



2026:DHC:9079



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

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Reserved on: 10th September, 2026

Pronounced on: 13th October, 2026

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CNR No. DLHC012669952015

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RSA 316/2015

SHEIKH FIROZUDDIN

S/o Late Sheikh Nawab Rehmat-Ullah

R/o G-45B, East of Kailash, New Delhi.

....Appellant

Through: Ms. Shobhana Takiar, Advocate.

versus

FARIDA

D/o Sh. Ashraf Zamal

R/o Hasanpur, Gajrola, Amroha, U.P.

Presently in unauthorized occupation of

G-45B, 1st Floor, East of Kailash, New Delhi.

....Respondent

Through: Mr. Javed Ahmad and Ms. Aakriti Aditya, Advocates.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (*hereinafter referred to as 'CPC'*) has been filed on behalf of the Appellant against the Judgment dated 27.02.2015 passed by the **learned Additional District Judge** in RCA 65/2013, whereby **he upheld the Judgment dated 16.01.2013 passed by the learned Additional Senior Civil Judge in CS No. 4/2011, whereby Suit of the Plaintiff / Appellant / Mr. Sheikh Firozuddin for Declaration and Permanent Injunction, has been dismissed.**



2. The ***facts in brief***, as narrated in the Suit, were that the Plaintiff was the lawful, sole and exclusive owner of the built up property *bearing No. G-45-B, East of Kailash, New Delhi*, comprising of Basement to Second Floor (*hereinafter referred to as 'the suit property'*). The Plaintiff and his mother Smt. Saeedan Nisa were allotted the plot bearing No. G-45-B, East of Kailash, New Delhi by DDA and the possession was handed over to them, on 09.10.1989. Thereafter, they got the plot constructed, after getting the sanctioned plan. Smt. Saeedan Nisa died on 15.07.2008 leaving behind a *Will in favour of the Plaintiff*, by virtue of which, he has acquired *absolute ownership in the suit property*. The other brothers including Mr. Aftab Ahmad, have no concern with the suit property.

3. His brother Mr. Aftab Ahmad got married to the Defendant, which was his second marriage and the third marriage of the Defendant. However, due to differences and threatening behaviour of the Defendant, Mr. Aftab Ahmad divorced her, as per Shariat Laws on 17.10.2008. After the divorce, the Defendant with her brother and mother and other associates, started threatening her husband, Mr. Aftab Ahmad as well as the Plaintiff and other family members, about which the Complaints were made by Mr. Aftab Ahmad to Commissioner of Police, SHO and other Authorities. Thereupon, the Defendant left and shifted to house bearing No. 1156, Haveli Hisamuddin Haider, Ballimaran, Delhi, in a hurry to stay there.

4. It was further stated that on 22.10.2008 at about 08:00 PM, the Defendant along with her brother, Mr. Hamid Khan and mother tried to forcibly trespass into the suit property, for which a written Complaint was given by the Plaintiff on 23.10.2008 to the Police Authorities, but no action was taken.



5. It was claimed that the Defendant, her brother, mother and associates have been regularly harassing and threatening the Plaintiff and the family and have been disturbing their peaceful life. Their sole intention is to extort money and blackmail the Plaintiff. Ultimately, ***in the month of June 2010, the Defendant with the help of her associates, forcibly entered and trespassed into one room of the First Floor of the suit premises.***

6. The Defendant is the ex-wife of the Plaintiff's brother and the Plaintiff is under no obligation whatsoever, to provide her with residence. The possession of the Defendant in one room on the First Floor of the suit premises, is illegal and unauthorised. She has no right to occupy the said room on the First Floor, as her ex-husband Mr. Aftab Ahmad had no right or interest in the suit premises and it is not her matrimonial home.

7. Despite several requests, Defendant failed to vacate the suit property. Rather, she has got multiple Suits and FIRs registered against the Plaintiff and her ex-husband.

