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

BEFORE

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

+ **RFA 71/2016**

Between: -

1. SMT AMRIT PAL KAUR
W/o LATE SARDAR SURENDER SINGH
R/o C-1/10, ASHOK VIHAR PHASE-II,
DELHI-110052 .

2. SMT HARPREET KAUR
W/o SHRI GURBIR SINGH CHARYA
R/o F-57, SECOND FLOOR,
RAJOURI GARDEN, NEW DELHI-110027

3. SMT SIMARPREET KAUR
W/o SHRI GAGANDEEP SINGH
C-1/10, ASHOK VIHAR PHASE-II,
DELHI-110052

.....APPELLANTS

*(Through:Mr.Sanjeev Sindhvani, Sr.Adv, Mr. Siddharth Aggarwal,
Mr. Gaurav Sindhvani and Mr. Maneet Oberoi, Advs.)*

AND

1. SHRI HARCHARAN SINGH JOSHI
S/o LATE SHRI JAI SINGH
R/o C-1/28, MALKA GANJ,
DELHI-110007

.....RESPONDENT

*(Through:Mr. R.K. Alagh, Mr. Chirag Alagh, Mr. Ambuj Saraswat
and Mr. Deepanshu, Advs.)*

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Reserved on: 29.08.2024
Pronounced on: 14.10.2024

J U D G M E N T

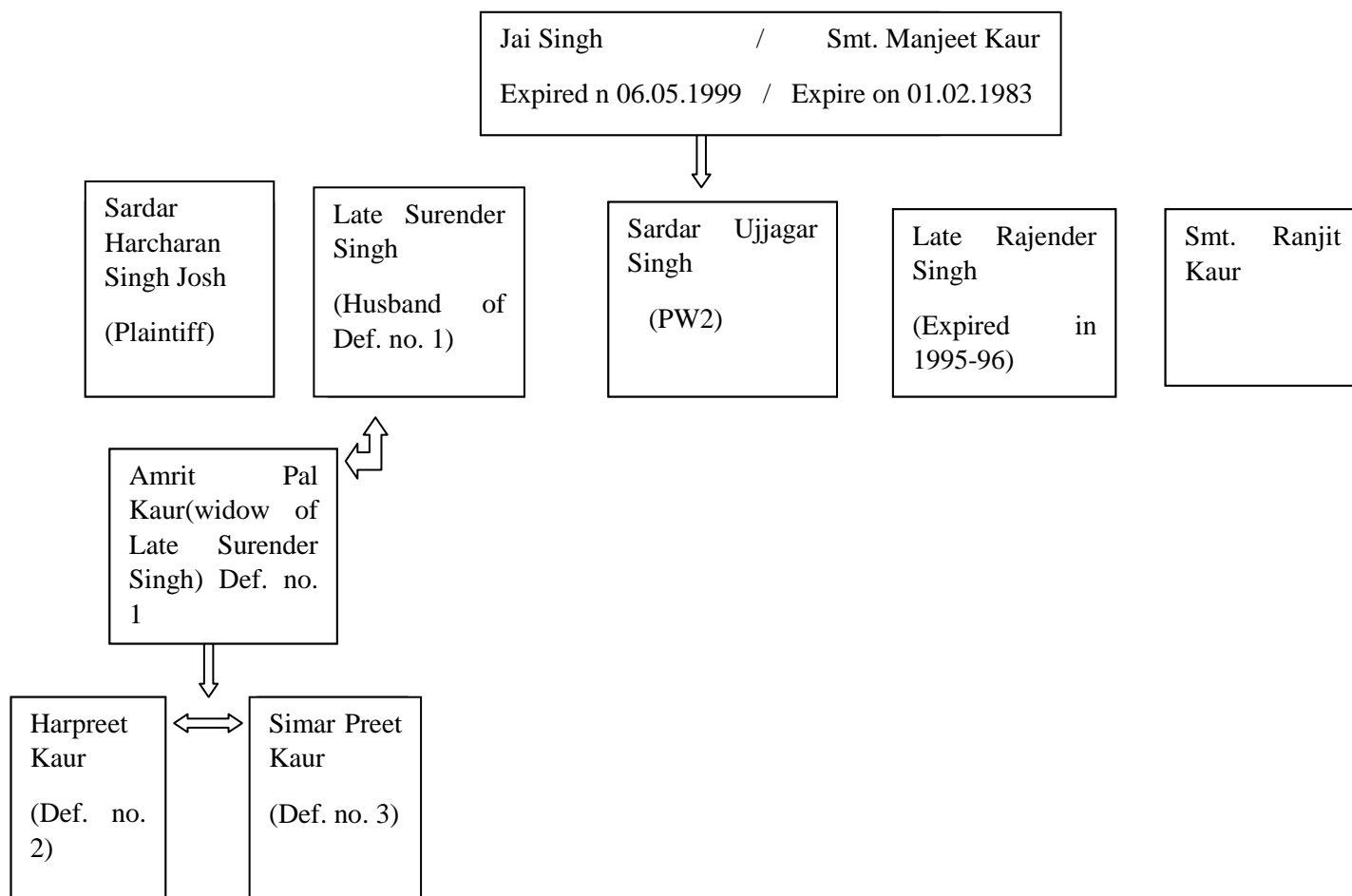
This appeal under Section 96 of the Code of Civil Procedure, 1908 (hereinafter ‘CPC’) is directed against the impugned judgment and decree dated 28.10.2015, passed in Civil Suit No.65/2016, by the Court of Additional District Judge-II, Central, Tis Hazari, Delhi, whereby, the Civil Suit filed by the plaintiff/respondent against the defendants/appellants has been decreed.

