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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

*Date of Decision : 10<sup>th</sup> January, 2018*

+ **RFA 120/2017, CM APPLs. 4014/2017, 8572/2017**

**DESH RAJ**

..... Appellant

Through: Mr. Sultan Singh, Senior Advocate  
with Mr. Motish K. Singh & Mr.  
Saurav Sachdeva, Advocates.

versus

**VIDYA DEVI & ORS**

..... Respondents

Through: Mr. Sunil Khanna, Advocate for R-1.  
Mr. Amit Ojha, Advocate for R-2,3 &  
5.

**CORAM:**

**JUSTICE PRATHIBA M. SINGH**

**Prathiba M. Singh, J. (Oral)**

1. Shri Mohan Lal had purchased the property bearing no.16/493-H, Street No.15, Hardhyan Singh Road, Bapa Nagar, New Delhi in the year 1966. He left for his heavenly abode on 10<sup>th</sup> September, 1988. He died intestate. He had six legal heirs namely Smt. Vidya Devi, Shri Desh Raj, Smt. Kamla Devi, Smt. Bimla Devi, Smt. Nirmla Devi and Smt. Phool Wati. His other legal heirs including his widow and two sons, namely Shri Daya Kishan and Shri Bhaskar had passed away by the time of the filing of the suit.

2. A suit came to be filed being CS No.614375/2016 (old No.331/2015) was filed by one of the daughters namely Smt. Vidya Devi seeking her share in the suit property. This was the second suit in respect of the same property. An earlier suit bearing *Suit No.285/2003* was filed by the

Appellant/Defendant No.1 (*hereinafter, 'Defendant'*) against two of his sisters, namely Smt. Nirmala and Smt. Kamla, seeking possession, damages, declaration and injunction, on the ground that as per an oral settlement between the family members he was the exclusive owner of the entire 50 sq. yds. of the suit property. This suit was dismissed on 1<sup>st</sup> July, 2005 wherein it was held that all the five sisters of the Defendant have 1/6<sup>th</sup> share in the suit property.

3. The allegations in the present suit were that out of the 50 sq. yds property, 25 sq. yds came to be sold away by the Defendant, in connivance with two sisters. The Defendant relied upon the General Power of Attorney and Special Power of Attorney in his favour executed on 9<sup>th</sup> November, 1998 which, however, was not accepted by the Trial court.

4. The learned Trial court relied on the order dated 1<sup>st</sup> July, 2005 passed in the earlier suit and held that since it was already decided that each of the parties had 1/6<sup>th</sup> share, the Plaintiff Smt. Vidya Devi is entitled to preliminary decree for her 1/6<sup>th</sup> share. The issues that were framed in the suit were as under:

- “1. Whether the plaint is liable to be rejected for want of cause of action? OPD*
- 2. Whether the suit is barred in view of Section 115 of Evidence Act? OPD*
- 3. Whether the suit is barred by limitation? OPD*
- 4. Whether the plaintiff is entitled for preliminary decree for partition in respect of the suit property? OPP*
- 5. Whether the plaintiff is entitled for decree for rendition of accounts? OPP*
- 6. Relief. ”*

5. On issue Nos.1 & 4, the Trial court held that the Plaintiff is entitled to

a preliminary decree of 1/6<sup>th</sup> share. On issue No. 2, the Trial Court held that the suit is not barred by Section 115 of the Indian Evidence Act, 1872. On issue No. 3, the Trial Court held that the suit is not barred by limitation. On issue no. 5, the Trial Court passed an order for rendition of accounts of all the profits earned by the Defendant i.e., the Appellant herein, in respect of the suit property. One of the fundamental grounds of challenge is that the decree has been passed by the Trial court without considering the evidence adduced in the suit.

***Appellant/Defendant's case***

6. It is the case of the Defendant that subsequent to the judgment passed in the earlier suit, the Defendant had settled the entire dispute with his sisters and had paid them monetary sums in order to buy peace in the family. This was sought to be proved by way of two affidavits filed by one sister Smt. Phool Wati (DW3) who stated in her cross-examination that she does not claim any share in the property and that the shares of her sisters were paid off by the Defendant during the Diwali festival in 2005 i.e. subsequent to 1<sup>st</sup> July, 2005, when the decree in the earlier suit was passed. The cross-examination of Smt. Phool Wati is extracted below:

*“I have only stated that I do not want any share in the property. It is wrong to suggest that the plaintiff have share in the suit property. Vol. She was given her share in my presence. I do not remember the date or month but it near Diwali in the year 2005. No writing had obtained from plaintiff. The plaintiff was alone when she was given her share. I do not remember whether the plaintiff was informed in advance that she will be paid her share on a particular date.”*

7. The second evidence led by the Defendant is of Smt. Pushpa, who is a

cousin sister of the Plaintiff and the Defendant. She submitted in her affidavit that in the last part of 2005, two floors constructed above the shops in half portion of the property, namely, 25 sq. yd. were sold away in order to settle the shares of all the sisters of the Appellant/Defendant. The averments in Smt. Pushpa's affidavit are as under:

*"That I say that after that in last quarter months of 2005, on demand of plaintiff and one other LRs namely Kamla two floors of half portion was disposed off and shares of the plaintiff and Smt. Kamla was given to them that was Rs.2 lacs after deduction of litigation charges. The plaintiff has received Rs.2 lacs from the defendant no.1 against her share in the property left by her father, in presence of the deponent. The plaintiff had not acknowledged the said amount with pretext that she had already executed document in favour of the defendant no.1."*

