Vikram Kaushik and Anr Vs. Vivek Kaushik

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Court : Delhi

Decided On : Feb-10-2015

Judge : Indermeet Kaur

Appellant : Vikram Kaushik and Anr

Respondent : Vivek Kaushik

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment reserved on :03.02.2015 Judgment delivered on :10.02.2015 CS(OS) 1848/2009 + CS(OS) 1848/2009 VIKRAM KAUSHIK AND ANR Through ..... Plaintiffs Mr. Sunil Aggarwal and Mr. Arjun Mitra, Advs. versus VIVEK KAUSHIK ..... Defendant Through Mr. Joydeep Sharma, Adv. CORAM: HON'BLE MS. JUSTICE INDERMEET KAUR INDERMEET KAUR, J.

1 The present suit is a suit for partition. It has been filed by the plaintiffs Vikram Kaushik and Jyotsna Kaushik. Defendant Kaushik is their brother. Vivek The immovable properties which are the subject matter of the present suit are - (i) L-19, Lajpat Nagar-III, Delhi-110024; (ii) Flat No.1402, Marathon Galaxy-I, L.B.S. Marg, Mulund, Mumbai and (iii) Agricultural land in two pieces comprising of about 10 acres each in village and post office Shedawan, District Bulandshahar, Uttar Pradesh (hereinafter referred to as the suit property). 2 The parties to the suit are legal heirs of deceased Hem Chandra Kaushik who had died intestate on 10.8.2008 leaving behind three Class-I heirs i.e. the two plaintiffs and the

defendant. His wife had predeceased him on 15.11.1997. Contention is that the superstructure which has been erected in L-19, Lajpat Nagr-III, New Delhi consists of a basement, ground floor, first floor and second floor. The second floor is vacant which is under the constructive possession of the parties. The basement and the ground floor are in occupation of the defendant. The first floor is under tenancy. Rent of the first floor at Rs.50,000/- is being received by the defendant. The second floor had also been let out at monthly rental of Rs.30,000/- per month. The flat in Mumbai is a two bedroom, one hall, one kitchen with a super area of 978 sq. feets. The third property i.e. the agricultural in Bulandshahar inherited by late Sh. Hem Chandra Kaushik by virtue of a Will executed by his father Late Sh. Kishore Lal Sharma. 3 Plaintiffs in spite of repeated requests seeking a partition of family properties have been left answered. Present suit has accordingly been filed seeking a relief of partition as also rendition of accounts. 4 Written statement was filed by the contesting defendant. His submission is that the property at Lajpat Nagar is in his actual physical possession. The plaintiff no.1 is in occupation of the flat at Mumbai. At the time of marriage of plaintiff no.2 being the only daughter of the deceased she was given a huge fortune in order that she could purchase her own accommodation. She had purchased a flat in Dr.Mukherjee Nagar, Delhi and the money for the purchase of this property had been paid by their father. Contention of the defendant is that the parties had arrived at an oral family settlement by virtue of which the right in the Mumbai property had fallen to the share of plaintiff no.1. There was a flat in Dwarka which has also been purchased from the funds of the plaintiff which also fell to the share of plaintiff no.1 and which purchase had been financed by the deceased with an agreement that the balance installment will be paid by plaintiff no.1. Submission is that in terms of this oral family settlement, which had been arrived at and acted upon between the parties, the present suit is not maintainable. It is liable to be dismissed. 5 On the pleadings of the parties the following issues were framed. They read herein as under:

(1) Whether the plaintiff is entitled to partition of the suit properties bearing Nos.L-19, Lajpat Nagar-III, Delhi-24, Flat no.1402, Marathon Galazy-I, LBS Marg, Mulund, Mumbai and agricultural land in two pieces comprising of about 10 acre each in Village and Post Office Shedawan, district Bulandshahar, (UP)?. OPP

(2) Whether the aforesaid properties were orally partitioned during the lifetime of one Sh.H.C.Kaushik, who is the father of the parties herein?. OPD

(3) Whether the suit is liable to be rejected under Order 7 Rule 11 (b)/(c) CPC?. OPD

(4) Whether the plaintiff is entitled to rendition of accounts from the defendant, if so, to what effect?. OPD