DESCRIPTION OF THE PARTIES

2. The parties are being referred through their original description in the Civil Suit. The suit was mainly defended by Smt. Amrit Pal Kaur (hereinafter ‘defendant’). However, for the sake of convenience, the position of the parties is represented in the following tabular format:-

S. No.	Name of the Parties	Before this Court	Before Trial Court
1.	Smt. Amrit Pal Kaur	Appellant No. 1	Defendant No.1
2.	Smt. Harpreet Kaur	Appellant No. 2	Defendant No. 2
3.	Smt. Simar Preet Kaur	Appellant No. 3	Defendant No. 3
4.	Sh. Harcharan Singh Joshi	Respondent	Plaintiff

3. The family chart depicting the relationship between the parties that remained undisputed before the Trial Court is extracted as under:-



FACTUAL MATRIX

4. The facts of the case exhibit that the plaintiff had instituted a Civil Suit against the defendant under Section 6 of the Specific Relief Act, 1963 (hereinafter '**Act**'), however, *vide* order dated 27.05.2009, the same was allowed to be converted into an ordinary suit for possession, damages and permanent injunction for the portion *Marked Red* in the annexed site plan of the suit property bearing no. C-1/10, Ashok Vihar Phase-II, Delhi-110052 (hereinafter '**suit property**'). The plaintiff had also sought damages against the defendant to the tune of Rs.7,20,000/- with effect from 20.03.2004 till the date of filing of the application for amendment and *pendente lite* damages at the rate

of Rs.20,000/- per month till the date on which the defendant hands over the possession of the front portion *Marked Red* of the suit property.

5. The plaintiff asserted that the suit property measuring 332.614 sq. meters was purchased by him on 27.11.1972 and out of love and affection, he also got the name of his immediate younger brother, Sardar Surender Singh (now deceased), recorded as a co-lessee in the suit property. The plaintiff further asserted that the suit property was constructed in the year 1975-1976 and on completion of the construction work, the plaintiff along with all the family members, moved into the property. It was asserted that initially, they all lived together, but gradually everyone moved out of the said property to their respective residences. It is the case of the plaintiff that possession of the respective parts was held by the family members in accordance with the site plan (Ex. PW-1/2) but, the defendant prevented them from entering the premises of the suit property, giving rise to the agitated cause of action.

6. The defendant, filed her written statement denying the contents of the plaint and opposed the same on multiple grounds. According to them, neither the plaintiff nor any of his family members ever resided or occupied any specific portion of the suit property and since the beginning, he has resided at 1206/7, Shora Kothi, Subzi Mandi, Delhi-110007 with his family, before subsequently shifting to Malkaganj.

7. It is the case of the defendant that Sardar Surender Singh (now deceased) was engaged in the business of finance with his father and was earning handsomely and made equal contributions towards the premium paid for the plot. The construction cost was borne by late Sardar Surender Singh and the plaintiff owed a sum of Rs.1 lakh for

the cost of construction. It is the case of the defendant that post-construction, late Sardar Surender Singh came into the exclusive possession of the entire premises but keeping in view the family goodwill, the father of Sardar Surender Singh and other family members started residing therein.

8. Various other assertions were made in the written statement, however, the Trial Court, *vide* order dated 18.05.2004, initially framed the following issues for adjudication:-

“

- (i) *Whether the plaintiff purchased in auction a plot No.10, Block-C-1, Wazirpur Residential Scheme, Ashok Vihar and mentioned the name of his brother Late Surender Singh as Co-owner?*
- (ii) *Whether Late Surender Singh make an equal contribution towards the Premium paid for the said plot? (Here I may observe that the onus of proving this issue has to be upon the defendants since it is the case of the defendants that Late Surender Singh made equal contribution towards the premium paid for the said plot. Hence, in order to avoid any confusion, the onus of proving the above issue shall be read as upon the defendants).*
- (iii) *Whether defendant trespassed into the portion of plaintiff in the suit property as alleged in the plaint?*
- (iv) *Whether plaintiff is entitled to the decree of possession as Prayed for?*
- (v) *To what amount of damages, if any, is the plaintiff entitled from the defendant?*
- (vi) *Whether plaintiff is entitled to decree for permanent injunction as prayed?*
- (vii) *Relief. ”*

9. *Vide* order dated 08.02.2010, following additional issues were framed thereto, by the Trial Court:-

”

- (i) *Additional Issue No.1: Whether plaintiff has no locus standi to file the suit?*
- (ii) *Additional Issue No.2: Whether the suit of the plaintiff is not maintainable?*

(iii) *Additional Issue No.3: Whether the suit has not been properly valued for the purposes of court fee and jurisdiction.*

"

10. The Trial Court has decided the aforesaid issues in favour of the plaintiff and *vide* impugned judgment and decree, the Civil Suit was decreed holding that the plaintiff is entitled to possession of the front portion *Marked Red* of the suit property. The defendant was also restrained from selling, disposing of, parting with the possession and creating any third-party interest in the said portion of the suit property in any manner, whatsoever. The plaintiff has also been held entitled to damages at the rate of Rs.5000/- per month from the date of application i.e., 19.03.2007 till the date of the decree. The defendant was granted three months for compliance with the directions and during this period, she was required to pay Rs.5000/- per month to the plaintiff as damages. It has also been held that in case, the defendant had failed to hand over the vacant and peaceful possession of the premises in question to the plaintiff within three months, the plaintiff would be entitled to damages to the tune of Rs.10,000/- per month, till the date of recovery of the possession.

