



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

% **Date of decision: 6<sup>th</sup> December, 2013.**

+ **RFA 439/2008**  
**SUDHIR KHANNA** ..... Appellant  
 Through: Mr. S.C. Singhal, Adv.

Versus

**JUGAL KISHORE KHANNA (DECEASED THROUGH LRS)**  
**AND ORS.** ..... Respondents  
 Through: Mr. Pravir K. Jain & Mr. Manoj  
 Chauhan, Adv.

**AND**

+ **RFA 483/2008**  
**JUGAL KISHORE KHANNA (DECEASED THROUGH LRS)**  
**AND ANR.** ..... Appellants  
 Through: Mr. Pravir K. Jain & Mr. Manoj  
 Chauhan, Adv.

Versus

**SUDHIR KHANNA & ORS.** ..... Respondents  
 Through: Mr. S.C. Singhal, Adv.

**CORAM :-**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**RAJIV SAHAI ENDLAW, J.**

1. RFA No.439/2008 impugns the judgment and decree dated 28.07.2008 of dismissal of suit No.70/06/83 of the Court of Additional



District Judge (ADJ), Karkardooma Courts, Delhi filed by the appellant Sh. Sudhir Khanna for partition of property bearing No.15-D, Kamla Nagar, Delhi. RFA No.483/2008 has been preferred by the respondent No.1 Sh. Jugal Kishore Khanna (since deceased) and respondent No.2 Sh. Man Mohan Khanna in RFA No.439/2008 for setting aside of the finding on Issue No.4 in the same judgment and decree dated 28.07.2008, pertaining to property No.D-56, Malcha Marg, Chanakya Puri, New Delhi and claiming the same to be a joint family property with the appellants (in RFA No.483/2008) Sh. Jugal Kishore Khanna and Sh. Man Mohan Khanna having one half undivided share therein.

2. Notice of RFA No.439/2008 was issued and vide *ex parte* ad-interim order dated 12.11.2008 therein, the respondents therein were directed to maintain *status quo* with regard to possession and title of property No.D-15, Kamla Nagar, New Delhi. Vide order dated 24.08.2009, the name of the respondent No.5 Sh. Shyam Kishore Khanna in the said appeal who had died during the pendency of the suit and whose heirs were not brought on record, was struck off from the array of parties and the appeal admitted for hearing. The hearing of the appeal was expedited owing to the parties thereto being senior citizens. Compromise / settlement attempted remained unsuccessful.



3. Notice of RFA No.483/2008 was also issued and the said appeal also admitted for hearing on 24.08.2009 and ordered to be listed along with RFA No.439/2008. Vide order dated 24.08.2009 therein, *status quo* was directed to be maintained with respect to the property in question.

4. The interim orders in both the appeals have continued. The counsels have been heard.

5. The appellant in RFA No.439/2008 Sh. Sudhir Khanna (“SK”) instituted the suit from which these appeals arise, pleading:

- (i) that SK and defendants No.4&5 in the suit (and who are respondents No.3&4 in RFA No.439/2008 and respondents No.2&3 in RFA No.483/2008) Sh. Raman Khanna (“RK”) and Smt. Shyama Khanna (“Sh.K”) were the heirs of Late Sh. Attar Chand Khanna (“ACK”) and defendants No.1 to 3 in the suit Sh. Ram Kishore Khanna, Sh. Jugal Kishore Khanna (“JKK”) and Sh. Man Mohan Khanna (“MMK”) and of which JKK and MKK are respondents No.1&2 in RFA No.439/2008 and are appellants in RFA No.483/2008 were the sons of late Sh. Roop Kishore Khanna (“RKK”);



- (ii) that RKK and ACK were the sons of Sh. Tek Chand Khanna (“TCK”) who held several immovable properties including one at 15-D, Kamla Nagar, Delhi as joint family property;
- (iii) that after the death of TCK, his two sons i.e. ACK and RKK became joint owners of the Kamla Nagar property with RKK as the *Karta* of the family;
- (iv) that after the death of RKK, ACK became the *Karta* of the joint family;
- (v) ACK also died in March, 1983 leaving behind SK, RK and Sh.K as his only heirs;
- (vi) that the property No.15-D, Kamla Nagar, Delhi was equally and jointly owned by the heirs of RKK and ACK i.e. with SK, RK and Sh.K having 50% share therein and Sh. Ram Kishore Khanna, JKK and MKK having the other 50% share;
- (vii) that the property stood in the municipal records in the joint name of both the parties;