(5) Relief. 6 The onus to discharge the issues was initially on the plaintiff; thereafter this order was modified and in terms of the order dated 13.12.2011 the defendant was directed to lead evidence in the first instance. 7 Eight witnesses were examined by the defendant. The plaintiff has examined one witness. Issue-wise findings are as under: ISSUE Nos.1 and 2 8 Both these issues will be decided by a common discussion. Admittedly, there are three suit properties i.e. L-19, Lajpat Nagar-III, Delhi-24, Flat no.1402, Marathon Galazy-I, LBS Marg, Mulund, Mumbai and agricultural land in two pieces comprising of about 10 acre each in Village and Post Office Shedawan, district Bulandshahar, U.P. 9 The father of the parties Hem Chand Kaushik had died intestate. He had left behind three Class-1 heirs i.e. two plaintiffs and the defendant. His wife had predeceased him. 10 The onus to discharge the issues was placed upon the defendant. This was vide order dated 13.12.2011. 11 The defence of the defendant is that the suit properties already stood partitioned in terms of an oral settlement which had been arrived at during the lifetime of the father of the parties. This was pursuant to discussion which had taken place in the intervening period of Dewali 2003 and Holi of 2004. To support this stand the defendant has produced nine witnesses of whom DW-1 is the defendant himself. DW-2 (Chhaya Sharma) is the paternal aunt (Bua) of the parties. Stand of the defendant being that DW-2 was closely connected with the family affairs of the parties and it was pursuant to discussions with her and her husband that the father of the parties had decided to give the Lajpat Nagar property to defendant no.1; the Mumbai flat was to fall to the share of plaintiff no.1; the land at Bulanshahar, U.P. was agreed to be divided half and half between plaintiff no.l and defendant no.1; however since plaintiff no.1was not showing any interest in the Bulandshahar property it had been decided that he

may either opt for the Bulandshahar property or he may opt for the rights over the second floor in the Lajpat Nagar property without the roof rights. Contention being that plaintiff no.2 at the time of her marriage had got a huge fortune; out of which money the property at Mukherjee Nagar had been purchased by her husband, for this reason the plaintiff no.2 is not entitled to any further share in the aforenoted properties. This was in terms of their family arrangement. His further contention was that the entire superstructure in the suit property at Lajpat Nagar was out of the funds and money which had been paid by him; the property had been constructed in the year 2004 during the lifetime of their father (who had died on 10.8.2008) since it had already been agreed that property at Lajpat Nagar would fall to the share of defendant no.1, the defendant no.1 had spent money on its construction. 12 Defendant had entered into the witness box ad DW-1 and reiterated all these averments on oath. The bills/receipts pertaining to acquiring building material, fittings and fixtures affixed at the Lajpat Nagar property had been proved collectively as Ex.DW-1/3 (colly). The municipal corporation receipt substantiating his averment that he was living in the Lajpat Nagar was marked as Mark A-1. Submission being reiterated on oath that the oral family settlement had in fact been acknowledged by the other siblings namely plaintiff no.1 and plaintiff no.2. He proved his statement of account as Ex.DW-1/6 and Ex.DW1/7. In his cross-examination he admitted that he is a diploma holder in export management and had taken training at the Central Institute of Medicinal and Aromatic Plants and at Fragrance and Flavours Development Corporation, Kannauj, U.P. He used to help farmers; he was paying income tax since 1990. He was taking rent of the Lajpat Nagar property but this rental income was not reflected in his income tax returns till the time of the death of his father but thereafter the same was being reflected in his returns. In the next line he countered this submission by stating that he in fact is taking this rent w.e.f. 2006; (father of the parties died in August 2008). Statement of the witness on this score is thus contrary as in one part of his statement he has stated that he was taking rent of the Lajpat Nagar property and which was being reflected in his income tax return only after the death of his father and prior to that his father was taking the rent but later part of his statement stated that that he was taking rent of the Lajpat Nagar property even during the lifetime of his father. He admitted that the amount spent on the reconstruction of the Lajpat

