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**(2008) 07 DEL CK 0188**

**Delhi High Court**

**Case No:** CS (OS) 248 of 2004

Virender Kumar

APPELLANT

Vs

Shri Manish Kumar Thakur

RESPONDENT

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**Date of Decision:** July 17, 2008

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 11
- Specific Relief Act, 1963 - Section 41

**Hon'ble Judges:** Rajiv Sahai Endlaw, J

**Bench:** Single Bench

**Advocate:** Sugriva Dubey, for the Appellant; Nemo, for the Respondent

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**Judgement**

Rajiv Sahai Endlaw, J.

The plaintiff has instituted the present suit for partition of following immovable properties:

- House bearing No. 19/16, Shakti Nagar, Delhi-7, consisting of three stories i.e., Ground, First and the Second Floors.
- House property shop No. A/243, Subzi Mandi, Azadpur, Delhi, under the leasehold rights in the land slotted to me by the DDA, Delhi;

and of share in the partnership firms M/s Babulal Paras Ram and M/s Babu Lal & Company to the extent of the 15 naya paisa in each and for certain Fixed Deposit Receipts (FDRs) which were stated to be in the name of Shri Babulal Thakur and his wife Smt Munni Devi being the grand father and grand mother respectively of the plaintiff and for certain other FDRs in the name of said Shri Babulal Thakur alongwith each of his three daughters.

2. The case of the plaintiff in the plaint, inter alia, was that his grand father Shri Babulal Thakur had left a Will dated 5th March, 1993 leaving the properties aforesaid and the plaintiff had requested the defendant for partition and the

defendant had denied the partition. The plaintiff thus sued for partition and also claimed the relief of permanent injunction restraining the defendant from alienating or creating third party rights with respect to the properties of which partition was sought. The defendant is the son of the brother of the father of the plaintiff. It is admitted in the plaint itself that Shri Babu Lal Thakur, grand father of the plaintiff, had left his wife Smt Munni Devi, two sons, namely, father of the plaintiff and the father of the defendant and three daughters as his natural heirs and further that the grand mother Smt Munni Devi has also died. However, neither the sons nor the daughters of Shri Babu Lal Thakur were impleaded as party to the suit and the suit was filed against the defendant only.

3. The defendant filed written statement to the suit in which the defendant has admitted that Shri Babulal Thakur left the Will dated 5th March, 1993. However, the defendant pleaded that under the said Will, only the shop No. A/243, Subzi Mandi, Azadpur, Delhi had been inherited by the plaintiff and the defendant in equal share but none of the other properties of which partition was sought had devolved upon the plaintiff and the defendant and the plaintiff and the defendant were not the owners of the other properties. The defendant thus averred that the suit with respect to other properties was misconceived.

On the pleadings of the parties, the following issues were framed on 9th August, 2005:

1. Whether the plaintiff is the co-owner of House No. 19/16, Shakti Nagar, Delhi and entitled to its partition?
2. Whether the shop No. A-243, Subzi Mandi, Azadpur, Delhi cannot be partitioned, as per terms of Lease? OPD
3. Whether the shop No. A-243, Subzi Mandi, Azadpur, Delhi is being noted used by both the parties to this suit as per the mutual agreement? OPP
4. Whether the suit is without any cause of action and is not maintainable under Order 7 Rule 11 CPC?
5. Whether the Hon"ble Court lacks necessary pecuniary jurisdiction to try this suit? OPD
6. Whether the Hon"ble Court has no jurisdiction on account of arbitration clause in the partnerships/Business Agreements?
7. Whether the suit is barred u/s 41 of the Specific Relief Act?

4. The plaintiff has instituted the present suit as a minor through his natural guardian and father. The date of birth of the plaintiff is stated to be 15th August, 1990. The plaintiff till date continues to be a minor. That to prove the case of the plaintiff, the father and natural guardian of the plaintiff tendered his affidavit by way of examination-in-chief as exhibit PW1/A. He was partly cross examined by the

counsel for the defendant. However, the defendant or his counsel thereafter stopped appearing before the court and were proceeded ex parte vide order dated 23rd October, 2007. The defendant continues to be ex parte and has thereafter not appeared before the court. The plaintiff thereafter tendered another affidavit of Shri Ajay Kumar Sharma by way of his ex parte evidence and thereafter closed his ex parte evidence.

5. The factum of Shri Babu Lal Thakur having executed a Will dated 5th March 1993 was not disputed in the written statement. However, the said Will was not proved by the plaintiff by examining any witness to the said will or otherwise. During final arguments, it was put to the counsel for the plaintiff that the plaintiff had not proved any case with respect to the property No. 19/16, Shakti Nagar, Delhi-7 or with respect to the share in partnership firm or with respect to the FDRs, inasmuch as no evidence whatsoever was led establishing any right of the plaintiff and the defendant to the said properties. The counsel for the plaintiff fairly conceded that the suit be treated as for partition for shop No. A-243, Subzi Mandi, Azadpur, Delhi only.

6. With respect to the shop No. A-243, Subzi Mandi, Azadpur, Delhi, as aforesaid, there is an admission in the written statement that the plaintiff and the defendant have an equal share in the said shop. Even though the defendant has not led any evidence and is ex parte, the defence of the defendant in the written statement to the partition of the said shop is that (i) from the said shop two firms one controlled by the father of the plaintiff and the other controlled by the father of the defendant are functioning, both occupying approximately equal area (ii) that the said shop being lease hold cannot be partitioned.

7. The defence of the defendant to partition of Shop No. A-243, Subzi Mandi, Azadpur Delhi, is not tenable. The said issue is no longer res integra and it has been held by this Court in the judgments (1) Chiranji Lal and Anr. v. Bhagwandas and Ors. 1991(3) DL 530; (2) Inderjeet Singh v. Tarlochan Singh 1991 R.L.R. 239; (3) [Mohinder Singh Vs. Kartar Lal](#), and (4) Ram Lal Sachdev v. Smt. Sneh Sinha AIR 2000 Del 92 that there is no bar to partition of the super structure of the leasehold properties and the same does not amount to division or partition of leasehold right in land which is prohibited under the terms of the lease. The plaintiff and the defendant would be entitled to have the lease hold rights in their joint names.

8. It is not the case of the defendant that the said property has been partitioned by metes and bounds between the parties. The case of the defendant only is that the said property was being used as per mutual agreement of the parties. However, such agreement would not bar the partition of the said property.

9. The plaintiff is, thus, entitled to a decree for partition of shop No. A-243, Subzi Mandi, Azadpur, Delhi only on admission of the defendant. The plaintiff is not entitled to any other relief. Accordingly, preliminary decree for partition is passed

with respect to shop No. A-243, Subzi Mandi, Azadpur, Delhi declaring the plaintiff and the defendant each having a 50% undivided share in the said property.

10. Mr S.M. Chopra, Additional District Judge (Retd) is appointed as the Local Commissioner to suggest ways and means, if any, of partition by metes and bounds of the said property. His fee is tentatively fixed at Rs. 25,000/- to be borne first by the plaintiff. On receipt of report of the Local Commissioner within three months, the suit be listed for passing of the final decree of partition. It is clarified that all out of pocket expenses, if any, incurred by the Local Commissioner in making the site visit, in preparation of plans or in taking any other technical help shall also be borne by the plaintiff.