- (viii) that part of the said property was in possession of Sh. Ram Kishore Khanna, JKK and MKK and the remaining portion was in the possession of the tenants;
- (ix) during the lifetime of ACK, it had been agreed that the rent receivable from the property would be utilized by Sh. Ram Kishore Khanna, JKK and MKK for improvement of the property; and,
- (x) that after the death of ACK in March, 1983 there was tension between the heirs of RKK on the one hand and the heirs of ACK on the other hand and SK, RK and Sh.K demanded partition of the Kamla Nagar property to the extent of 50% and upon the same being denied by Sh. Ram Kishore Khanna, JKK and MKK, the suit was being filed.

6. Sh. Ram Kishore Khanna, JKK and MKK (hereinafter called heirs of RKK) contested the suit by, filing a joint written statement, on the grounds:

- (A) that the Kamla Nagar property was neither a joint family property nor were SK, RK and Sh.K (hereinafter called heirs of



ACK) in possession of any part or parcel thereof and the suit had not been properly valued for the purpose of court fees and jurisdiction;

- (B) that the only property which was jointly owned by ACK with RKK was plot No.D-56, Malcha Marg, Chanakya Puri, Delhi which was built by them in the name of Sh.K in or about the year 1955 with joint funds;
- (C) that even if SK had any right to claim partition of the Kamla Nagar property, if the same was held to be a joint family property, SK having not included the Malcha Marg property for partition, the suit was bad for partial partition;
- (D) denying that the Kamla Nagar property belonged to TCK and pleading that TCK had died in the year 1942 and the Kamla Nagar property was built by RKK in or about the year 1950 with his own self earned funds and further pleading that TCK did not leave behind any assets and RKK was the only earning member of the family maintaining the household;



- (E) however RKK out of respect for his father (TCK) had purchased the plot underneath the Kamla Nagar property in the name of TCK and had raised construction thereon with his own financial resources; ACK was till then unemployed;
- (F) RKK associated ACK in his business as a partner in equal share though ACK had not contributed anything to the business;
- (G) ACK settled at Shimla permanently and continued to be a permanent resident of Shimla till his death;
- (H) ACK had not contributed anything towards the costs of construction of the Kamla Nagar property;
- (I) denying that RKK and ACK were the joint owners of the Kamla Nagar property;
- (J) ACK and RKK were the *Karta's* of their own individual coparceneries and there was no joint family of RKK and ACK of which RKK and ACK could be the *Karta*;
- (K) though RKK was the exclusive owner of the Kamla Nagar property but out of sheer love and affection for his brother ACK



had got the name of ACK entered into Conveyance Deed of the land underneath the Kamla Nagar property;

- (L) ACK during his lifetime did not claim any right, title and interest in the Kamla Nagar property;
- (M) it was only after the death of ACK that the heirs of ACK, with a view to harass the heirs of RKK had started claiming share in the Kamla Nagar property;
- (N) that to maintain harmony and cordial relations and to avoid unnecessary dispute and bickering, a settlement was made between ACK and his family on the one hand and heirs of RKK on the other hand, whereunder the heirs of RKK including his widow who was then alive, paid a sum of Rs.55,000/- to ACK in October, 1979 in full and final settlement of his alleged claim in the Kamla Nagar property;
- (O) at the time of said settlement, ACK represented that he was interested in selling the Malcha Marg property and sharing the sale proceeds thereof and assured that if he decided to retain the





Malcha Marg property, he will pay to the heirs of RKK, prevailing market price thereof;

(P) however thereafter ACK died and the Malcha Marg property remained unsettled and joint as before;

(Q) neither ACK nor any of his family members were at any point of time in possession of the Kamla Nagar property and ACK along with his family was living in the Malcha Marg property.