Nagar property would be about Rs.40 to Rs.50 lacs. He denied the suggestion that money was spent by his father. His contention was that the entire money was spent by him but the same was not reflected by him in his income tax returns. Further contention being that he had saved this money while he was working in Moscow. He had worked in Moscow between 1993 to the year 2000; his savings in Moscow were in cash; he had sent the same through Mr.Ravindra Kumar Tiwari and Mr.Ravindra Mamgain to India. He used to carry cash even when he used to come Delhi. None of this has been proved by documentary evidence. Mr.Ravindra Kumar Tiwari and Mr.Ravindra Mamgain have not come into witness box to substantiate this version of DW-1. In fact, defendant no.1 who was initially working in Gopal Zarda was thrown out of the firm in the year 1998; in this intervening period he was making intermittent trips to Moscow but he did not progress financially even there. He was unemployed after 1998. Defendant and his family were residing with their father in Lajpat Nagar. In these circumstances he had undertaken to carry out the reconstruction of the Lajpat Nagar property through the funds of his father as he did not have any funds of his own. The documentary evidence in this regard i.e. the statement of account of Hem Chandra Kaushik at the ICICI Bank, Lajpat Nagar Branch and income tax returns (Ex.DW-1/6 and Ex.DW-1/7) reflected his rental income from the first floor and the second floor of the Lajpat Nagar property apart from his agricultural income from his land at Bulandshahar which was admittedly tax free. This document establishes the stand of the plaintiff that the father of the parties namely Hem Chandra Kaushik had sufficient funds in his account to carry out the re-construction of his property which was done in the year 2004 when he was alive. Contention of defendant no.1 that he had funded this projected has not been established by any documentary evidence. Ex.DW-1/3 which a colly of receipts produced by DW-1 to establish his stand that he had paid for the building material and for the fittings and fixtures at the Lajpat Nagar property is not borne out from these documents. Apart from the fact that there is only one invoice for Rs.12,900/- for a submersible pump dated 15.3.2005 in the name of defendant no.1 (issued by Aquatech Engineers), other paper slips placed on record are just hand written papers; in whose hand writing these slips had been prepared and they related to which part of fittings and fixtures which were allegedly fixed at Lajpat Nagar property are wholly undecipherable.

