

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

% **RFA 704 OF 2002**

+ Date of Decision: 05 July, 2010

# **CHELA RAM CHOPRA(THROUGH LRs)** ...Appellants

! Through: Mr. Harish Malhotra, Sr. Advocate  
with Mr. Sanjeev Kr. Tiwari,  
Advocate.

Versus

\$ **RAMO DEVI & ORS.** ...Respondents

^ Through: Mr. V.K.Makhija, Sr. Advocate with  
Mr. Akshay Makhija, Ms. Vandana  
Khurana, Mr. Rahul Gupta, Mr.  
Rajnish Mishra, Mr. Shekhar Dosi  
and Ms. Aanchal Dhingra,  
Advocates

**CORAM:**

\* **HON'BLE MR. JUSTICE P.K.BHASIN**

1. Whether Reporters of local papers may be allowed to see the judgment? No.
2. To be referred to the Reporter or not? No.
3. Whether the judgment should be reported in the digest? No.

### **JUDGMENT**

**P.K.BHASIN, J:**

Legal heirs of one of the defendants in a suit for partition in respect of property no. J-369, New Rajinder Nagar, New Delhi(hereinafter referred to as the 'suit property') had filed this appeal challenging the judgment and preliminary decree of partition passed in the suit by the Court of Additional District Judge holding the respondent no.1- plaintiff Smt. Ramo Devi and

her husband's two brothers to be the owners of the suit property in equal shares.

2. The suit for partition and separation of 1/3<sup>rd</sup> share in the suit property was filed by the respondent no.1-plaintiff Smt. Ramo Devi against her two brothers-in-law (husband's brothers) Shri Chela Ram Chopra and Shri Shiv Kumar Chopra. It was claimed by Smt. Ramo Devi that the suit property was initially a Government built quarter and the same was allotted to her father-in-law late Shri Manohar Lal Chopra on lease-hold basis by the Government of India in the year 1950 on his migration to Delhi from Peshawar(now in Pakistan) after partition of the country. Shri Manohar Lal Chopra died intestate in the year 1955 leaving behind three sons, namely, Shri Chela Ram, Shri Shiv Kumar and her husband late Shri Roshan Lal Chopra and three daughters,namely. Krishna, Lalli and Urmil. It was further claimed by Smt. Ramo Devi that the three sisters had surrendered their rights in favour of their brothers by giving affidavits to that effect in the Estate Office and the suit property was then transferred in the names of the three brothers on 17<sup>th</sup> August, 1963. She further pleaded that after the death of her husband her name was substituted in the Government records as a co-owner of the suit property since her two children(who are respondents no.2 and 3 in this appeal) had surrendered their right in the suit property in her favour. The filing of suit for partition had been necessitated because of the refusal of her brother-in-law Shri Chela Ram(who was defendant no.1 in the suit and reference to him shall

now be made as 'the deceased defendant no.1' since he had died during the pendency of the suit) to give her share in the suit property after the death of her husband.

3. Defendant no.2 in the suit was Shri Sushil Kumar Chopra, the other brother-in-law of the plaintiff Smt. Ramo Devi. However, before he could be served with the summons of the suit the plaintiff informed the Court that he had died and she also moved an application for bringing on record his two daughters being his only legal representatives. Before that application could be considered Smt. Ramo Devi moved another application for impleading the two daughters and the widow of Sh. Shiv Kumar Chopra as plaintiffs since they were also claiming 1/3<sup>rd</sup> share in the suit property. That application was allowed by the trial Court and two minor daughters of Shri Shiv Kumar Chopra and Mrs.Kamlesh Chopra were then brought on record as plaintiffs no. 2 to 4.