11. Aggrieved by the aforesaid decision and consequential directions, the defendant has preferred the instant appeal.

SUBMISSIONS

12. Mr. Sanjeev Sindhwani, learned senior counsel appearing for the defendant assails the impugned judgment and decree and submits that the same is illegal and improper and suffers from material perversity. He has made the following broad submissions:-

- (i) A co-owner cannot sue another co-owner for possession of a specific portion of the property which is thereof, jointly owned by both. Every co-owner's share and possession is omnipresent and until separated by metes and bounds by a

partition, every nook and corner of the property remains joint and common. No co-owner can claim exclusivity over any particular part of the property. The jointness of the ownership is homogenous and it is not feasible to allocate the parts of jointness severally.

(ii) The only remedy for one co-owner to evict another co-owner of the same property is to seek for a decree of partition claiming separate/exclusive possession. The suit for partition has not been instituted and, therefore, the suit for possession alone is not maintainable. To support this submission, he has placed reliance on the decisions of the Supreme Court in the cases of *Budhram v. Bansi and Ors.*¹, *A. Viswanatha Pillai and Ors. v. Special Tahsildar for Land Acquisition*², *Rachakonda Venkatrao and Ors. v. R. Satya Bai (dead) by LR. And Anr.*³, *Delhi Development Authority v. Diwan Chand Anand and Ors.*⁴ and *Mangal Builders & Enterprises Limited and Ors. v Williamson Magor & Company Ltd. and Ors.*⁵.

(iii) There is no scope for invoking equitable consideration to claim exclusive possession from a co-owner. According to him, it is trite that law prevails over equity as the law is deemed to be equitable. He places reliance on a decision of the Supreme Court in the case of *B. Premanand & Ors. v. Mohan Koikal & Ors.*⁶ and *State of Uttarakhand v. Archana Shukla and Ors.*⁷.

¹(2010) 11 SCC 476

²(1991) 4 SCC 17

³(2003) 7 SCC 452

⁴(2022) 10 SCC 428

⁵2017 SCC OnLine SC 2133

⁶(2011) 4 SCC 266

⁷(2011) 15 SCC 194

(iv) There are material inconsistencies in the pleadings and the oral evidence adduced, thereto. In addition, the plaintiff kept on shifting/changing its stand at different stages which can be noted from paragraph no.8 of the amended plaint wherein, the suit property is stated to have been constructed in such a manner that it comprises of two separate portions implying that it was divided from the beginning itself. Further, while drawing the attention of the Court to paragraph no.11 of the plaint, it was asserted that a case of subsequent living arrangement was set up which allegedly specified the portions to be occupied by the respective parties. He further emphasises on affidavit Ex.PW-1/A dated 09.11.2004 to indicate that the said position was re-asserted. However, while pointing out another evidence i.e., affidavit Ex.PA dated 23.03.2010, he submitted that the plaintiff introduced an altogether new narration of an oral partition. Therefore, the plaintiff cannot be allowed to shift his case and such contradictory standpoints completely vitiate the plaintiff's version. Further, there is no pleading for a case of living arrangement and in the absence of a specific pleading and material, particularly to show a living arrangement, such a plea cannot be accepted. Reliance is placed on a decision of this Court in the case of ***Urmila Sharma v. Jai Bhagwan and Ors.***⁸ to substantiate the said submission.

(v) He also criticises the plea of an oral settlement/oral partition on the ground that there was no plea of oral settlement/oral partition in the plaint and the same has been asserted for the first time in evidence affidavit Ex.PW-1/A

⁸2021 SCC OnLine Del 4552

dated 23.03.2010. Besides the decision of *Urmila*, he also places reliance on a decision in the case of *Anil Gulati v. Promila Gulati*⁹. According to him, there is no evidence to establish an oral partition and while taking the Court through various documents i.e., Ex.PW-1/2 and evidence of other witnesses, he submits that the allegation of trespass made in the plaint is false and incorrect. Evidence of PW-2, Mr.Ujjagar Singh has also been criticized and it is stated that he has falsely deposed and there is a marked contradiction between the evidence of PW-2 and other witnesses. According to him, PW-3, who claims to be a neighbour, himself had shifted in the year 1995 and therefore, his statement was at best a hearsay.

(vi) The possession of keys of the almirah was disputed by the defendant and it was stated that after the demise of Mr. Jai Singh, the plaintiff had visited the suit property for the last rites and took away the keys with him. Thus, where a material averment is simply glossed over without specific denial, it shall be treated to have been admitted. Reliance is placed on a decision in the case of *Abdul Hamid v. Nur Mohammad*¹⁰.

