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SAJAN SETHI

v.

RAJAN SETHI

(Civil Appeal Nos. 1899-1900 of 2020)

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MARCH 02, 2020

**[MOHAN M. SHANTANAGOUNDAR
AND R. SUBHASH REDDY, JJ.]**

Partition: Parties to the suit are two brothers – Suit property

- C *devolved on them in terms of the will by their mother – As per the will, the ground floor portion was bequeathed to the respondent-plaintiff, the first floor portion to the appellant-defendant and the second floor to be divided equally between them – Respondent filed suit for partition – Though the suit was for partition of the second floor and terrace rights, the defendant in the written statement raised a dispute in respect of common areas in the ground floor also – Defendant, however, did not file any counter claim in the suit – In view of the claim set up by the defendant in respect of common areas, issues were framed in respect of common areas also – Trial court negatived the claim of the defendant for common areas and held that the second floor and the terrace rights cannot be partitioned by metes and bounds and thus final decree of partition was passed granting equal share of 50% each in the second floor and the terrace right – Trial court also ordered to put up the said property for sale by auction, and distribute the sale proceeds in equal share – In appeal, High Court set aside the trial court judgment to the extent of directions for sale of second floor and terrace rights and issued certain directions in respect of common areas including ground floor – In instant appeal, defendant contended that trial court and High Court committed error in deciding the rights of the parties in respect of the common areas in the ground floor when the suit itself was filed confined to the partition of second floor and terrace rights and that in any event he was entitled to 50% of common areas in the ground floor – Held: It is true that the suit filed by the plaintiff was only for partition and permanent injunction with regard to second floor portion of the house and the terrace rights, but it was the defendant who raised the dispute with regard to common*
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areas in the suit property in the written statement – Trial court, had to frame an issue in view of the claim made by the defendant in respect of the common areas also – It is clear from the record that the suit property is situated on a corner plot and on one side there is a main road of the colony and on another side of the property, there is a side lane, and such side lane itself abuts a park – The side lane also is not a thoroughfare and on both sides of the lane there are gates regulated by the colony residents – However, the High Court took care to ensure that the defendant has necessary access to the pipes and booster pump/motor in the rear courtyard – Having raised the dispute of the common areas, when such claim is considered by framing an issue, which is in accordance with the pleadings and evidence on record, it is not open for the defendant to plead that directions issued in the impugned judgment, are beyond the scope of the suit – From the material and the evidence placed on record, the judgment and final decree for partition, as ordered by High Court and directions issued with regard to common areas are in accordance with evidence on record.

Dismissing the appeals, the Court

HELD: It is true that the suit filed by the respondent-plaintiff was only for partition and permanent injunction with regard to second floor portion of the house and the terrace rights, but it was the appellant-defendant who has raised the dispute with regard to common areas in the suit property in terms of paragraph 14 of the written statement. The Trial Court, had to frame an issue in view of the claim made by the appellant-defendant in respect of the common areas also. The High Court found that normally a driveway on the ground floor of the property would be a common area. But in the peculiar facts of the instant case, the suit property also has a side lane from which there is a direct entrance to the staircase, which takes the appellant-defendant to his first-floor portion. In that view of the matter, it is found that the appellant-defendant cannot claim any right to use the driveway from front side. It is clear from the record that the suit property is situated on a corner plot and on one side there is a main road of the colony and on another side of the property, there is a side lane, and such side lane itself abuts a park. The side lane also is not a thoroughfare and on both sides of the lane there are gates

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- A regulated by the colony residents. However, the High Court has also taken care to ensure that the appellant-defendant has necessary access to the pipes and booster pump/motor in the rear courtyard. Having raised the dispute of the common areas, when such claim is considered by framing an issue, which is in accordance with the pleadings and evidence on record, it is not open for the appellant-defendant to plead that directions issued in the impugned judgment, are beyond the scope of the suit. Having invited findings by raising a dispute of the common areas, the appellant-defendant cannot plead that the Trial Court as well as the Appellate court have exceeded scope of the suit, in issuing directions for the common areas. [Paras 9, 10, 11][1087-G-H; 1088-A-F]

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 1899-1900 of 2020.

- D From the Judgment and Order dated 18.02.2019 and 15.04.2019 of the High Court of Delhi at New Delhi in RFA No. 641/2018 and Review Petition No. 168/2019.

Vikas Singh, Sr. Adv., Varun Singh, Ms. Deepika Kalia, Ms. Shikha Rai, Kapish Seth, Mritunjai Singh, Ms. Nishtha Kumar, Advs. for the Appellant.

- E P. S. Patwaria, Anupam Lal Das, Sr. Advs., Kunal Verma, Ms. Yugandhara Pawan Jha, Sooraj Sharma, Waheb Hussaini, Advs. for the Respondent.