8. Plaintiff served a Legal Notice dated 19.10.2010, asking the Defendant to vacate the suit property, which she has failed to do. The Plaintiff also sought in the sum of Rs.10,000/- per month for unauthorised use and occupation, but she has failed to comply with the Legal Notice.

9. Hence, *the Suit was filed for a Decree of Possession in respect of one room on the First Floor and to stop using the common facilities like latrine, bathroom and kitchen of the suit property. A Prayer was also made for grant of damages in the sum of Rs.10,000/- per month and for Permanent Injunction to restrain the Defendant from parting with the possession or further trespassing into any other portions of the Suit Property.*



10. Defendant Ms. Farida filed her **Written Statement**, where she took the *preliminary objection* that the Plaintiff Mr. Sheikh Firozuddin, who is Defendant's brother-in-law (*jeth*), is not the owner of the suit property as alleged by him and *had no locus to file the present Suit*. Though, due to some temperamental differences between the Defendant and her husband Mr. Aftab Ahmad, she had filed a *Suit for Permanent Injunction* and a *Petition under Section 125 Cr.P.C. for maintenance* against her husband Mr. Aftab Ahmad. An *FIR under Sections 498A/406/34 IPC* had also been registered against the Plaintiff and other family members of Mr. Aftab Ahmad, on the Complaint of the Defendant. She had also filed a Complaint under *Section 12 of the DV Act*, which is pending consideration. It was stated that the Plaintiff had filed this Suit, as a counterblast to her litigation.

11. Defendant had filed a *Suit for Permanent Injunction against her husband Mr. Aftab Ahmad*, who in fact, is the owner of the suit premises, as the Plaintiff and his brother Mr. Aftab Ahmad, were adamant to forcibly dispossess her from the suit premises. They even disconnected the electricity supply, as Plaintiff and his brother Mr. Aftab Ahmad are rich and influential people and have tried to misguide the learned Civil Court, by moving different Applications.

12. The Plaintiff had filed an Application under **Order I Rule 10 CPC read with Section 151 CPC**, asserting that he was the owner of the suit premises. All the documents of ownership relating to Mr. Aftab Ahmad (Defendant's husband) had been filed before the learned Civil Court, and the injunction **had been** granted in her favour and the electricity **supply had also been directed to be restored**, to the suit premises.



13. Defendant had also filed two *Contempt Petitions against the Plaintiff and other persons*; the present Suit is nothing but a counter-blast to her Contempt Petitions. The Suit has been filed only for putting pressure on the Defendant, who is a helpless, poor woman residing with her son in the suit premises, while maintenance of Rs.4,000/- per month is being provided to her by Mr. Aftab Ahmad (her husband), on the direction of the Court.

14. The Plaintiff and Mr. Aftab Ahmad have been putting all kinds of pressure on her, to vacate the house.

15. It was claimed that the Suit is *bad for misjoinder and non-joinder of all the necessary parties*. Mr. Aftab Ahmad (her husband) has not been made a party deliberately and intentionally, which is essential for proper adjudication of the Suit. The Defendant's minor son is also residing in the suit property, who must also be made a party.

16. It was further asserted that this Court has no jurisdiction to entertain the present Suit, as the suit property is situated in a posh area of New Delhi and its value is more than Rs.1,00,00,000/-.

17. Defendant further explained that the Agreement dated 23.04.1996 is in respect of Property in question between the brothers and mother of the Plaintiff, in which all the family members have got a share. Mr. Aftab Ahmad has got First and Second Floors, in his share. Therefore, the mother of the Plaintiff, could not have executed a Will in favour of the Plaintiff. The alleged Will is false and fabricated, which has been executed in connivance with Mr. Aftab Ahmad, after the disputes arose between the Plaintiff and Mr. Aftab Ahmad, her husband.

18. Had the Plaintiff been the owner of the suit property, the electricity and water connection in the suit premises would not have been installed in



the name of Mr. Aftab Ahmad, which again shows that the Plaintiff is not the owner of the suit property and the Suit is liable to be rejected under Order VII Rule 11 of C.P.C.