7. Needless to state, SK filed a replication controverting the contents of the written statement of heirs of RKK; the receipt by ACK of Rs.55,000/- in settlement of his claim towards the Kamla Nagar property was also denied.

8. RK and Sh.K also filed a written statement supporting SK.

9. Sh. Ram Kishore Khanna (one of the heirs of RKK) died during the pendency of the suit and Sh. Shyam Kishore Khanna was substituted as his legal heir. Subsequently, as aforesaid, Shyam Kishore Khanna also died and he was deleted from array of parties.

10. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 19.12.1991:



- “1. *Whether the suit is properly valued for the purpose of court fees and jurisdiction? OPD*
2. *Whether the property in question was owned by late Sh. Attar Chand Khanna? OPD*
3. *Whether the plaintiff and the defendants No.4,5 and 6 are the joint owners of the suit property as alleged? If so, what are the shares? OPP*
4. *Whether the suit is bad on account of partial partition? OPD*
5. *Whether there was a family settlement as alleged by the defendants? If so to what effect? OPD*
6. *Whether the plaintiff is entitled to rendition of account? If so, from whom and for which period? OPP*
7. *Relief.”*

11. The learned ADJ has in the impugned judgment, found / observed / held:

- (a) the heirs of RKK had not denied that Kamla Nagar property was purchased in the name of TCK; their case however was that it was RKK who had purchased the plot underneath the said property with his own monies though in the name of TCK;



- (b) that Issue No.2 had been wrongly framed and was covered by other issues and there was thus no need to return any finding thereon;
- (c) that the land underneath the Kamla Nagar property was admittedly acquired in the name of TCK; no positive evidence had been led by heirs of RKK to prove that TCK was not doing any work or had no means to purchase the said property or that RKK had acquired the said property from his own monies; thus the property had to be assumed to be ancestral in the hands of RKK and ACK;
- (d) that though SK in his replication had denied receipt of Rs.55,000/- by ACK but in cross-examinations of JKK and MKK gave a suggestion that the amount of Rs.55,000/- was given for the betterment of HUF property and SK was thus deemed to have admitted receipt of Rs.55,000/- by ACK;
- (e) SK had however failed to prove, as to betterment of which other property the said sum of Rs.55,000/- had been received by ACK or as to how ACK during his lifetime had spent the



money so received by him in 1979 as ACK has died only in the year 1983;

- (f) SK had also not proved the income tax return of ACK. Though ACK had in his wealth tax returns for the years 1964-65, 1965-66 and 1966-67 shown half share of the Kamla Nagar property in his wealth tax returns but had not shown himself to be the owner of the Kamla Nagar property in the wealth tax returns filed by him in the years 1979-83;
- (g) if the Kamla Nagar property was being shown by ACK in his income tax returns, the same would have been produced and from non-production thereof, adverse inference had to be drawn;
- (h) law does not prohibit oral partition;
- (i) JKK and MKK had thus successfully proved that oral partition took place because of payment of Rs.55,000/- to ACK in the year 1979 by the heirs of RKK;



- (j) the oral partition of the year 1979 thus stood proved from the pre-ponderance of evidence;
- (k) SK had failed to prove that on the date of filing of the suit, he or his brother RK or mother Sh.K had any share in Kamla Nagar property and Issue No.3 was decided against them and JKK and MKK had succeeded in establishing a settlement of the year 1979 and Issue No.5 was decided in their favour;
- (l) in view of the aforesaid finding, Issue No.6 was infructuous;
- (m) in view of the aforesaid finding, Issue No.1 was decided in favour of SK and against JKK and MKK;
- (n) JKK and MKK had relied upon two payments of Rs.10,000/- and Rs.50,000/- in support of their plea of the Malcha Marg property being a joint family property acquired from joint family funds;
- (o) that Sh.K in whose name the Malcha Marg property stood, had no source of income of her own;



- (p) ACK had no other source of income except the joint family business of cinema at Shimla;
- (q) thus any property purchased by ACK becomes the joint family property;
- (r) circumstances given by JKK and MKK were not sufficient to prove the fact that Malcha Marg property was purchased out of joint family funds; and,
- (s) accordingly, Issue No.4 was decided against JKK and MKK and in favour of SK.