The Judgment of the Court was delivered by

- F **R. SUBHASH REDDY, J.**

1. Leave granted.

- G 2. These civil appeals are filed by the defendant in the Suit, aggrieved by the judgment and decree dated 18.02.2019 passed by the High Court of Delhi in R.F.A.No.641 of 2018, arising out of a partition suit with respect to the property bearing No.D-1090, New Friends Colony, New Delhi, constructed in a plot area of 292 sq. yards. The review petition filed by the appellant also ended in dismissal, as such, these are the two appeals, one against the judgment and decree dated 18.02.2019 and other appeal against an order dismissing the review petition vide H order dated 15.04.2019. The house property bearing No.D-1090, situated

in New Friends Colony, New Delhi, constructed in a plot area of 292 sq.yards, was originally owned by the father of the parties, late Sh. S. L. Sethi. On his demise, the suit property was devolved upon his wife Smt. Krishna Sethi, who is the mother of the parties herein, pursuant to a Will executed by their father. Subsequently, the mother also passed away by executing a Will dated 27.01.2005. As per the Will dated 27.01.2005, the ground floor portion is bequeathed to the respondent-plaintiff, the first-floor portion was bequeathed to the appellant-defendant and the second-floor portion was to be divided equally between the parties, with the front-half portion to the share of appellant-defendant and the back-half portion to the share of respondent-plaintiff. The relevant portion of the Will executed by the mother, reads as under:-

“a) House No.D-1090, New Friends Colony, New Delhi shall devolve upon my both sons Shri Rajan Sethi & Shri Sajan Sethi in the following manner:

- Ground Floor shall fall to the exclusive share of my elder son Sh. Rajan Sethi, first floor shall fall to the exclusive share of my son Sh. Sajan Sethi. Top floor shall be divided by my children in equal share. The front half portion shall go to the exclusive share of my son Sh. Sajan Sethi and half back portion shall go to the exclusive share of my elder son Sh. Rajan Sethi. The booster pump/motor installed at ground floor shall be used by both the children without any interference/obstruction by any of them in any manner what so ever. My both sons shall not sell their share in the property to an outsider without concurrence of each other and shall first offer to the other before taking any step in that regard.”

3. The respondent-plaintiff i.e. Sh. Rajan Sethi filed a suit in CIS No.11193 of 2016 on the file of Additional District Judge, South-East, Saket Courts, New Delhi, for partition and permanent injunction of the second floor and the terrace rights. As per the preliminary decree passed by the Trial Court share of the respondent-plaintiff and defendant was decided in the ratio of 50% each. Though, the suit was for partition of the second floor and terrace rights, it is the appellant-defendant, who in the written statement, raised a dispute in respect of common areas in the ground floor also. The appellant-defendant, however, has not filed any counter claim in the suit. In view of the claim set up by the appellant-defendant in respect of the common areas, the following issues were framed in the suit for trial:

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- A “i) Whether the second floor and the terrace above of property No.D-1090, New Friends Colony, New Delhi was partitioned and if not, whether the Plaintiff is entitled to partition of the same by metes and bounds? OPP
- B ii) Whether the common areas in the suit property are liable to be partitioned in terms of paragraph no.14 of the written statement? OPD
- iii) Relief”
- C 4. The Trial Court by considering the pleadings and evidence on record, has negatived the claim of the appellant-defendant for the common areas, as claimed in para 14 of the written statement. On the claim of the respondent-plaintiff for partition of second floor and terrace rights, by accepting objections of the respondent-plaintiff to the Report of the Court Commissioner, the Trial Court held that the second floor and the terrace rights cannot be partitioned by metes and bounds and, thus, final
- D decree of partition was passed, granting equal share of 50% each in the second floor and the terrace rights. The Trial Court also ordered to put up the said property for sale by auction, and distribute the sale proceeds in equal share.
- E 5. Aggrieved by the judgment and decree dated 20.04.2018 passed in CIS No.11193 of 2016, the appellant-defendant has filed first appeal in R.F.A.No.641 of 2018 before the High Court of Delhi at New Delhi. The Regular First Appeal filed by the appellant-defendant is disposed of by the impugned judgment by the High Court of Delhi, by setting aside the judgment of the Trial Court, to the extent of directions for sale of second floor and terrace rights and issued further directions in respect
- F of the common areas. The directions issued by the High Court read as under:-
- “(i) The appellant/defendant will not have a right to use the small driveway on the ground-floor of the property.
- G (ii) The appellant/defendant will however have easementary right to use the water pipes and booster pump at the rear courtyard, which are the water pipes and booster pump, and which feed the first-floor and second-floor of the suit property falling to the share of the appellant-defendant.
- H (iii) The respondent/plaintiff will use a part of the landing of the staircase on the second-floor which adjoins the back portion of

the second-floor of the suit property so that a door can be constructed on this second-floor landing which opens directly to the back portion of the second-floor of the suit property falling to the share of the respondent-plaintiff.