19. The Defendant further explained that the Plaintiff has been residing in Flat No.105, B-1, Punjabi Saudagauran Co-op Group Housing Society, Plot No.8, Samachar Apartments, Mayur Vihar, Phase-I Extension, Delhi, along with his family. He has no concern with the suit property and he was neither in possession nor resided in the same.

20. The entire Second Floor was occupied by the Defendant, out of which one room has been snatched by the Plaintiff, in connivance with Mr. Aftab Ahmad. The two Contempt Petitions filed in this regard, are pending before the learned Civil Court.

21. It was further asserted that the suit property comprised of Ground, First, Second and Third Floors. There are portions belonging to Sheikh Abdul Khalid, Mr. Mirazuddin, Dr. Sheikh Zaki, Mr. Shafiullah, Mr. Aftab Ahmad and Mr. Firuzuddin.

22. As per the Report of Deputy Assessor and Collector, Central Zone, M.C.D., Lajpat Nagar, dated 04.02.2005, the *ex parte* rateable value ('RV') was Rs.5,25,000/- per annum, w.e.f. 01.04.1999. The Defendant claims that her husband is the absolute owner of the suit property.

23. It was denied that Plaintiff and his mother Smt. Saeedan Nisa, were allotted Plot bearing No.G-45-B, East of Kailash, New Delhi admeasuring 327.19 sq. m. by DDA, pursuant to the Orders of the learned District Judge Delhi and possession of the said Plot was given on 09.10.1989. It was denied that the construction was raised by them, after getting a building plan sanctioned from the concerned Authority.



24. It was further denied that Smt. Saeedan Nisa @ Mst. Saidul Nisa, died on 15.07.2008 or that she had left her Will in favour of the Plaintiff. It was also denied that Defendant's husband Mr. Aftab Ahmad has divorced her, as per Sharia law, in the presence of witnesses. It was also denied that she had made false Complaints against the Plaintiff and the other family members or that she along with her brothers has caused nuisance and extended threats to the Plaintiff.

25. The Defendant asserted that being the wife of Mr. Aftab Ahmad, Plaintiff's brother, she is entitled to stay in the suit premises i.e. the entire Second Floor of the property in-question. It was denied that Mr. Aftab Ahmad had no right, title or interest in the suit premises or that the Property in-question was not her matrimonial home or that she had no right to reside therein. It was thus, submitted that the Suit is bad in law and may be dismissed.

26. The Plaintiff in the **Replication** re-affirmed the assertions as made in the Plaint and denied the allegations made in the Written Statement.

27. **Issues in the pleadings**, were framed on 12.05.2011 as under:

"1. Whether the plaintiff has no locus standi to file the present suit against the defendant? OPD

2. Whether the suit filed by the plaintiff has not been properly valued and this court does not have any jurisdiction to try and entertain the present suit? OPD.

3. Whether the plaintiff is entitled to decree of possession as prayed for? OPP

4. Whether the plaintiff is entitled to mesne profits/damages, if so, at what rate and for which period. OPP?



5. Whether the plaintiff is entitled to decree of permanent injunction as prayed for in the suit? OPP

6. Relief.”

28. **Plaintiff** examined himself as **PW-1** and tendered evidence by way of Affidavit Ex.P-1, wherein he re-affirmed the assertions made in the Plaint. He proved Site Plan, Original Possession Letter dated 09.10.1989, certified copy of Agreement dated 13.02.1989, etc. as Ex.PW-1/A to Ex.PW-1/U.

29. **PW-2, Mr. Aftab Ahmad**, the brother, tendered his evidence by way of Affidavit Ex.P-2, wherein he corroborated the testimony of the plaintiff.

30. **PW-3, Mr. Jitender Sharma, LDC, Record Room**, Tis Hazari Courts, Delhi, produced the summoned record of judicial file of Suit No.127/03 titled as “Saidul Nisa & Ors. Vs. Residents Welfare Association & Ors.”

