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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RSA 68/2020

SMT. VIJAY KUMARI JAIN DECEASED BY LRS RAJESH
KUMAR JAIN

..... Appellant

Through: Mr. Rajinder Mathur, Advocate.
versus

RAKESH KUMAR JAIN & ANR.

..... Respondents

Through: Mr. Ramesh Kumar, Advocate for R-
2 (M: 9810159436).

CORAM:

JUSTICE PRATHIBA M. SINGH

ORDER

% **06.11.2020**

1. This hearing has been held through video conferencing.

CM APPL. 28121/2020 (for exemption)

2. Exemption allowed, subject to all just exceptions. Application is disposed of.

CM APPL. 28119/2020 (for delay)

3. This is an application for condonation of delay in filing the regular second appeal. Delay of 139 days is condoned. Application is disposed of.

CM APPL. 28120/2020 (for stay)

4. On behalf of Respondent No.2, it is submitted by Mr. Ramesh Kumar, Id. counsel that he will not alienate or part with possession of the property. Insofar as Respondent No.1 and the Appellant are concerned, *status quo* shall be maintained as to title and possession. Application is disposed of.

RSA 68/2020

5. The present regular second appeal has been filed challenging the judgment and decree dated 28th August, 2015 as upheld by the Appellate



Court vide judgment dated 26th February, 2020.

6. The appeal arises out of a suit for permanent and mandatory injunction on the basis of an oral partition. The suit has been dismissed on the ground that the proper remedy for the Plaintiff/Appellant was to file a suit for partition.

7. The submission of Mr. Mathur, ld. counsel appearing for the Plaintiff/Appellant is that in the written statement both the Defendants admit that there was an oral partition amongst them when the property was purchased. He submits that the Trial Court and the Appellate Court have erred in holding that the Plaintiff/Appellant has failed to discharge its onus of proving the oral partition. On behalf of Respondent No.2, Mr. Ramesh Kumar, ld. counsel submits that the appeal is against concurrent findings of fact.

8. A perusal of the written statement shows that the Defendants have taken the stand that some portion of the property was divided amongst themselves after the purchase of the property. Thus, the dismissal of the suit requires consideration of this Court, inasmuch as the Trial Court has dismissed the suit on the ground that the Plaintiff has failed to discharge the onus of proving the oral partition. The following questions of law arise in this matter: -

- i. *What is the mode and manner of proving an oral partition and whether the same stands proved?*
- ii. *Whether in light of the pleadings and the written statement, a specific prayer for partition was required or whether the permanent and mandatory injunction could have been granted by this Court?*

9. Let the Trial Court record and the Appellate Court record in **Suit No.**



278/2011 titled ***Vijay Kumari Jain v. Rakesh Kumar Jain & Anr*** and **RCA 28/2018** titled ***Vijay Kumari Jain v. Rakesh Kumar Jain & Anr*** be called for the next date of hearing.

10. List this matter for hearing on 18th January, 2021.

11. This order shall not come in the way of the suit for partition, filed by Respondent No.2, from being proceeded with and decided in accordance with law.

PRATHIBA M. SINGH, J.

NOVEMBER 6, 2020
MR/T