(vii) He also submits that the plaintiff withheld the best evidence and not even a single document evidencing the possession of the plaintiff had been proved on record. No evidence has been brought on record, such as voter ID, School College record etc. to substantiate the claim of living arrangement of the plaintiff till 1983. He draws the attention of this Court to the evidence of PW-1, to assert that even the address of the son of the plaintiff in his school record was

⁹2015 SCC OnLine Del 10531

¹⁰1976 SCC OnLine Del 58

shown to be 1206/7, Shora Kothi, Subzi Mandi, Delhi-110007 which in itself is enough to defeat the case of the plaintiff. He then places reliance on a decision in the case of ***Rashtriya Printing Press v. Gianchand***¹¹.

(viii) The plaintiff has not proved his case and therefore, he cannot take any advantage of the alleged weakness of the defendant's case. According to him, the plaintiff must stand on his own legs to prove his case. He places reliance on decisions of the Supreme Court in the cases of ***Union of India and Ors. v. Vasavi Co-op. Housing Society Ltd. and Ors.***¹² and ***Smriti Debbarma (Dead) through LRs v. Prabha Ranjan Debbarma and Ors.***¹³

(ix) Lastly, he submits that this Court may be pleased to re-appreciate the entire evidence in light of the facts stated in the pleadings and the evidence available on record, which is permissible in law and to support the said submission, he places reliance on a decision of this Court in ***Seema Bansal v. Durga Dass Bansal and Ors.***¹⁴

13. Mr. R. K. Alagh, learned counsel appearing on behalf of the plaintiff has strongly contradicted the case set out by the defendant. Learned counsel submits that the impugned judgment and decree elaborately and lucidly deals with the material available on record and the Trial Court has rightly decreed the Civil Suit in favour of the plaintiff. While supporting the impugned judgment and decree, he made the following broad submissions:-

¹¹1997 SCC OnLine Del 697

¹²(2014) 2 SCC 269

¹³2023 SCC OnLine SC 9

¹⁴2024 SCC OnLine Del 5440

- (i) The suit property is a leasehold property which could not be partitioned as the lessor continued to be the Delhi Development Authority. Reliance is placed on a decision in the case of ***Ram Lal Sachdev v. Sneh Sinha***¹⁵ passed by this Court.
- (ii) The site plan (Ex. PW-1/2) reflects that the property was already constructed in such a manner that the superstructure was divided into two separate units and therefore, the plaintiff was right in law to have sought for a decree of possession. While taking the Court through the evidence of PW-2, Mr.Ujjagar Singh, he asserted that the said witness made it amply clear that after completion of the construction, all the family members, including the plaintiff, shifted in the suit property which includes the parents and siblings of the plaintiff.
- (iii) The entire investment in construction of the suit property was incurred by the plaintiff. The said fact has duly been supported/corroborated by the evidence of PW-2, Mr.Ujjagar Singh, who is the real brother of the plaintiff and brother-in-law of the defendant.
- (iv) Learned counsel also submits that the evidence of PW-2 and PW-3 clearly proves that the plaintiff was in possession of the front portion, *Marked Red* in the site plan Ex.PW-1/2 and the husband of appellant no.1 was in possession of the rear portion *Marked Green* depicted in the site plan. Later on, the defendant was in permissive possession of one room of the front portion of the suit property.
- (v) The possession of the plaintiff has been established by oral as well as documentary evidence, including the fact that the defendant had forcibly broken open the locks of the plaintiff's

¹⁵1999 SCC OnLine Del 917

portion. Learned counsel emphasised that it was well within the jurisdiction of the Trial Court to grant the relief of partition, even if the same was not prayed for, in case, there is sufficient recital and foundation laid in the plaint which is duly responded by the other side. In the instant case, although the plaintiff continued to remain in physical possession initially, and later on, in constructive possession, therefore, his possession cannot be disputed in view of the fact that the superstructure itself was constructed in a manner so as to bring out two different portions of accommodation. Based on this proposition, no decree of partition was required to have been sought. Even otherwise, if the Court finds the need to do so, it can always consider granting the decree of partition.

(v) He also submitted that though the possession has been clearly established by the plaintiff, in any case, the preponderance of probability would govern the civil proceedings and if the same principle is adhered to, the plaintiff can be held to have successfully proved the relevant aspects. He placed reliance on the decision of the Supreme Court in the cases of *Maya Gopinathan v. Anoop S.B. and Ors.*¹⁶ and *N.G.Dastane v. S.G. Dastane*¹⁷.

(vi) He finally submitted that there is no infirmity or perversity in the impugned judgment and therefore, the instant appeal deserves to be dismissed.

14. I have considered the submissions made by learned counsel for the parties and perused the record.

¹⁶2024 SCC OnLine SC 609

¹⁷(1975) 2 SCC 326

ISSUES

15. On the basis of the submissions made by learned counsel appearing for the parties, the following broad issues emerge for consideration:-

- (i) Whether the suit for possession, in the absence of a prayer for partition, is maintainable keeping in view the facts of the present case?
- (ii) Whether the Trial Court has erred in decreeing the suit in favour of the plaintiff, in view of the alleged inconsistencies in the pleading and pieces of evidence and whether the plaintiff has been able to prove his case for partition?