4. The suit was contested by the deceased defendant no. 1 *inter alia* on the ground that there had been a family settlement between the three brothers vide agreement dated 12<sup>th</sup> July, 1963 and pursuant thereto the original two room quarter was demolished and new ground floor was constructed by his wife Mrs. Daman Chopra during 1963-64 and in the newly constructed ground floor his two brothers Shri Roshan Lal and Shri Shiv Kumar had no right. As per the said arrangement between the three brothers, which late Shri Chela Ram claimed to have signed on behalf of his two brothers also as their attorney, Shri Roshan Lal Chopra had

however the right to construct first floor and Shri Shiv Kumar Chopra could construct second floor with their own funds if they so desired. It was also claimed by the deceased defendant no.1 that after the said family settlement there was an oral partition between the three brothers pursuant to which late Shri Roshan Lal had received the entire jewellery of their father and had surrendered his 1/3<sup>rd</sup> share in the suit property in his favour and his other brother Shri Shiv Kumar Chopra had also surrendered his right in the suit property in his favour after receiving due consideration which fact Shiv Kumr had accepted also in the memorandum of settlement dated 24<sup>th</sup> September, 1970. The deceased defendant no.1 denied that their three sisters had surrendered their interest in the suit property as was being claimed in the plaint. It was also pleaded that one of the three sisters had in fact died on the same day when their father had died within few hours after his death and so there was no question of her surrendering her right in the suit property by giving an affidavit to that effect in the Estate Office. Regarding the claim of plaintiff no.2 Smt. Kamlesh Chopra, who got herself impleaded in the suit being the widow of Defendant no.2 Sh. Shiv Kumar Chopra, it was claimed that she was in any event not entitled to any share in the suit property since she had divorced her husband.

5. The pleadings of the parties had led to the framing of the following issues by the trial Court:-

*“1. Whether the suit has been instituted by a duly authorized person on behalf of Smt. Kamlesh Chopra and her two daughters? OPP.*

2. *Whether the suit is bad for non-joinder of Sh. Sudhir Kumar and Smt. Neena, the children of late Roshan Lal Chopra? OPD.*
3. *Whether the plaintiffs are out of possession of the property in suit and the suit has not been correctly valued for purposes of court fees? OPD.*
4. *Whether there was any family arrangement on July 12, 1963? If so, what are its terms and its effect? OPD.*
5. *Whether the plaintiffs or anyone of them surrendered their rights in the property in dispute? If so, to what effect? OPD.*
6. *What are the respective shares of the parties in the property in suit? OP parties*
7. *Relief.”*

6. In view of the objection taken by the deceased defendant no.1 that Smt. Ramo Devi had one son Shri Sudhir Kumar and a daughter Smt. Neena and they should have also been impleaded in the suit both of them were also impleaded as defendants. The daughter filed her written statement claiming that her father had no right in the suit property while the son did not file any written statement.

7. The learned trial Court decided issues no.1 and 3 to 6 in favour of the plaintiffs while issue no.2 was disposed of as having become redundant since the original plaintiff had impleaded her son and daughter also as defendants in the suit. The conclusion of the trial Court was that the “.....defence taken by the defendant that Roshan Lal Chopra and Shiv Kumar Chopra had surrendered their rights in favour of Chela Ram Chopra is absolutely false and baseless.....” and so all the three brothers were owners of the suit property in equal shares. The legal heirs of late Shri Chela Ram Chopra felt aggrieved and so they filed the present appeal.

Alongwith the appeal they also filed an application for additional evidence for proving certain documents which according to them would establish that there was an oral partition between the three brothers in the year 1966 and which documents though were available on record could not be exhibited during the course of evidence due to lack of proper legal advice. This application was opposed by respondent no.1-plaintiff no.1 and it was claimed, *inter alia*, in her reply to the application that the documents sought to be exhibited now were forged documents and in any case the reasons being given for leading additional were not covered under the provisions of Order XLI Rule 27 CPC.

8. During the course of arguments Shri Harish Malhotra, learned senior counsel for the appellants challenged the findings of the trial Court only on issue no.4 to the effect that there was no settlement dated 12th July,1963 between the three sons of late Shri Manohar Lal Chopra and the wife of the deceased defendant no.1 Shri Chela Ram Chopra. The reversal of the trial Court's judgment was also sought on the ground that the trial Judge had not even dealt with issue no.5 which was framed in respect of the main defence that there was an oral partition between the three brothers in the year 1966 according to which both Shri Roshan Lal Chopra and Shri Shiv Kumar Chopra had surrendered their rights in the suit property in favour of their deceased brother Shri Chela Ram Chopra and the suit had been decreed only after holding that the defendant no.1 had failed to establish the alleged settlement dated 12<sup>th</sup> July,1963 which settlement was

only an understanding between the three brothers that after demolition of the old structure Chela Ram's wife would construct ground floor, Roshan Lal shall have the right to construct first floor and Shiv Kumar could construct second floor.