What the defendant had to established was that the money for these fittings and fixtures had been paid out of his own personal funds. Admittedly, the defendant was living with his father. He was a senior citizen; in his early 80s at the time when this reconstruction project was undertaken Hem Chandra Kaushik had sufficient funds to re-construct the property whereas defendant no.1 has failed to show from any documentary evidence that it was he who had funded this project. In fact he candidly admitted that he did not reflect these expenses in his income tax return. He admittedly had no source of income as although he was working in Gopal Zarda in Delhi, his salary being low, to earn some extra income he was flitting between Delhi and Moscow between 1993 to 2000. Ultimately, he lost his job in the year 1998. There is no evidence to show that DW-1 thereafter was reemployed in any other job. He also did not visit Moscow after 2000. He was a M.Com. He had taken training at an Institute at Kanauj, U.P. for training of farmers but what was his source of income to fund the project, which according to him was to the tune of Rs.40 - 50 lacs has not been explained or answered. 13 DW-6 Pawan Gupta, the owner of Fair Deal Corporation had entered into the witness box to support the stand of the plaintiff on this count. His submission was that in the year 2004-2005 M/s Fair Deal Corporation had supplied sanitary and hardware goods to Vivek Kaushik and payment had been received from him. In his cross-examination, he admitted that he does not remember if he had issued any invoices. He admitted that five bills are in his handwriting which are in the sum of Rs273/-, Rs.10,006/-,Rs.392/-, Rs.22,070/- and Rs.8,755/-. He did not have the original of the bills. They must be with the defendant. These bills did not see the light of the day. Testimony of DW-5 Gaurav Virmani, the architect who had planned this redevelopment/reconstruction of the Lajpat Nagar property is also relevant. His testimony has been highlighted. His version only discloses that he was the architect who had prepared the drawings and plans for this property. He admitted that MCD drawings were in the name of the father of the defendant i.e. Hem Chandra Kaushik and the submitted plans were also signed by the owner i.e. Hem Chandra Kaushik. Vivek Kaushik i.e. the defendant had accompanied him. He admitted that he only had a professional relationship with the defendant and he does not know what was the settlement arrived at between the parties and which property has fallen to which person. Testimony of this witness also does not in any manner support the stand of the defendant that it was he who had funded the project at Lajpat Nagar. In fact, DW-1 in his cross-examination has admitted that three water meters were installed in the property after its reconstruction. He admitted that these water meters were installed in the name of their father Hem Chandra Kaushik. Learned counsel for the plaintiffs has rightly pointed out that if this property had already fallen to the share of defendant in terms of the oral family settlement why the water meters were installed in the name of their father has not been explained by him. This was obviously for the reason that there appears to be no family settlement which had been arrived at between the parties. DW-1 had also admitted that the property continues to stand in the name of his father and he had not informed any authority that this property has fallen to his share. 14 Testimony of PW-1 is also relevant in this context. His submission was that this property of Lajpat Nagar was owned by their father Hem Chandra Kaushik and this property comprised of the basement, ground floor, first floor and second floor; being the elder son defendant no.1 was living with their father and he had an opportunity to misappropriate the property papers of their father. Plaintiff no.1 was living in Bombay and plaintiff no.2 was married. Further averment of PW-1 was that the basement and ground floor was in occupation of the defendant where their father was also residing. The first floor was in occupation of a tenant and the second floor had also initially been let out to a tenant and thereafter after the demise of their father the rent was being collected by defendant no.1 from both the tenants. A sum of Rs.20-25 lacs had been spent on redevelopment of the property which was from the funds of their father Hem Chandra Kaushik. Contention being that the deceased had a continuous tax free income from his agricultural land; out of this income he had undertaken this construction at Lajpat Nagar. The entire redevelopment cost was borne by their father; Ex.DW-1/6 and Ex.DW-1/7 evidenced the rental and agricultural income of their father; reflecting an income of about Rs.4 lacs per year. The father of the parties (deceased) was also a post graduate and an editor of the Science Journal of the Council of Scientific and Industrial Research of the Government of India and was also giving tuitions in science and maths; he had income from this source as well. 15 DW-2 is the paternal aunt of the parties and her testimony has been heavily relied upon by defendant to substantiate his stand that it was in her presence and under her guidance that their father had orally partitioned his properties. Her testimony is relevant. She is Smt.Chhaya Sharma. In her examination-in-chief she stated that her brother (father of the parties) and his wife used to discuss all small and big internal matters with her which included family rituals, such as namkaran, mundun, engagement, marriage, education and career of the children; she was a part of the decision making process during the growing up phase of the children and thereafter. The Lajpat Nagar property was in the name of her brother. Oral family settlement had been entered into between the family wherein the defendant was to have exclusive right over the Lajpat Nagar property and half the share in the Bulandshahar property. In her cross-examination, she has stated that she does not