12. Mr. Pravir K. Jain, Advocate for JKK and MKK (being heirs of RKK) has argued that he is not pressing that TCK or ACK were benami owners of the property / half of the Kamla Nagar property and that RKK was the real/sole owner of the property and is confining his case to ACK having not been left with any share in the Kamla Nagar property upon receipt of Rs.55,000/- against the same. He has further argued that adverse inference from non appearance in the witness box of Sh.K, in whose name Malcha



Marg property stands, to prove the source from which she had acquired the Malcha Marg property, should be drawn.

13. Mr. S.C. Singhal, Advocate for SK. RK and Sh.K (being the heirs of ACK) has argued:

- (I) that he is not controverting the receipt by ACK of Rs.55,000/-;
- (II) that there can however be no extinguishment of rights in immovable property without documents; oral partition can be of several properties and not with respect to one property only;
- (III) that the parties were admittedly having joint business and thus exchange of monies should not raise the presumption of the same being against a share in the property; and,
- (IV) that it was for JKK and MKK to establish as to on what account the said amount of Rs.55,000/- was paid;
- (V) that no record to substantiate settlement of 1979 has been proved;



(VI) that the mutation of the Kamla Nagar property in the joint names of RKK and ACK was not changed after 1979.

14. The decision of this appeal entails, adjudication of rights in two properties i.e. one at Kamla Nagar and the other at Malcha Marg.

15. The Kamla Nagar property as per the documents, is in the joint names of RKK and ACK. Though JKK and MKK, being the heirs of RKK, had also set up a case of benami earlier, of RKK being the real owner thereof but have now not pressed the same. The only question which is to be adjudicated is whether there was be any settlement with respect to the said property in the year 1979 in which ACK received Rs.55,000/- against his 50% share in the said property, making the same the exclusive property of heirs of RKK. The learned ADJ has found in favour of heirs of RKK and which finding is under challenge in RFA No.439/2008.

16. As far as the Malcha Marg property is concerned, the same is in the name of Sh.K being the widow of ACK. JKK and MKK, being the heirs of RKK claim the same to be a joint family property acquired from joint family funds. The learned ADJ has found against them and which finding is under challenge in RFA No.483/2008.





### **KAMLA NAGAR PROPERTY**

17. I am unable to agree with the learned ADJ and do not find JKK and MKK to have proved that there was any settlement in the year 1979 whereunder the 50% share of ACK in the said property stood transferred to the heirs of RKK against payment of Rs.55,000/- to ACK, for the following reasons:

- (A) the heirs of RKK in their written statement verified on 09.07.1984/09.09.1984 to the suit for partition took a plea of RKK being the real owner of the property and TCK being the benami owner of the property and after the death of TCK, ACK being the benami owner of half of the property;
- (B) though upon coming into force on 19<sup>th</sup> May, 1988 of the Benami Transaction (Prohibition) Act, 1988, such pleas are barred but as per the dicta in *G. Mahalingappa Vs. G.M. Savitha* (2005) 6 SCC 441, plea of benami taken in a pleading filed prior thereto is not barred;



- (C) the heirs of RKK persisted with the said plea before the Trial Court as well as in this appeal and have not pressed the same only at the time of hearing of this appeal;
- (D) it is further the case of the heirs of RKK that though ACK during the lifetime of RKK did not claim any right in the property but after the death of RKK in the year 1978, started pestering the heirs of RKK, claiming a share in the property and goaded the heirs of RKK to agree to some family arrangement; that in pursuance thereto, the settlement of 1979 was made;
- (E) had this been the position and had the heirs of RKK in 1979 paid Rs.55,000/- to ACK to settle his claims against the Kamla Nagar property even though according to heirs of RKK, ACK had no right thereto, in the normal course of human behavior, a proper documentation would definitely have been made; admittedly, there is no documentation;
- (F) the version of the heirs of RKK of having paid Rs.55,000/- to ACK to settle his claim which in fact did not exist and yet getting no document in writing from ACK in confirmation of



his not having any such claim or the said claim having been settled, is improbable and unbelievable and against the preponderance of probabilities;