ANALYSIS

21. The parties have examined their respective witnesses and also relied upon various documents. The Trial Court in paragraph no.17 of the impugned judgment and decree has extracted the list of witnesses with *inter se* relations and list of documents relied upon by the parties, which is enumerated as under:-

List of witnesses:

<i>Sr.No.</i>	<i>Name of witness</i>	<i>Details</i>
<i>Witnesses of the Plaintiff</i>		
1.	<i>Harcharan Singh Josh (PW1)</i>	<i>Plaintiff himself</i>
2.	<i>Sardar Ujjagar Singh (PW2)</i>	<i>Brother of the plaintiff</i>
3.	<i>Sujeet Singh (PW3)</i>	<i>Neighbour of the plaintiff</i>
4.	<i>Raman Kumar (PW4)</i>	<i>Official Witness - Assistant from DDA</i>
5.	<i>HC Rati Ram (PW5)</i>	<i>Official Witness from Police Station Ashok Vihar</i>
<i>Witnesses of the Defendant</i>		
6.	<i>Amrit Pal Kaur (DW1)</i>	<i>Defendant no.1 herself</i>

List of documents relied upon by the parties:

<i>Sr No.</i>	<i>Exhibit No.</i>	<i>Details of the document</i>	<i>Relied upon by</i>
1.	<i>PW1/1</i>	<i>Perpetual lease deed dated 26.11.1973</i>	<i>Harcharan Singh</i>

2.	PW1/2	Site plan of the property in question	Josh (PW1)
3.	PW1/3	House Tax Receipt	
4.	PW1/4	Copy of FIR No. 352/2003	
5.	PW4/1	Copy of Auction Bid Form	Raman Kumar (PW2)
6.	PW4/2	Application moved by the plaintiff with the DDA for adding the name of his brother Surender Singh	
7.	PW5/1	Copy of Fard Khana Talashi	HC Ratti Ram (PW5)
8.	DW1/1	Copy of Sale Deed of the adjoining property	Amrit Pal Kaur (DW1)
9.	DW1/2	Copy of Sale Deed of the adjoining property	
10.	DW1/3	Copy of Sale Deed of the adjoining property	

22. The following dates relating to various events, which find mention in paragraph no.20 of the impugned judgment and decree, are reproduced as under:-

Sr. No.	Date	Event
1.	28.12.1970	Auction Bid was filed by the plaintiff Harcharan Singh Josh vide Ex.PW4/1
2.	29.08.1972	Application was filed by the plaintiff Harcharan Singh Josh for adding the name of his' brother Sardar Surinder Singh vide Ex.PW4/2
3.	22.11.1972	Possession of the plot was handed over to the plaintiff
4.	26.11.1973	Perpetual Lease Deed was executed infavour of. the plaintiff and Sardar Surinder Singh vide Ex.PW1/1
5.	1975-76	Construction over the plot was completed
6.	1981	An oral family settlement arrived at between the Plaintiff and late Sardar Surinder Singh to the extent that the plaintiff will use the front portion and Sardar Surinder Singh will use the back portion of the property in question.
7.	21.5.2003	The youngest brother of the plaintiff namely Sardar Rajinder Singh expired in an incident of Road Rage.
8.	22.5.2003	The dead body of Sardar Rajinder Singh was

		<i>brought to the property in question for conducting the last rites but the defendants did not permit the entry of the plaintiff and other relatives pursuant to which Smt. Indr Singh wife of Sardar Rajiender Singh made a police complaint.</i>
9.	11.6.2203	<i>Smt. Indra Singh widow of Sardar Rajinder Singh lodged a complaint with the DCP pursuant to which FIR No. 352/2003, under Section 380/448 IPC was registered at Police Station Ashok Vihar vide Ex.PW1/4</i>
10.	27.6.2003	<i>The Investigating Officer visited the-property in question and prepared the FardKhanatalashi vide EX.PW5/1</i>

Issue (i)

23. The plaintiff has stated that the suit property was purchased by him alone through an auction bid, however, he got the name of his immediate younger brother recorded in the perpetual lease deed of the suit property out of love and affection and thereby, the name of late Sardar Surender Singh got recorded as a co-lessee for the suit property. It is further stated that the plaintiff alone participated in the auction.

24. The aforesaid position is duly established on the examination of the auction bid dated 28.12.1970 (Ex.PW-4/1) and the application filed by the plaintiff dated 29.08.1972 (Ex.PW-4/2) for recording the name of late Sardar Surender Singh as the co-lessee.

25. The perpetual lease deed (Ex.PW-1/1) *inter alia* stipulates that the lessee, within a period of two years from 22nd day of November 1972, after obtaining a sanction to the building plan, with necessary designs, plans and specifications from the proper Municipal or other authorities, at his own expense, was to erect upon the residential plot and complete in a substantial and workmanlike manner, a residential plot for private dwelling with the requisite and proper walls, sewers and drains and other conveniences in accordance with the sanctioned

building plan and to the satisfaction of such Municipal or other authority.

26. Clause 4 (a) of the perpetual lease deed further stipulates that the lessee was not allowed to sell/ transfer/ assign or otherwise part with the possession of the whole or any part of the residential plot except with the previous consent in writing of the lesser.

27. It is also the case of the plaintiff that he started construction over the said plot out of his own funds, which was completed in the year 1975-76. Considering the fact that he had made his brother late Sardar Surender Singh the co-owner, he got the property constructed in such a way that there are two separate portions, each containing a drawing room, two bedrooms, one bathroom, a kitchen and a common entrance under the staircase leading to the roof. Besides this, there are open spaces on the front and rear sides of the plot, an entrance/driveway on one side of the plot and a common courtyard/verandah between both portions. On completion of the construction, the plaintiff claims to have started residing in the suit property along with his entire family, including parents, three younger brothers and sister before the family members gradually shifted to their respective places. The plaintiff asserts that in 1981, as per mutually settled and agreed terms, the defendant occupied the portion *Marked Green* and the plaintiff occupied the front portion *Marked Red* in the annexed site plan.