31. **PW-4 Mr. Sanjeet Kumar, LDC, Record Room** (Sessions), Tis Hazari Courts, Delhi, produced the summoned record of judicial file of Suit No.1326/89 titled as “*Mst. Saidul Nisa vs. Union of India*, decided on 05.11.1990.”

32. **PW-5 (SIC) Mr. Shakeel Ahmad** tendered his evidence by way of Affidavit and deposed that he was the attesting witness to the Will dated 05.03.2008 of Smt. Smt. Saidul Nisa.

33. **PW-6 Sh. Ram Kumar, Head Clerk**, 01 Building, MCD, (Central Zone, Lajpat Nagar, produced the summoned record pertaining to sanction of building plan of the suit property, in the name of Firozuddin and Smt. Saidul Nisa, original of which is already Ex.PW-I/E.

34. **Defendant** examined herself as **DW-1** and deposed about the averments made in the Written Statement, by way of Affidavit of evidence



Ex.D-1. She also placed on record certified copies of Order dated 04.06.2011, statement of Plaintiff dated 04.06.2011, her Statement dated 04.06.2011, water bill, electricity bill and photograph of Property as Ex.DW-1/1 to Ex.DW-1/6; copy of Agreement dated 23.04.1996 as Mark-A; House / Property Tax Receipt dated 13.02.2009 as Mark-B; and copy of document issued by MCD on 04.07.2005 as Mark-C.

35. DW-2, Sh. K. N. Sharma, In-Charge Record Room, Saket Courts, New Delhi, produced the summoned record pertaining to file of MCA No.07/2009 titled as “*Firozuddin vs. Farida*”, to prove certified copies of Order dated 04.06.2011 as Ex.DW-1/1 and Statement of Firozuddin and Farida as Ex.DW-1/2 and Ex.DW-1/3.

36. Learned Civil Judge, on appreciation of the evidence, noted that there was no dispute that Plaintiff and his mother Smt. Saeedan Nisa, were allotted a plot bearing No. G-45-B, East of Kailash, New Delhi, by the DDA and that they became co-owners of the said property. The Plaintiff claimed that his mother had executed Will dated 05.03.2008 Ex.PW-1/H in his favour, by virtue of which he claimed to have become the sole and absolute owner of the property.

37. Plaintiff had examined PW-5 Mr. Shakeel Ahmad, one of the attesting witnesses, but it was held that he nowhere identified his signatures on the Will dated 05.03.2008 Ex.PW-1/H as well as the signatures of the executant, Smt. Saeedan Nisa. It was thus, concluded that this Will had not been typed in his presence and he was unable to prove the authenticity of the Will. *Therefore, it was held that the Will was not proved in accordance with law.*

38. It was also observed that Mr. Rama Shankar Shukla, the second attesting witness of the Will Ex.PW-1/H, had also not been examined, which



assumed importance, in view of the contradictions in the testimony of Plaintiff and PW-5 Mr. Shakeel Ahmad, the attesting witness. It was thus, on appreciation of evidence, concluded that *the Plaintiff failed to prove the genuineness of Will dated 05.03.2008 Ex.PW-1/H and was unable to remove the suspicion and doubts surrounding the execution of the Will*. Therefore, it was concluded that Plaintiff was unable to prove Will dated 05.03.2008 Ex.PW-1/H of Mst. Saidul Nisa, bequeathing her share in the suit property in favour of the Plaintiff.

39. It was further observed that parties to the Suit, were Mohammedans (Muslims) and therefore, Plaintiff's mother Mst. Saidul Nisa could not have bequeathed her entire share in the suit property, in favour of the Plaintiff, by virtue of Will dated 05.03.2008 Ex.PW-1/H, unless all her Legal Heirs gave their consent in bequeathing her estate in excess of 1/3rd share in the suit property and such bequest was not valid.