remember as to when she visited the Lajpat Nagar after it was reconstructed in the year 2004. Admittedly, after the year 2004 she had not visited her brother except on the occasion of the death of her sisterin-law. She admitted that her brother had told her about the partition between himself and his children. This statement made by DW-2 in fact destroys the version set up by the defendant that the oral partition had been effected interse the family members in the presence of DW-2. DW-2 has made a categorical admission that her brother had told her about the partition between himself and the children meaning thereby that she was not witness to the oral settlement. That apart even as per her examination in chief she had been consulted by her brother in the decision making process of the growing up children i.e. matters of namkaran, mundane, engagement, marriage and education and the further admission made by DW-2 that her brother had told her about the partition substantiates the submission of the plaintiffs that in fact an oral family settlement was not arrived at in the presence of DW-2. 16 DW-2 also admitted that the marriage of her niece Jyotsna who had been studying in the Jesus and Marry College was performed simply. She admitted that the Mukherjee Nagar property (where plaintiff no.2 is residing) is in the name of the father of Ajesh (husband of plaintiff no.2) since before the marriage of the parties. This property at Mukherjee Nagar being in the name of father of Ajesh destroys the second submission of the learned counsel for the defendant that the father of the parties had given a fortune to his daughter at the time of her marriage and the purchase of Mukherjee Nagar property was made out of that fortune. This property is neither in the name of Jyotsna nor in the name of her husband Ajesh but is in the name of father of Ajesh. Thus this submission of plaintiff no.1 on this score being that this property is the property of the in-laws of the plaintiff no.2 and family of the parties had nothing to do with the funds generated for the purchase of this property is correct submission i.e. why obviously this property was in the name of the father of Ajesh (father-in-law of plaintiff no.2). 17 DW-7 Shiv Kumar Pathak was a family friend of the parties. He admitted that he is living in Faridabad since 2007. He used to meet the father of the parties (Hem Chandra Kaushik) once or twice in a year. Before 2007 he had met Hem Chandra Kaushik in the year 2004 and lastly met him in 2007. He had admitted that a criminal case was pending against him in Delhi and defendant Vivek had come to court to appear as a surety. He admitted that he only knew the broad facts of the family affairs of Hem Chandra Kaushik. He denied the suggestion that Vivek had stood surety for him that is why he has come to court to depose in his favour. 18 DW-3 Ashok Kaushik was a cousin of the parties. In his cross- examination, he admitted that he does not know if Hem Chandra Kaushik had divided his properties amongst his children in the year 2004; he was only aware about the status of the agricultural land. Testimony of this witness also does not help the stand of the defendant. 19 DW-4 Deepak Chopra was a neighbor of the parties. He reiterated the stand of the defendant but in his cross-examination he stated that he cannot say as to whether Hem Chandra Kaushik had got the property constructed himself or whether it was the defendant who had reconstructed it. He admitted that in the summer of 2004 he had gone to the house of Hem Chandra Kaushik where he found that Hem Chandra Kaushik was sorting out his books. On inquiry he was told that the Lajpat Nagar property L-19, had fallen to the share of Vivek who wanted to reconstruct it. He admitted that he had not asked Hem Chandra Kaushik as to what had fallen to the share of the other plaintiffs. He did not try to find out details of the family agreement. He admitted that he has come to depose in court at the request of defendant. 20 Plaintiff no.1 being the younger son of Hem Chandra Kaushik had got married in the year 1997, plaintiff no.2 being the daughter was married in the year 1996; her marriage was performed simply. This was admitted by both DW-1 and DW-2. The submission of the defendant that a huge fortune was given to her at the time of her marriage which had led to purchase of house of Mukherjee Nagar has been demolished by the testimony of DW-1 and DW-2 themselves. It is an admitted fact that this house at Mukherjee Nagar was in the name of the father-in-law of plaintiff no.2. Had the money for the purchase of house of Mukherjee Nagar being given them by Hem Chandra Kaushik, the obvious corollary would have been that the house would have been purchased in the name of either plaintiff no.2 or her husband but definitely not in the name of her father-in-law. The stand of the stand of the plaintiffs on this score being that this property at Mukherjee Nagar has no connection with the family funds of Hem Chandra Kaushik. This is a correct submission. 21 Admittedly, redevelopment of the Lajpat Nagar property had taken place but the question which has to be answered is as to who had spent this money. The bank account and income tax returns of Hem Chandra Kaushik reflect that he had a steady source of income i.e. not only his agricultural land which was tax free but also his rental income which he was getting from the first and second floor and was also earning from tuitions; it is also admitted that at the time when the reconstruction of the property at Lajpat Nagar property was done (2004-2005) Hem Chandra Kasuhik was very much alive. It was he who had used his funds in the redevelopment of this property. The supervisory capacity of the defendant in this redevelopment project did not entitle himself to claim ownership over this property and set up a stand that he had spent the money on this redevelopment. Testimony of DW-1 has been demolished in his cross-examination. He is not entitled to the benefit of the ratio of the judgment reported as 2010

