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Shri Devender Gautam Vs. Smt. Usha Rani Gautam and Others

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Court : Delhi

Decided On : Nov-16-2012

Judge : Pradeep Nandrajog

Appellant : Shri Devender Gautam

Respondent : Smt. Usha Rani Gautam and Others

Judgement :
$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI % Date of Decision: November 16, 2012 + RFA(OS) 109/2012 SHRI DEVENDER GAUTAM ..... Appellant Represented by:Mr.F.S.Chauhan, Adv. versus SMT. USHA RANI GAUTAM AND OTHERS . Respondents Represented by:Mr.Prakash Gautam, Adv. CORAM: HONBLE MR. JUSTICE PRADEEP NANDRAJOG HONBLE MR. JUSTICE MANMOHAN SINGH PRADEEP NANDRAJOG, J.

(Oral) CM No.19170/2012 Allowed, subject to just exceptions. RFA(OS) 109/2012 & CM No.19169/2012 1. Vide CM No.19169/2012 it is prayed that affidavit deposed to by Shri Mahavir Prasad Gautam, annexed as Annexure-2 to the appeal may be taken on record as evidence.

2. We propose to decide the appeal and the application together.

3. We highlight at the very inception that the suit from which the appeal arises may have an ill drafted plaint, but we cannot ignore the written statement filed.

4. Three daughters born to late Gauri Shankar Gautam and his wife Sushila Devi are the plaintiffs and they sought partition of a plot of land ad-measuring 100 sq.yd., pleading that the same bears private number J&K-66 comprised in Rectangle No.63 Killa No.15 Village Khureji Khas.

5. It is apparently a case of a plot in an unauthorized colony.

6. The three sisters sought partition against their brother i.e. the appellant. They pleaded in paragraph 2 of the plaint as under:2. That the brief facts which would be relevant for the disposal of the present Suit are that the plaintiff and the defendants are sisters and brothers and the present suit is being filed seeking partition of the suit property. The suit property was purchased by deceased Smt.Sushila Devi (mother) by virtue of Registered Sale Documents No.4830, Book No.1, Volume No.201, Pages 45 to 47 dated 13.07.1970. Copy of the same is enclosed. The said Suit Property admeasures 100 Square Yards and was built up by the father of the parties.

7. It was further pleaded that Sushila Devi died intestate on February 17, 1995 leaving behind her husband, three daughters i.e. the plaintiffs and the son i.e. the appellant as the five legal heirs, who inherited 1/5th share in the suit property. Pleading further that on December 05, 2008 the plaintiffs executed a relinquishment deed in favour of their father who thus became owner of 4/5th share in the plot and that he executed a will dated December 19, 2008 in favour of the plaintiffs, share claimed in the suit property was 80%, on the death of the father in the year 2010.

8. In the written statement filed by him, the appellant never took a plea, as is now sought to be urged that as per the sale deed referred to in paragraph 2 of the plaint, 200 sq.yd. land was purchased by the mother of the parties i.e. late Smt.Sushila Devi and her brother-in-law Mahavir Prasad Gautam. It was never pleaded that in the absence of Mahavir Prasad Gautam impleaded as a defendant, the property could not be partitioned.

9. The suit was opposed on the plea that the suit property was a dwelling house and was liable to be dismissed in view of Section 23 of the Hindu Succession Act

1956. In paragraph 1 of the written statement it was admitted that the suit property ad-measures 100 sq.yd. Strangely, it was pleaded that since Sushila Devi acquired the property from her own funds, her daughters could not have relinquished their share in the property on the death of their mother; a plea which we fail to understand.

10. Vide impugned decision dated October 10, 2012, noting that the plaintiffs were restricting their share to only 25% each, the learned Single Judge has passed a preliminary decree holding that the share of the three sisters and the brother was 1/4th each in the property.

11. Laying a challenge it is argued that Mahavir Prasad was a necessary party in whose absence the decree could not be passed.

12. We have already highlighted herein above that in the written statement it was not pleaded that in the absence of Mahavir Prasad Gautam impleaded as a defendant the suit could not proceed ahead.

13. It appears to be a case where Mahavir Prasad Gautam and Sushila Devi purchased 200 sq.yd. land as per sale deed, particulars whereof have been pleaded in paragraph 2 of the plaint; indeed, learned counsel for the parties so concede. But, we highlight once again that the appellant proceeded to join issues with his sisters on the factual premise that the suit property was only 100 sq.yd. land and a building constructed thereon.

14. Now, Mahavir Prasad Gautam, whose affidavit has been filed along with the appeal may have any ground to challenge the impugned decree and if he is aggrieved by the same he may do so, but the appellant cannot take any advantage of the fact that his mother and Mahavir Prasad Gautam jointly purchased 200 sq.yd. land. We repeat once again, the appellant defended the suit on the premise that the mother of the parties was the owner of 100 sq.yd. land bearing Private No.66 Block J&K in the Revenue Estate of Village Khureji Khas.

15. We have been shown a release deed executed by Mahavir Prasad Gautam in favour of Sushila Devi which records that he and Sushila Devi sold two parcels ad-

measuring 50 sq.yd. each out of 200 sq.yd. land they had purchased to one Smt.Kesar Devi and one Shri Amar Chand.

16. It is apparent that left with a joint interest in a 100 sq.yd. land Mahavir Prasad Gautam relinquished his share therein in favour of Sushila Devi who became the exclusive owner of 100 sq.yd. land.

17. Of course, it would have been better pleadings in the plaint if the respondents had pleaded as aforesaid. But we highlight the admissions made by the appellant and bring home the point that the four siblings were aware of the fact that as of today, at site, only 100 sq.yd. land with a house constructed thereon exists.

18. The defence under Section 23 of the Hindu Succession Act was not available to the appellant inasmuch as the same was removed from the Statute Book with effect from September 09, 2005 and the suit was instituted in April 2010.

19. Notwithstanding lack of proper pleadings in the plaint, but in view of the written statement filed and noting that the respondents gave up claim under will executed by their father, meaning thereby, that as against the three sisters claiming 80% share in the property, they restricted the claim to 1/4th each i.e. 75%, we dismiss the appeal in limine and also CM No.19169/2012 but without any order as to costs. CM No.19168/2012 Since the appeal has been dismissed in limine the above captioned application which seeks stay of the impugned preliminary decree pending hearing of the appeal is dismissed as infructuous. (PRADEEP NANDRAJOG) JUDGE (MANMOHAN SINGH) JUDGE NOVEMBER 16 2012 dk

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