(G) the inescapable conclusion is that the said payment of Rs.55,000/- was not towards any such claim against the property but was on some other account which did not require any writing to be made with respect thereto; had the heirs of RKK in the year 1979 felt coerced into make payment of Rs.55,000/- in settlement of claim of ACK against the property and which claim according to the heirs of RKK was not legitimate, the heirs of RKK would not also have believed the verbal assurances of ACK with respect to the Malcha Marg property and which representations and assurances are part of the settlement pleaded of 1979; for this reason also, the plea of heirs of RKK of the 1979 settlement is unbelievable;

(H) had there been any such settlement of 1979 and as per which ACK had assured and represented to the heirs of RKK that the Malcha Marg property would be sold or else he would pay heirs



of RKK their share with respect thereto, the heirs of RKK would have chased ACK for the same; they however did nothing of that sort; it is not their case that they at any point of time demanded that ACK should take a call with respect to the Malcha Marg property or demanded their share with respect thereto since ACK had not proceeded to sell the same; the said plea was taken for the first time in the written statement filed in July, 1984 in response to the suit filed by SK in or about 1983;

- (I) had monies been due to heirs of RKK from ACK towards their share in the Malcha Marg property, there was no occasion for the heirs of RKK to pay to ACK Rs.55,000/- towards the share claimed by ACK in the Kamla Nagar property;
- (J) had the heirs of RKK been compelled to pay Rs.55,000/- to ACK towards his illegitimate claim on the Kamla Nagar property, they would at least have thereafter got the name of ACK deleted with respect to the said property; it was not done; the only inference is that the payment of Rs.55,000/- was not against the Kamla Nagar property;



- (K) during the hearing, instance has been given of other litigation between the parties with respect to property at Shimla; though partial family settlement is permissible in law but the same is generally done for the mutual benefit of all the parties; where one part of the family considers the demand of another with respect to one of the properties to be illegitimate, generally all joint properties / business are settled or at least proper documentation made of the state of affairs; non-happening of any such thing belies the claim of heirs of RKK of any settlement in the year 1979;
- (L) the heirs of RKK have not proved / established as to how the payment, of Rs.55,000/- which they claim to have made in settlement of share claimed by ACK in the Kamla Nagar property, has been treated by them in their income tax / wealth tax returns and it is not their case that after the said date they started showing themselves to be the absolute owners of the Kamla Nagar property;



- (M) though the witnesses examined by the plaintiff SK from the house tax department deposed that though earlier the property was in the names of RKK, ACK and TCK but was subsequently being shown in the name of RKK only, but without any application on record as to why the names of ACK and TCK were dropped; it is thus not as if after the settlement of 1979 any steps were taken for removal of the name of ACK;
- (N) the onus to establish the settlement of 1979 is on the heirs of RKK; and,
- (O) no basis whatsoever also, for arriving at the valuation of the property at Rs.1,10,000/- of which Rs.55,000/- was half, has been disclosed.

### **MALCHA MARG PROPERTY**

18. I concur with the finding of the learned ADJ, of the heirs of RKK having failed to establish that they have any right, title, claim or interest in this property, admittedly in the name of Sh.K, for the following reasons:



- (i) the claim of the heirs of RKK to the said property, though made by averring the said property to be a joint family property, but in fact and in law is a claim of benami, as Sh.K in whose name the said property stands, being the wife of ACK, cannot be said to be a coparcener or a member of any HUF;
- (ii) the averments of SK in the plaint, of a joint family of which earlier RKK was the *Karta* and after the death of RKK, ACK was the *Karta*, were denied by the heirs of RKK in their written statement; the claim of the heirs of the RKK, for a share in the Malcha Marg property, was made subject to acceptance of the plea in the plaint of the Kamla Nagar property belonging to such joint family;
- (iii) the claim of the heirs of ACK to the Kamla Nagar property has been upheld, not on a finding of the said property belonging to any joint family but on a finding of ACK and RKK being the co-owners of the said property and on further finding of negating the claim of the heirs of RKK of having paid