28. According to the plaintiff, on account of social obligation, he, thereafter, shifted to 1206/7, Shora Kothi, Subzi Mandi, Delhi. However, the parents of the plaintiff and his son had been living in the suit property and the portion *Marked Red* was continuously occupied by them.

29. On 06.05.1999, the father of the plaintiff died and the portion which according to him was in his possession, had to be put under the lock since the son of the plaintiff could not live alone and had to shift to the residence of the plaintiff. As per his assertion in the plaint, on the request of the husband of the defendant, the plaintiff permitted him to use one room which is marked as in the annexed site plan but the defendant had never spent a penny on the property. All repairing/whitewashing and payment of municipal taxes etc. has always been made by the plaintiff.

30. There also appears to be an unfortunate incident on 21.05.2003 where the youngest brother of the plaintiff, Sardar Rajender Singh died on account of an incident of road rage near Azad Pur Mandi, Delhi. The deadbody was brought to the suit property but the defendant prevented the family members from entering the suit property, which eventually resulted in the lodging of FIR No. 352/2003 at Police Station, Ashok Vihar, North-West Delhi, at the instance of Mrs. Indira Singh Josh, wife of the deceased Sardar Rajender Singh.

31. It appears that during the investigation, the room which was locked up to 22.05.2003, had been broken open on or after 22.05.2003, by the defendant and their associates. When the plaintiff was called by the Investigating Officer [“IO”] to the suit property, a huge ancestral almirah was found to be lying in one of the rooms which was opened after obtaining the key found to be in the possession of the plaintiff. Thereafter, an inventory of the articles stored in the said almirah was prepared in the form of *Fird Khana Talashi* which recorded some silver ornaments missing.

32. The plaintiff, therefore, filed the Civil Suit and asserted that the defendant is an errant trespasser and is unlawfully and unauthorisedly

occupying the portion belonging to the plaintiff. The plaintiff had also prayed for various reliefs including damages and mesne profits.

33. The defendant in her written statements, denied the assertions made in the plaint. Besides various averments, the defendant stated that the suit property is a joint property with the plaintiff and late Sardar Surender Singh having equal shares in the same and unless the same is divided by metes and bounds, the plaintiff is not entitled to a decree of possession. It is the specific case of the defendant that she is in exclusive possession of the entire portion and she cannot be dispossessed without following the due process of law.

34. However, it is discernible from the record that PW-1, Harcharan Singh Josh, in his evidence, stated that the structure over the plot in question was made in two different portions. According to him, as per the mutual agreement, the plaintiff and the defendant started residing in their respective portions of the suit property.

35. PW-2, Ujjagar Singh Josh also stated that the property was bought by the plaintiff and the name of late Sardar Surender Singh was recorded as the co-owner, only out of love and affection. He also asserted an oral settlement between the plaintiff and the deceased, late Sardar Surender Singh, and stated that when he visited the suit property, the locks on the portion *Marked Red* were broken open. He supports the case of the plaintiff that the locks of the almirah were opened by the key provided by the plaintiff only.

36. PW-3, Surjeet Singh, neighbour and relative of the parties, stated in his evidence that the plaintiff shifted to Shora Kothi in the year 1983 and even thereafter, his parents continued to stay in the front portion of the property. According to him, the plaintiff continuously visited the suit property after his father's death.

37. PW-4, Raman Kumar, Assistant from DDA, asserts in his evidence that the bid for auction was submitted by the plaintiff and the earnest money as well as the second payment was also made by the plaintiff. According to him, the plaintiff applied to DDA to add the name of the deceased Sardar Surender Singh as the lessee.

38. PW-5, Head Constable Rati Ram submitted FIR No. 352/2003 and *Fird Khana Talashi* before the Trial Court when summoned to do so.

39. On the other hand, the defendant only herself got examined as the witness i.e., DW-1. Besides other submissions, she stated that in the year 1975, she had shifted to the suit property along with her husband, late Sardar Surender Singh, who was the co-owner to the extent of one-half share in the suit property. The possession of a specific portion by the plaintiff has been disputed by her. According to her, the plaintiff used to reside at Shora Kothi previously, before shifting to Malkaganj. She stated that the plaintiff never stayed in the suit property after 1981. She, however, admitted that her mother-in-law and father-in-law stayed in the suit premises, till their demise in 1983 and 1999, respectively. She admitted that the plaintiff paid the house tax on 11.02.2003. According to her, the keys of the almirah were given by the plaintiff to the IO and thereupon, the ancestral almirah was opened. The electricity connection is admitted to have been in the joint name of the plaintiff and late Sardar Surender Singh. She also admitted to have never paid the house tax of the suit property.

40. Therefore, an overall examination of the oral and documentary pieces of evidence and the claims set up by the plaintiff in the civil suit rested mainly on the basis of the perpetual lease deed. The defendant has nowhere disputed the existence and execution of the perpetual lease deed establishing the co-ownership of the suit property

which records the name of the plaintiff and the husband of the defendant.

