The plea of the plaintiff is that the property was owned by Shri Umrao Singh who had died on 30th January, 1982. The wife of late Shri Umrao Singh, mother of the plaintiff and defendant had pre-deceased him. Consequently, on the death of Shri Umrao Singh on 30th January, 1982, the rights in the property devolved on all his children, plaintiff and defendants No. 1 to 8, in equal share. Consequently, the plaintiff and defendants No. 1 to 8, being nine legal representatives of deceased Shri Umrao Singh, will inherit 1/9th share each in the said house.

18. The deposition of the plaintiff to this effect has remained un-rebutted and unchallenged. In the facts and circumstances, the inevitable conclusion is that the plaintiff is the owner of 1/9th undivided share in the property being House No. 16/628-E, situated at Tank Road, Bapa Nagar, Karol Bagh, New Delhi-110005 and defendants No. 1 to 8 are also co-owners of 1/9th undivided share each in the suit property.

19. Since the plaintiff and defendants No. 1 to 8 are the co-owners of 1/9th share each in the property being House No. 16/628-E, situated at Tank Road, Bapa Nagar, Karol Bagh, New Delhi-110005, therefore, none of the parties have any right to dispose of their share or to part with the possession of any portion of the property to a third party during the pendency of the present suit. Learned Counsel for the plaintiff has also relied on Section 22 of Hindu Succession Act contemplating that since the father of the plaintiff Shri Umrao Singh had died on 30th January, 1982 intestate leaving behind plaintiff and defendants No. 1 to 8 as his legal representatives, none of the legal representatives/heirs can sell his or her share without offering it for sale to the plaintiff. The plaintiff had been granted interim order of injunction against the transfer of rights in the property till the disposal of the suit.

20. In the circumstances the issue is thus decided in favour of plaintiff holding that the plaintiff is the owner of 1/9th share in the property being House No. 16/628-E, situated at Tank Road, Bapa Nagar, Karol Bagh, New Delhi-110005 and defendants No. 1 to 8 are also co-owners of 1/9th share each in the property.

21. Therefore, a preliminary decree of partition is passed in favour of plaintiff holding that the plaintiff is owner of 1/9th undivided share of property being House No. 16/628-E, situated at Tank Road, Bapa Nagar, Karol Bagh, New Delhi-110005 and the property of deceased Shri Umrao Singh is liable to be partitioned.

22. Consequently, in the facts and circumstances, Mr. Bhagwat Saxena Advocate, 348 Lawyer's Chambers, Civil Side, Tis Hazari Courts, Delhi (Phone No. 9811373684) is appointed as a Local Commissioner to suggest the mode of partition of the property being House No. 16/628-E, situated at Tank Road, Bapa Nagar, Karol Bagh, New Delhi-110005 by metes and bounds. The fees of the Local Commissioner shall be Rs. 10,000/-, in the first instances, which shall be payable by the plaintiff. Parties are directed to appear before the Local Commissioner on March 27th, 2009 at 5.00 PM. The Commissioner shall submit his report within three months. A copy of this order be sent to the Local Commissioner and copy of the order be also given dasti to the counsel for the plaintiff.

23. Since there is already an interim injunction order that the defendants shall not part with the possession of the property and will not create third party rights during the pendency of the suit, the relief of perpetual injunction sought by the plaintiff shall be decided at the time of passing of final decree.

24. In the circumstances, a preliminary decree of partition as stated hereinabove is passed and the parties are left to bear their own costs.

25. List on July 10, 2009 for awaiting the report of the Local Commissioner.