8. In her cross-examination, Smt. Pushpa states as under:

*"I am aware that all the three sisters have been given share as the same told to me by my parents. The defendant no.1 was giving money to the plaintiff when I reached the house of the defendant no.1. It was near Diwali. No writing was done in my presence. My mother and my Bhabhi was the only person present at that time when the money was given. (Again said) Phoowati was also present there. Phoolwati had refused to take any money. When money was given to Vidya Devi that time Kamala was not present but Phoolwati was present."*

9. It is the Defendant's submission that the learned Trial court has solely relied on the earlier decree dated 1<sup>st</sup> July, 2005 and has completely ignored the evidence of events which transpired post the said judgment. The counsel

for the Plaintiff submits that the Plaintiff did not have good relations with Smt. Phool Wati, which is evident from her affidavit where she categorically accepts that she had not even attended the wedding. Relevant part of the cross-examination of Smt. Phool Wati is set out below:

*“I am no speaking terms with the plaintiff for the last many years. It is correct that I attended the marriage of only one daughter of the plaintiff namely Anita and I did not attend the marriage of any of the children of the plaintiff. I had attended the cremation of the husband of the plaintiff but I do not remember when the husband of the plaintiff has died.”*

***Respondents/Plaintiffs’ case***

10. Mr. Khanna, Counsel for the Plaintiff, submits that the earlier order operated as *res judicata* between the parties and it was not open to the Defendant to argue contrary to the said judgment/decreed. On behalf of the other sisters/Respondent Nos. 2, 3 & 5, it is submitted that they have already received their shares and they do not claim any share in the suit property. The relevant part of the reply is set out below:

*“11. In reply to para 4(X), it is submitted that the mother of the parties and all the sisters i.e., Respondent No. 1 to 5 had executed a NOC/Affidavit in favor of the appellant and Daya Kishan (deceased) in relation to the suit property. It is further submitted that Respondent no. 1 (Vidya Devi), Respondent No. 3 (Bimla Devi) and Respondent No. 5 (Phoolwati) had executed GPA and SPA thereby transferring their entire rights, title and interests in the suit property in favour of the appellant.*

.....

*24. That the contents of Para 5(A) to 5(DD) of grounds are not denied. However, it is submitted that the Respondent No.1 had already received her share in the*

*suit property. It is further submitted that the mother of the parties and all the sisters i.e. Respondent No.1 to 5 had executed a NOC/Affidavit in favor of the appellant and Daya Kishan (Deceased) in relation to the suit property with a clear mutual understanding that in future they would not claim any share in the suit property and that they had relinquished their right in the suit property in favor of the appellant. It is further submitted that Respondent no. 1 (Vidya Devi), Respondent No.3 (Simla Devi) and Respondent No.5 (Phoolwati) also had executed GPA and SPA thereby transferring their entire rights, title and interests in the suit property in favor of the appellant.”*

11. The said reply is duly signed by the three sisters namely Smt. Kamla Devi, Smt. Bimla Devi and Smt. Phoolwati and is also supported by the affidavits of all three sisters.

#### ***Appeal Proceedings***

12. Insofar as the Respondent No.4 is concerned, none appears on her behalf and it is the submission of all counsels that she does not stake any claim against the Defendant, her brother and she has chosen not to appear in the matter.

13. The factual position, thus, appears to be that insofar as Smt. Nirmla/Respondent No.4 is concerned, in the present suit, she has never appeared. All the other sisters, namely, Respondent Nos. 2, 3 & 5 have supported the stand of the Defendant and do not stake any claim in the property. The only sister, who claims a share in the suit property is the Plaintiff i.e., Smt. Vidya Devi. The Trial court has simply gone by the order dated 1<sup>st</sup> July, 2005 and has failed to take into consideration the developments subsequent to the said order. Thus, the preliminary decree is unsustainable. The evidence which has come on record subsequently ought

to have been considered and could not have been ignored by the Trial court.

14. Both the Defendant and Plaintiff are present in court. Submissions have been heard on behalf of the parties. By the conclusion of the hearing, settlement options were put forth and parties have arrived at a settlement on the following terms and conditions.

(i) The Respondent no.1/Plaintiff is ready and willing to accept a sum of Rs. 3,00,000/- (Rupees Three Lakhs) towards her share in the suit property.

(ii) The Appellant/Defendant No. 1 shall pay a sum of Rs.3,00,000/- in the following manner:

- By 25<sup>th</sup> January, 2018 - Rs. 1,00,000/- (Rupees One Lakh);  
and
- Remaining sum of Rs.2,00,000/- (Rupees Two Lakhs) on or before 28<sup>th</sup> February, 2018.

15. The suit is decreed as per the settlement. Statements of the parties have been recorded to the above effect. The Plaintiff shall have no further claims in respect of the suit property upon receipt of full payment from the Defendant.

16. The appeal is disposed of as settled. Suit is decreed in terms of the settlement. The Executing Court shall dispose of the execution petition.

17. List for compliance on 5<sup>th</sup> March, 2018.

**PRATHIBA M. SINGH, J.**  
**Judge**

**JANUARY 10, 2018**

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