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Court : Delhi

Decided On : Sep-01-1996

Reported in : 1996IVAD(Delhi)541; 65(1997)DLT845; (1997)115PLR41

Judge : M.J. Rao and; Manmohan Sarin, JJ.

Appeal No. : Civil Miscellaneous Appeal Nos. 299 and 2845 of 1996

Appellant : Rajinder Kumar Rakyan and ors.

Respondent : Jitender Kumar Rakyan

Advocate for Pet/Ap. : Mukul Rohatagi,; Ravi Gupta and; Vijay Gupta, Advs

Judgement :

Manmohan Sarin, J.

(1) This appeal is an off-shoot of acrimonious family litigation between two brothers, to which the father aged 82 years is a mute and helpless witness. The appellant No. 1 Mr. Rajinder Kumar Rakyan is the elder brother, the appellants No. 2 and 3 Mr. Ravi Rakyan and Mr. Pankaj Rakyan are his sons. The respondent No. 1 is Mr. Jitender Kumar Rakyan. The present appeal is against the order of the learned Single Judge dated 26.7.1996 and 31.7.1996. By the order dated 26.7.1996, learned Single Judge as an interim measure pending the suit had directed that the disputed barsati room be divided by erecting a partition wall with

2/3 of the barsati room being allotted to the appellants and 1/3 to the respondent who would in addition have the use of the adjoining store room and the toilet on the barsati floor.

(2) The facts leading to the appeal are that respondent No. 1 and late Smt. Krishna Kumari Rakyan had purchased property bearing No. W/114, Greater Kailash, Part-I, New Delhi -110 048 in 1971. Smt Krishna Kumari Rakyan expired in December, 1981 bequeathing her half share in favor of appellant Nos. 2 and 3. Thus the appellant No. 1 and the respondent Nos. 2 and 3 became owners in equal shares.

(3) The case of the appellants is that on 20.4.1991, the appellant No. 1 as guardian of appellant Nos. 2 and 3 entered into a memorandum of partition dividing the property in question, by metes and bounds and providing for user of the different portions. The stamp paper to the said memorandum is claimed to have been produced by respondent No. 1. The memorandum is duly witnessed by one Mr. Vijay Kumar Jain and a family friend and partner of M/s. Indian Art Palace. The memorandum is accompanied with plan, wherein different portions of the property which fell to the share of the parties are duly delineated and marked. The plan is duly signed by the respondent.

As per the memorandum of April 1981, the first floor and second floor of the main house as well as second floor and third floor of the garage block fell to the share of the appoint Nos. 2 and 3. The entire ground floor, garage and room on first floor of the garage block fell to the share of the respondent. The memorandum also provided that the possession of the one room on the ground floor and the barsati room on the second floor marked in Blue would remain with Mr. Sital Dass Rakyan, father of the parties, for a period of two years and after that period the same shall be given to the parties to the memorandum as per their agreement. It is the admitted position that the room on the first floor over the garage block which was to go to the respondent still continues in possession of the appellants.

(4) The barsati room is the bone of contention. The appellants claim that the possession of the barsati room had been handed over to them about a year and a half back and the respondent on the pretext of removing or putting the goods of

Mr. Sital Dass Rakyan, father who lives with respondent on the ground floor, had put in their own goods. The respondent had filed a suit for perpetual injunction seeking to restrain the defendant from in any way interfering with the possession and use of the barsati room, store and the toilet. A restraint on the appellants using the tubewell newly installed by them next to the existing tubewell was also sought. It is respondent's case that the same puts in jeopardy the entire water supply. The case of the respondent is that he and his family Along with Shri Sital Dass had gone to pilgrimage to Mata Vaishno Devi and on their return discovered that the appellants had illegally got a door installed on the landing of the first floor of the staircase and also changed the locks of barsati doors in an attempt to dispossess him. The respondent claims that the barsati room had his luggage.

(5) Prior to the filing of the suit, the respondent had issued a notice dated 19.6.1996. The appellants in a reply to the said notice had mentioned the factum of oral partition and the execution of the memorandum of partition. The plaintiff in the plaint concealed the factum of memorandum executed in 1981 and only stated that the reply received to the notice contained false, illegal, untenable and misconceived pleas.