41. The suit property has been bought by the plaintiff out of his own funds. The said position is also established from the record i.e., auction bid (Ex.PW-4/1) and application filed by the plaintiff dated 28.09.1972 (Ex.PW-4/2) for recording the name of the husband of the defendant as the co-owner. The possession of the plot was also handed over to the plaintiff. The site plan (Ex.PW-1/2) further indicates that the construction has been raised in a manner that two separate but identical portions are carved out. When the plaintiff is the co-owner of the suit property, he is legally entitled to enjoy the same unless the plaintiff legally becomes disentitled to do so. No ouster of the plaintiff is seen to have taken place in the instant case. Rather, it is the plaintiff, who on his own volition, moved out of the suit property in order to fulfil his obligation as an elected member towards the citizens of his constituency.

42. The parties are admittedly lessees of the DDA. The land in question could not have been partitioned in view of the specific terms and conditions of the lease deed. Though denied by the defendant, but the Trial Court has found that the superstructure in the suit property is built in two distinct but identical portions. The aforesaid finding is unassailable in view of the facts and evidence available on record.

43. Therefore, the plaintiff, who is the lawful owner of the suit property cannot be denied the relief of possession on establishing his title and rights over the property by way of adducing sufficient oral and documentary evidence.

44. Learned counsel appearing for the plaintiff has rightly placed reliance on a decision of this Court in the case of **Ramlal** to assert that the suit property in question being a leasehold property cannot be

partitioned and the superstructure has already been divided into two parts. Since the site plan of the construction clearly indicates that the superstructure is already divided into two parts between the parties and a settlement with regards to the same is already established by the testimony of the plaintiff, therefore, there does not arise any question of filing a suit for partition. Reliance can be placed on the decision of the Supreme Court in the case of *H. Vasanthi v. A. Santha*¹⁸, wherein, it has been held that there is no prohibition to effect a partition otherwise than through an instrument in writing by duly complying with the requirement of law. It has been unambiguously noted in the said decision that the division may also be effected under a settlement or an oral understanding.

45. It is pertinent to refer to the relevant findings of the Trial Court in paragraph no.42 of the impugned judgment and decree, which seems to be a correct appreciation of the testimonies of PW1, PW2 and PW3. It is specifically noted therein that there existed an oral settlement regarding possession of the suit property as per the demarcated plan. The relevant excerpt of the aforesaid paragraph reads as under:-

“(42) Thirdly the plaintiff (PW1) has in his testimony has specifically proved that in the year 1981 there was an oral settlement according to which the plaintiff being the elder brother would occupy the front portion of the property whereas the defendant Sardar Surinder Singh ' along with his family and the defendants would occupy the rear/ back portion, This fact has been duly corroborated by Sardar Ujagar Singh (PW2) the second brother of the plaintiff and also the brother in law of the defendant no.1 as also by Surjeet Singh (PW3) the first cousin of the plaintiff being the son of the Mausi of the plaintiff who the next door neighbour of the parties residing in the adjoining property. They have both confirmed that the plaintiff continued to be in occupation of the premises till the year 2003”

¹⁸2023 SCC OnLine SC 998

46. A holistic examination of the facts of the controversy would undisputedly manifest that the suit property is held in co-ownership by the rival parties. In addition, there has been relevant oral and documentary evidence adduced by the plaintiff to prove that there existed a living arrangement/family settlement after 1981 when all the other family members moved to their respective residences and the suit property came to be possessed by the plaintiff and defendant in portions as already discussed above.

47. It is also noteworthy that the plaintiff has proved his title and ownership over the property by way of documents, namely, the perpetual lease deed, application for co-ownership etc. It is also the defendant's own admission that the property was co-owned, the plaintiff paid the property tax on 11.02.2003 and the electricity connection was in the name of both co-lessees. The defendant has failed to prove her exclusive possession over the property, as contended by her in the Trial Court. DW-1, Amrit Pal Kaur in her testimony admitted the fact that the possession of the keys of the ancestral almirah containing the valuables, placed in the front portion *Marked Red*, was lying with the plaintiff. It is, therefore, seen that even assumingly, in the absence of physical possession, the plaintiff did have a constructive possession over his demarcated share in the property.

48. The Court, therefore, holds that under the facts of the present case, the suit for possession is maintainable without there being a prayer for partition. So far as the decisions relied upon by learned senior counsel appearing for the defendant are concerned, there is no dispute with respect to the proposition of law laid down therein. However, the facts and circumstances of those cases have no relevance with the factual scenario in the case at hand, as the land in question

herein, cannot be partitioned by virtue of following a legal procedure *qua* leasehold property as also the fact that the superstructure standing therein has been found to be already divided in two different portions.

Issue (ii)

49. Having concluded the first issue in the aforesaid terms, the Court now proceeds to determine the second issue which has fallen for consideration. Learned senior counsel appearing for the defendant points out various inconsistencies and alleged shifting of stands regarding the living arrangement of the parties at different occasions, as has been recorded in preceding paragraphs. The Court, however, takes note of the decision relied upon by the learned counsel appearing for the plaintiff in the case of *Maya Gopinathan* and finds force in his submissions that the normal rule that governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. The Court, in the case of *Maya Gopinathan*, while placing reliance on the decision in the case of *Dr. N. G. Dastane* has held that under Section 3 of the Indian Evidence Act, 1872, a fact is said to be proved when the Court either believes it to exist or considers its existence so probable that the prudent man ought to act, under the circumstances of a particular case, upon the supposition that it exists.