(174) DLT665Suresh Chand Mathur v.Harish Chand Mathur to support an argument that where a statement has been made by a witness and he has not been cross-examined on that point is deemed to be accepted. The stand of DW-6 also does not support the case of the defendant on this count. 22 The most vehement argument of the learned counsel for the defendant that the oral partition had taken placed in the family of Hem Chandra Kaushik in consultation with DW-2 and her husband was also negatived by DW-2 in her candid admission when she admitted that her brother had told her about this partition; this is contrary to the stand of DW-1 whose categorical version was that this oral family settlement had taken placed in her presence. That apart DW-2 has deposed that her brother used to consult her on various issues of the family which included marriage ceremonies, mundun, engagement ceremonies and the education of the children; in this detail

there was a conspicuous absence of any family arrangement being made in consultation with DW-2. 23 DW-3 and DW-4 have also made a frank admissions. DW-3 knew only about the status of the agricultural land at Bulandshahar. DW-4 was aware only of Lajpat Nagar property but was unaware what has fallen to the share of plaintiffs. He also admitted that he could not say whether the redevelopment of the Lajpat Nagar property which was admittedly carried out during the life time of Hem Chandra Kaushik was done by Hem Chandra Kaushik himself or otherwise. DW-1 had also admitted that the water meters which were installed after the redevelopment in the property continued to be in the name of their father Hem Chandra. It is rightly pointed out learned counsel for the plaintiff that if this property was reconstructed and redeveloped and the charges had been borne by defendant noting prevented him from getting these water meters installed in his name. Thus obviously for the reason that no oral partition as has been alleged by the defendant had taken place. The sum total of the aforenoted evidence both oral and documentary thus nowhere establishes the stand of the defendant that an oral partition had taken place between the parties between the Deewali in the year 2003 and Holi in the year 2004. There being no oral partition of the aforenoted properties during the life time of Hem Chandra Kaushik, the plaintiffs are entitled to the partition of the suit properties. 24 Issue nos. 1 and 2 are decided accordingly. Issue No.3 25 Order 7 Rule 11 (b) of the CPC provides that where relief is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court in case fails to do so, the plaint is liable to be rejected. The judgment relied upon by the learned counsel for the defendant reported as 2008

(149) DLT746Meenakshi Gupta Vs. Naveen Mahajan has no application to the factual matrix of this case. This was a case where the court had held that even as per the case of the plaintiff there was no joint position. 26 The present suit is a suit for partition. This Court has already answered issue no.1 in favour of the plaintiffs. There having been no oral partition of the suit property, all the properties of Hem Chandra Kaushik were in possession of his Class-I legal heirs i.e. the plaintiffs and the defendants either constructively or physically. Ad valorem court fee did not have to be affixed as is the arguments raised by the learned counsel for the defendant. Plaint is not liable to be rejected. This issue is decided in favour of the

plaintiffs and against the defendant. Issue No.4 27 In view of the aforenoted discussion, the plaintiffs are entitled to the rendition of accounts of from the defendant. DW-1 has admitted that he has been receiving the rent of the first floor and the second floor of the property till the time that they were on rent; in one part of his testimony he had admitted that even during the life time of his father he was taking rent from the first floor. After the death of their father i.e. on 10.8.2008 all rentals of the first floor and the second floor have been enjoyed by the defendant alone. Defendant is liable to render accounts on this score. He will submit statement of account on affidavit of the rentals collected by him w.e.f. 2006 onwards within a period of eight weeks from today. This issue is decided in favour of the plaintiffs and against the defendant. RELIEF :

28. This Court hereby passes a preliminary decree of partition under Order 20 Rule 18 of the CPC declaring that each of the parties i.e. the two plaintiffs and the defendant are entitled to 1/3rd share in all the suit properties i.e. (i) L-19, Lajpat Nagar-III,Delhi-110024; (ii) Flat No.1402, Marathon Galaxy-I, L.B.S. Marg, Mulund, Mumbai and (iii) Agricultural land in two pieces comprising of about 10 acres each in village and post office Shedawan, District Bulandshahar, Uttar Pradesh. 29 Mr.S.S.Chadha, Advocate (Cell No.9810340129) is appointed to conduct an inquiry into the suit property and to submit a report as to whether it is possible to physically divide the suit properties by metes and bounds, if so, to suggest mode of partition. The fee of the local commissioner is fixed at Rs.1.00 lac to be borne equally by all the parties. The local commissioner shall submit his report in eight weeks. 30 List for directions on 27.04.2015. INDERMEET KAUR, J FEBRUARY10, 2015 ndn