Rs.55,000/- in settlement of the share of ACK in the Kamla Nagar property;

- (iv) since no finding of the existence of any joint family has been returned, the claim of the heirs of RKK to the Malcha Marg property, which was predicated on a finding of existence of a joint family, in any case does not survive;
- (v) the plea, in the written statement of the heirs of RKK, was of RKK having purchased the said property in the name of Sh.K being the wife of his brother ACK;
- (vi) mere providing of sale consideration or financing for purchase of property, even if that were found to be a case, does not make the provider of such consideration or the financier, the owner of the property and the right / claim of such financier / provider of finance is only of seeking refund of the finances so provided with interest if any proved to payable;
- (vii) for a case of benami to be proved and established, as was permissible prior to coming into force of the Benami





Transaction (Prohibition) Act, 1988, not only was payment of consideration for purchase required to be proved but it was further required to be proved and established that the purchase was for the benefit of the provider of such consideration, though in the name of another and that it is the said actual/real owner who has always dealt with the property as owner and not the benami owner;

- (viii) neither have the heirs of RKK been able to disclose any reason for the benami purchase if any nor have they been able to plead or prove RKK or after the demise of RKK his heirs, having exercised any rights of ownership with respect to the property; (I have recently in judgment dated 18<sup>th</sup> September, 2013 in RFA No.329/1997 titled ***Chanan Kaur Vs. Ajit Singh***, also dealing with the aspect of *benami*, have held motive to be an important circumstance to hold a case of benami to be made out.)



- (ix) a claim for the said property is pleaded to have been made for the first time in the year 1979 upon ACK making a false claim with respect to the Kamla Nagar property;
- (x) however the settlement of the year 1979 as pleaded and which included a settlement qua this property also has not been believed for the reasons stated against the Kamla Nagar property;
- (xi) even after the alleged settlement of 1979, no claim with respect this property was made until the filing of written statement to the suit for partition of the Kamla Nagar property;
- (xii) the onus to prove that this property was the benami property of Sh.K and that RKK was the real owner thereof or that the said property was the property of any joint family was again on the heirs of the RKK and which onus they have miserably failed to discharge; and,
- (xiii) again absolutely no evidence has been led of any joint family accounts or of any such joint family having been declared in the



taxation to which the parties were subject or RKK or heirs of RKK having shown themselves as having any interest in this property.

19. Resultantly, RFA No.439/2008 filed by SK against the judgment and decree dismissing his suit for partition of the Kamla Nagar property is allowed and RFA No.483/2008 filed by JKK and MKK impugning the finding on Issue No.4 with respect to the Malcha Marg property claiming the relief of partition of the Malcha Marg property is dismissed.

20. Axiomatically, the suit filed by SK for partition of the Kamla Nagar property has to be decreed and cannot be said to be bad for the reason of being for partial partition for non-inclusion of Malcha Marg property. So far as the shares of the respective parties are concerned, the same are not in dispute. Admittedly, RKK and ACK were equal owners of the property. Their respective shares are to devolve on their respective heirs. It is thus declared that SK, RK and Sh.K together and in equal shares are the owners of 50% share in the Kamla Nagar property and JKK and MKK are the owners in equal share of the remaining 50% share in the Kamla Nagar property.



21. Though a decree for rendition of accounts of the Kamla Nagar property was also claimed but in the facts and circumstances of the case, it is not deemed expedient to grant any such decree, moreover for the reason that the same will entail litigation which commenced three decades ago, continuing for some more time.

22. Parties are left to bear their own costs.

23. Decree sheet be prepared.

24. The suit file which was requisitioned in this Court be forthwith returned to the Court of the concerned District Judge having jurisdiction over the Kamla Nagar property for proceedings for a final decree of partition to be undertaken either by the District Judge himself / herself or by any other Court to which the suit may be so marked.

25. Parties to appear before the concerned District Judge on 20<sup>th</sup> January, 2014.

**DECEMBER 06, 2013**  
'gsr'

**RAJIV SAHAI ENDLAW, J**