15. The appeal is accordingly disposed of in terms of the aforesaid directions, leaving the parties to bear their own costs.”

6. We have heard Sri Vikas Singh, learned senior counsel appearing for the appellant-defendant and Sri P.S. Patwalia, learned senior counsel appearing for the respondent-plaintiff.

7. Mainly, it is contended by Sri Vikas Singh, learned senior counsel for the appellant-defendant, that the Trial Court and the First Appellate Court committed an error in deciding the rights of parties in respect of the common areas in the ground floor, when the suit itself was filed, confined to the partition of second floor and terrace rights. It is further contended that in any event, as the entire property is divided between the respondent-plaintiff and appellant-defendant in equal share, the appellant-defendant is also entitled for 50% of the common areas in the ground floor.

8. On the other hand, Sri P.S. Patwalia, learned senior counsel appearing for the respondent, has submitted that it was the appellant-defendant, who in the written statement had raised a dispute in respect of common areas, as such the Trial Court has framed the issue on the common areas and decided the same. It is submitted that in view of the limited rights granted for maintenance of the booster pump/motor installed in the ground floor, no other right is conferred on the appellant-defendant in the common areas in the ground floor. It is further submitted that having regard to pleadings and evidence on record, the Trial Court as well as the Appellate Court, have rightly decided the claim of the appellant-defendant in respect of the common areas also and there are no grounds to interfere with the same.

9. It is true that the suit filed by the respondent-plaintiff is only for partition and permanent injunction with regard to second floor portion of the house and the terrace rights, but it is the appellant-defendant who has raised the dispute with regard to common areas in the suit property in terms of paragraph 14 of the written statement. The parties are claiming rights to the property pursuant to a Will dated 27.01.2005. As per the recitals of the Will, the respondent-plaintiff and the appellant-defendant

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- A are entitled to the property in question as indicated in the Will and relevant portion of the same is already extracted above.
10. The Trial Court, had to frame an issue in view of the claim made by the appellant-defendant in respect of the common areas also. The High Court has found that normally a driveway on the ground floor
- B of the property would be a common area. But in the peculiar facts of the present case, the suit property also has a side lane from which there is a direct entrance to the staircase, which takes the appellant-defendant to his first-floor portion. In that view of the matter, it is found that the appellant-defendant cannot claim any right to use the driveway from
- C front side. It is clear from the record that the suit property is situated on a corner plot and on one side there is a main road of the colony and on another side of the property, there is a side lane, and such side lane itself abuts a park. The side lane also is not a thoroughfare and on both sides of the lane there are gates regulated by the colony residents. However, the High Court has also taken care to ensure that the appellant-defendant
- D has necessary access to the pipes and booster pump/motor in the rear courtyard. Having raised the dispute of the common areas, when such claim is considered by framing an issue, which we find in accordance with the pleadings and evidence on record, it is not open for the appellant-defendant to plead that directions issued in the impugned judgment, are beyond the scope of the suit.
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11. Having invited findings by raising a dispute of the common areas, the appellant-defendant cannot plead that the Trial Court as well as the Appellate court have exceeded scope of the suit, in issuing directions for the common areas. From the material and the evidence placed on record, we find that the judgment and final decree for partition,
- F as ordered by the Appellate Court and directions issued with regard to common areas are in accordance with evidence on record and we do not find any merit in these appeals so as to interfere with the same.
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12. For the aforesaid reasons, we do not find any merit in these appeals and they are to be dismissed. Before we order to do so, we deem it appropriate to extract the following two paragraphs of the Will dated 27.01.2005, executed by their mother late Smt. Krishna Sethi:-
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- “As life is uncertain and in order to avoid any differences or dispute by and between my legal heirs, I feel it proper and expedient to put on record my last wishes so that there is no discord or enmity

or differences amongst my children/legal heirs for the division of assets which I may leave behind after my demise. I am at present suffering from certain incurable disease and have recently been hospitalised and I may require further hospitalisation and I am now aged about 74 years and although I am in my full senses and understand right and wrong.”

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“Last but not the least I bestow my all blessing, love affection to my all children and their families and as them of the same from my and my late husband when we are in the heavens and continue to pray for their well being and shall desire that my all children with their family should always remain united and live the way as I and my husband have lived. My greeting for the family, brothers and sisters and the children – God may help all.”

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13. These appeals are accordingly dismissed, with no order as to costs.

Devika Gujral

Appeals dismissed.