(6) Learned Single Judge had appointed a local Commissioner to ascertain the factum of possession of the barsati room and to make out the inventory of the goods there, local Commissioner on inspection found that the respondent's goods had been stacked into the store room and the toilet. He also found that there was a steel almirah in the main room, which was opened by the respondent's wife and cash and sarees were removed there from. The appellants had claimed before the local Commissioner that the goods belong to Mr. Sital Dass, father of appellant No. 1. Mr. Sital Dass, however, denied the same and stated that they belonged to the respondent. The local Commissioner thus concluded that the barsati had the goods and articles of respondent No. 1. He found that the locks of barsati room had been opened by the appellants. The barsati room also had some goods of the appellants.

(7) Learned Single Judge after considering the report of the local Commissioner and the pleadings of the parties and the submissions made before him reached

the conclusion that the memorandum of partition dated April 1991, had not been fully acted upon inasmuch as the possession of the room on the first floor of the garage block was still with the appellants. The respondent had alleged that the appellants prior to the visit of the local Commissioner had removed and stacked his goods in the toilet and storeroom. It was, in these circumstances and considering that Mr. Sital Dass Rakyan was living with the respondent and in occupation of one room, the learned Judge thought it fit to maintain the possession of the respondent to part of the barsati room.

(8) Learned Counsel for the appellant forcefully urged before us that the respondent was admittedly guilty of suppression of material facts while seeking equitable relief of injunction. The respondent had not disclosed in the plaint the execution of the memorandum of partition. He had thus clearly dis-entitled himself for the equitable relief of injunction. He relied on *M/s. Seemax Construction (P) Ltd. v. State Bank Of India and Another*, Air 1992 Delhi 197 and *T.A. George and Another v. Dda and Others*, : AIR1995 Delhi131 . We find that the Explanationn of the respondent before the learned Single Judge that his signatures on the memorandum had been obtained on blank, papers, was totally incredible. The respondent is a Chartered Accountant. Besides, the plan delineating different portions of the property falling to the shares of the parties had also been signed by the respondent.

(9) Learned Counsel for the respondent submitted that the said memorandum was not enforceable at law and the respondent does not admit the contents of the document. The correct legal and factual position about the same would be brought out in the replication. Learned Counsel for the respondent submitted that the appellants who had taken the law into their own hands and illegally and forcibly installed a door in an attempt to dispossess the respondent were not entitled to any relief from the Appellate Court. It would amount to attaching a premium to taking law into ones own hands.

(10) We had adjourned this matter twice emphasizing to the parties the desirability of reaching a settlement by making some adjustment to achieve harmony and welfare of the family. Regretfully, the parties continue to maintain obstinate and

rigid positions. Counsel for the appellant submitted that as offered before the learned Single Judge, appellants had always been ready to handover the possession of the servant room on the first floor of the garage block to the respondent in accordance with the settlement. The respondent was not amenable to the suggestion since he was questioning the legality and enforceability of the memorandum.

(11) On a consideration of the entire matter, we find that the respondent / plaintiff is clearly guilty of suppression and concealment of relevant material namely the factum of the memorandum of 1981, while seeking equitable relief of injunction. At the same time, it is also significant that in terms of the memorandum, the respondent does not have any legal right to the use and occupation of barsati. In terms of the memorandum, right to use the barsati room for a period of two years expired in 1983. Respondent does not have a prima facie case in his favour. The appellants also appear to have attempted to dispossess the respondent by removal of the goods from the barsati room and stacking them in the toilet and store room. The appellants appear to have taken the law into their own hands.

(12) We further feel that the partition of barsati as ordered by the learned Single Judge may not be workable. As a result of partition, the appellants would have a room of 13.3' x 15 ft. while the respondent would be left with a comparatively small room of 6.7' x 15 ft. The existence of store room by itself would not make the said partitioned barsati room practically usable. Besides, considering the state of acrimonious relationship, the common toilet and access and its usage is likely to result in further day to day problems between the parties and aggravate the situation and litigation.

(13) Considering the facts and circumstances of the case and, particularly, the conduct of the parties, as discussed above, we are of the view that during the pendency of the suit neither of the parties should use the Barsati room. The barsati room be got locked after removal of goods and the goods will be returned to the parties and the keys will be deposited in Court by the local Commissioner, Mr. Girish Aggarwal. The respondent will, however, have the use of the store room for storage and toilet, while the appellant would have the use of the room over the

garage block on the first floor. The fee of the local Commissioner is fixed at Rs. 2,000.00 to be shared equally by both the parties. The local Commissioner will file his compliance report within ten days.

(14) We hope that with passage of time good sense will prevail over the parties and they would attempt an amicable settlement of their disputes. Parties could request the learned Single Judge to expedite the trial of the suit, as far as feasible.

(15) With these observations and directions, the appeal is disposed of.

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