9. On the other hand, Shri V.K.Makhija, learned senior counsel for the respondents-plaintiffs maintained the stand taken by them before the trial Court and supported the trial Court's judgment.

10. After going through the pleadings of the parties, the judgment under challenge and after giving thoughtful consideration to the arguments advanced by the learned senior counsel for the parties this Court does find that the learned trial Court has failed to consider the plea of the deceased defendant no.1 that there was an oral partition between the three brothers in the year 1966 whereby his two brothers had surrendered their respective shares in the suit property in respect of which earlier in the year 1963 there was a settlement between the brothers only regarding construction of new floors after demolishing the original two room construction. The trial Court had though framed issue no.5 in respect of that plea but while deciding the suit failed to render any finding on this plea of the deceased defendant no.1 Shri Chela Ram Chopra.

11. The question thus arises as to what should be done by this Court as an appellate Court in such a situation when the trial Court has not decided a very material point in dispute between the parties. Normally, considering the fact that the parties are fighting this battle in respect of the suit property

since the year 1980 this Court would have preferred to resort to the provisions of Order XLI Rule 24 CPC and to proceed to examine the evidence adduced by the contesting parties to find out whether this Court itself could decide the question of oral partition between the three brothers in the year 1966, as was being claimed by the deceased defendant no.1 Shri Chela Ram Chopra, or whether the legal heirs of the deceased defendant no.1 should be permitted to adduce additional evidence to enable the Court to pronounce its judgment on this material point but that course of action cannot be adopted by this Court and in fact even the trial Court also could not have returned any finding in respect of the oral partition of the estate of late Shri Manohar Lal Chopra. In my view, for the reasons to be given hereinafter, this is a fit case where the trial Court's judgment should be reversed and re-trial should be ordered in exercise of the power conferred upon an appellate Court under the provisions of Order XLI Rule 23A CPC.

12. It was common case of the parties that the suit property was allotted to late Shri Manohar Lal Chopra by the Government in the year 1950. It is also not in dispute that he died intestate leaving behind three sons and three daughters and also that the three daughters also had become entitled to have equal shares in the estate of their father alongwith their brothers. The plaintiff-respondent no.1 had, however, not impleaded the three daughters of late Shri Manohar Lal Chopra in her suit for partition of the suit property. The reason given for their non-impleadment was that they had surrendered their rights in the estate of their father. This fact was refuted by

the deceased defendant no. 1 Shri Chela Ram Chopra in his written statement. While denying this averment in the plaint he had also claimed that one of the three daughters had in fact died within hours of the death of their father and so there was no question of her surrendering her rights in his properties. There was thus a dispute between the parties in respect of a very material fact and the same was required to be resolved by the trial Court and that dispute could be resolved only in the presence of the three daughters of late Shri Manohar Lal Chopra. They were necessary parties to be impleaded in the suit for partition since in a suit for partition any person who can claim to have any share in the estate of their ancestor which is sought to be partitioned is a necessary party. The question whether or not any legal heir had relinquished his/her interest in the property in dispute, if it is so claimed by any party to the suit, can be decided only when that legal heir is a party to the suit. The learned trial Judge in the present case has proceeded to accept the plea of surrender of their rights by the daughters of late Shri Manohar Lal Chopra by observing in the judgment that it was an admitted case of the parties that the three daughters of late Shri Manohar Lal Chopra had surrendered their rights. This observation is contrary to the stand taken by Shri Chela Ram. Apart from the fact that the deceased defendant no.1 had not accepted the averment of the respondent no.1-plaintiff that his sisters had surrendered their rights in the estate of their father, as has been observed by the trial Court in the impugned judgment, I am also of the view that simply by observing that it was an admitted case

of the parties that the daughters had relinquished their rights in the estate of their father no decree could be passed to the effect that the three brothers had become owners of the suit property in equal shares in the absence of the daughters of late Shri Manohar Lal Chopra. Similarly issue regarding the settlement dated 12<sup>th</sup> July, 1963 could not be decided in the absence of the daughters of late Shri Manohar Lal Chopra since that controversy also was dependent upon the decision regarding the plea of alleged surrender of the rights by the daughters. The daughters being necessary parties ought to have been impleaded in the suit and despite the fact that there was no objection regarding their non-impleadment taken by any defendant their impleadment should have been ordered by the trial Court *suo moto*.