50. The belief regarding the existence of the fact may itself be founded on a balance of probabilities. It is also equally settled that inference from the evidence and circumstances must be carefully distinguished from conjunctures and speculations. If the material available on record in the instant case is re-looked from the aforesaid perspective, it would be established even from the documentary material that the plaintiff made the application for auction of the property in question for which he paid the earnest money and further

the whole amount. He further funded the construction of the superstructure over the suit property in question, as has been established by the testimony of PW-1 and PW-2. He has further demonstrated to have paid the property tax. The property is recorded in his name alongwith the name of the deceased brother Sardar Surender Singh. Electricity connection admittedly has been established to have been in the joint name of the co-owners. The possession of the keys of the ancestral almirah containing valuables of the family was with him which were handed over during the investigation of FIR 352/2003, thereupon, the almirah was opened. His late father continuously resided up to the year 1999, and that is when the keys of the almirah were taken by the plaintiff, as admitted by the defendant in her testimony.

51. At this juncture, it is also useful to lend credence on the decision in the case of *Kale v. Deputy Director of Consolidation*¹⁹ which exposts different ways in which a family settlement can be effected. The Supreme Court in the said case had opined that the Courts have leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds.

52. In Halsbury's Laws of England²⁰, the phrase 'family arrangement' finds the following connotation:-

"A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour".

53. Therefore, the recurring account of the existence of a family arrangement post-construction of the suit property in 1975-76 and the

¹⁹(1976) 3 SCC 119

²⁰Vol. 17, III Edition, at pp. 215-216

mutually agreed arrangement which arose after 1981, can be interpreted as the existence of an oral partition irrespective of the different nomenclatures used for the same at different instances in the pleading and evidence adduced by the plaintiff.

54. Another case that needs consideration on this aspect is *Shariff Iqbal Hussain Ahmed v. Kota Venkata Subbamma*²¹, wherein, it was held that once the plaintiff's title to the property is proved, the Court has to grant a decree for possession, for it has no discretion to deny it.

55. Therefore, even if the plaintiff has used different terminologies i.e., family settlement, living arrangement or oral partition, the facts of the case would indicate that the arrangement came to be agreed between the parties for living separately in portions marked as A and B alongwith their families. The use of different expressions, therefore, under the facts of the present case, cannot dismantle the rights of the plaintiff or prevent him from exercising his legal right of possession of the property of which he is the co-owner.

56. The decision, therefore, relied upon by the learned senior counsel for the defendant, in the case of *Urmila Sharma*, will have no application under the facts of the present case as the facts of the said case manifest a pleading of there being an oral partition on one hand and entire denial of any right over the property on the other hand. However, in the case at hand, the co-ownership of the suit property by both the contesting parties is an admitted position.

57. So far as the argument that the plaintiff has to stand on his legs and the best evidence is being withheld by the plaintiff is concerned, the same does not have any substance and deserves to be rejected for the reasons that the best evidence to prove his title of the property by the plaintiff is the perpetual lease deed executed in his name and the

²¹1994(1) A.P.L.J. 349 (HC)

way the name of the co-owner late Sardar Surender Singh came to be recorded on the said lease deed. Further, with respect to the possession of the portion *Marked Red*, the same is established by the constructive possession held by the plaintiff even after exiting the suit property, first, by his father on his behalf and then, by visiting the suit property. The fact that the key of the ancestral almirah was found to be in possession of the plaintiff also establishes the sanctity of his right over the suit property.

58. The plaintiff, by way of oral and documentary pieces of evidence, has proved that he himself, along with his family, stayed in the suit premises and even otherwise, his constructive possession continued up to 1999 and further till 27.06.2003, when the *Fard Khana Talashi* was prepared by the IO based on the FIR by obtaining the keys of the almirah from the plaintiff who facilitated the opening of the locks. Even otherwise, the fact that the plaintiff paid the property tax on 11.02.2003, and the electricity connection was in the joint name indicates that he may not have been in physical possession of the suit property but his constructive possession cannot be denied. The evidence adduced is sufficient to establish his right or ownership over the property, and his right of possession, as has been extensively dealt with in preceding paragraphs, cannot be denied as being *de hors* the law.

59. The settled position in law *qua* standard of proof concerning civil cases is the preponderance of probability, meaning thereby, that the evidence which is of greater weightage or more convincing than the evidence which is offered in opposition to it, is admitted and preferred. Therefore, in view of the facts and circumstances of the case at hand and on the examination of the oral and documentary evidence adduced before the Court, it is justified to hold that the

principle of preponderance of probability tilts in favour of the case made out by the plaintiff. Thus, it leaves no doubt that the plaintiff is rightly entitled to the relief granted to him by the trial court.

60. In view of the aforesaid, the Court does not find any substance in the instant appeal and consequently, the same stands dismissed. The cost of the litigation be borne by the defendant. The litigation cost of the learned counsel is determined to be Rs.25,000/-. Let a decree be drawn accordingly.

61. In terms of the interim order, the amount which was deposited by the defendant and released in favour of the plaintiff shall be adjusted during the execution proceedings.

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

OCTOBER 14, 2024/MJ/p