13. Even in appeal no objection was raised by the appellants that the suit for partition was bad for non-joinder of the three daughters of late Shri Manohar Lal Chopra. However, during the course of hearing of the appeal this Court had raised the point regarding the non-impleadment of the daughters. Though the counsel for the respondents/plaintiffs had initially stated that they would be moving an application under Order I Rule 10 CPC for the purpose of impleading the left out legal heirs of late Shri Manohar Lal Chopra but later on they changed their mind and claimed that there was no necessity of moving any application under Order I Rule 10 CPC. While informing the Court that no such application was required to be moved learned counsel for the respondents/plaintiffs came out with a totally different plea that the daughters of late Shri Manohar Lal Chopra

were not required to be impleaded since perpetual lease deed in respect of the suit property was actually executed in the names of three sons only of late Shri Manohar Lal Chopra who was only an allottee and being an allottee only of the suit property he had not acquired any title thereto. It was also contended that his three sons upon execution of the lease deed in their favour, anyone of them could file the suit for partition and separation of his share in the suit property by impleading the other two joint lessees only. In support of the submission that merely on allotment of the suit property under the Administration of the Evacuee Properties Act, 1950 late Shri Manohar Lal Chopra had not become its lessee learned senior counsel for the respondents had cited one judgment of the Supreme Court in “*Amar Singh and Others vs. Custodian, Evacuee Property Punjab and another*”, **AIR 1957 SC 599**.

14. This twist sought to be given in the story on behalf of the respondents/plaintiffs to meet the flaw of non-impleadment of necessary parties pointed out by the Court cannot be entertained at all since the trial in the suit had proceeded on the premise that the suit property belonged to late Shri Manohar Lal Chopra and upon his death had devolved upon his three sons and three daughters and not that the suit property had attained the character of self acquired property of three sons of late Shri Manohar Lal Chopra because of the Government having executed the lease deed in respect thereof in the joint names of three sons. Therefore, this argument raised on behalf of the plaintiffs is rejected.

15. In the result, this appeal succeeds and the judgment and the preliminary decree passed by the learned Additional District Judge are set aside. The matter is remanded back to the trial Court for re-trial which shall be conducted after taking on record amended memo of parties in which the left out legal heirs of late Shri Manohar Lal Chopra would be shown as defendants since they are being ordered to be impleaded by this Court to enable the trial Court to adjudicate the rights of all the legal heirs of late Shri Manohar Lal Chopra in respect of his estate once for all leaving no scope for any of the legal heirs to contend at any stage in future that the determination of shares in respect of the estate of late Shri Manohar Lal Chopra is not binding on him/her because of his/her not impleadment. During the course of hearing of the appeal this Court had been informed by the appellants' counsel that one of the daughters of late Shri Manohar Lal Chopra, namely, Smt. Shakuntala Kapoor had died issueless and another daughter Smt. Krishna Dhawan had died within 12 hours of the death of her father leaving behind one daughter Mrs. Neelam Khanna who was now settled in U.S.A. and her address was 1810, University Avenue, Berkley, California, U.S.A. The third daughter Mrs. Nirmal Dhawan was also settled in U.S.A. and her address was 3700, Parkview Apartments, Parkview Lane, Apartment No. 1-D Irvine, California-92612, U.S.A. This position was not disputed by the counsel for the respondents-plaintiffs. The trial Court shall take on record the amended memo of parties and shall cause these legal heirs of late Shri Manohar Lal Chopra to be served with the summons in

the suit and after completion of service and pleadings on their behalf, if they choose to contest the suit, and after framing additional issues, if any, arising out of their pleadings render fresh decision. Since re-trial of the suit is being ordered, the trial Court shall render fresh findings even in respect of the issues which already stand framed. And now that the matter is being remanded back to the trial Court the appellants would be at liberty to make their prayer before the trial Court itself for adducing additional evidence and if any such request is made the trial Court shall deal with the same in accordance with law.

The trial Court shall take up the matter now for further proceedings on 30<sup>th</sup> July, 2010 at 2 p.m. and shall make an endeavour to conclude the fresh trial as expeditiously as possible.

**05 July, 2010**

**P.K. BHASIN,J**