40. The Defendant's claim that her husband Mr. Aftab Ahmad had become exclusive owner of the suit property, by virtue of family partition, by virtue of Agreement dated 23.04.1996 Mark-A, executed by all LR's. of Mst. Saidul Nisa. However, it was held that the Agreement Mark-A did not confer any ownership rights in favour of the parties to the said Agreement. It was concluded that there were no title documents in the name of Mr. Aftab Ahmad, Defendant's husband.

41. It was also concluded that there was no title document executed in favour of Mr. Aftab Ahmad (Defendant's husband). The Electricity and Water Bills may be in the name of Mr. Aftab Ahmad, but neither of these conferred ownership upon him in the suit property.



42. The *Declaration of Surrender Ex.PW-1/I allegedly executed by Mr. Aftab Ahmad in favour of the Plaintiff*, in respect of his share, was held not to have been proved and thus, on the basis of this Declaration, Plaintiff could not claim himself to be the exclusive owner of the suit property.

43. It was thus, concluded that Will of Plaintiff's Mother, bequeathing her share in favour of the Plaintiff, was not established. Likewise, alleged execution of the Declaration by Mr. Aftab Ahmad in favour of the Plaintiff, was also not a reliable document.

44. It was held that Defendant, after her marriage, had come to reside in the suit property along with her husband Mr. Aftab Ahmad and had right to continue to reside therein. ***Therefore, the Suit of the Plaintiff had no merit and the same was dismissed by the learned Civil Judge, vide Judgment dated 16.01.2013.***

45. Aggrieved by this Judgment dated 16.01.2013, Plaintiff ***filed First Appeal bearing RCA No.65/2013 titled as Sheikh Firozuddin vs. Mst. Farida.***

46. Learned ADJ re-appreciated the entire evidence and ***concurred with the reasoning given by learned Civil Judge*** and held that the Will had not been proved by any cogent evidence. The Plaintiff did not have the exclusive right in the suit property and Mr. Aftab Ahmad along with the other Legal Heirs, became co-sharers in the half-share of the mother.

47. Aggrieved by this Judgment dated 27.02.2015, Plaintiff / Appellant has preferred the ***present Regular Second Appeal.***

48. The ***grounds of challenge*** are that the Defendant / Respondent is the divorced wife of his brother, Mr. Aftab Ahmad and he has no obligation to provide her residence in the suit property, as Mr. Aftab Ahmad had no right,



title or interest in the suit property. Furthermore, there was no domestic relationship between the Plaintiff and the Defendant and it is not her matrimonial home.

49. Additionally, the Respondent had claimed a right of residence in the shared household, but she cannot stake a claim in the Plaintiff's Property, of which he is the exclusive owner. It was claimed that Mr. Aftab Ahmad himself had no right, title or interest in the suit property and further, the Respondent has been divorced by Mr. Aftab Ahmad, on 17.10.2008.

50. The Agreement dated 23.04.1996, relied upon by the Respondent, does not confer any right, title or interest in favour of Mr. Aftab Ahmad or any other person in respect of the suit property. Furthermore, Mr. Aftab Ahmad had made a Statement before the Court, confirming that he had no right, title or interest in the suit property.

51. Mr. Aftab Ahmad, as PW-2, had deposed that he was permanently residing at the address of Ballimaran, Chandni Chowk, Delhi and that he had already divorced the Respondent, as per Sharia law on 17.10.2008. He also corroborated the exclusive and sole ownership of the Plaintiff in the suit property and also corroborated that the Will of their mother, had been executed in favour of the Plaintiff.

52. The Suit of the Plaintiff has been erroneously dismissed by holding that execution of the Will by the Plaintiff's mother in favour of the Plaintiff, had not been proved. In fact, the learned Trial Court was not competent to decide the issue of Probate and thus, the execution of Will, had no relevancy in the Case, especially when the Legal Heirs had no objection to the execution of the Will.



53. Only at the behest of the Respondent, who has no right to claim maintenance and residence from the Appellant, that the suit property has been illegally permitted to be retained by the Respondent. She is not entitled to any share in the Plaintiff's Property or of her husband Mr. Aftab Ahmad, which is beyond the claim of maintenance. The disputes between husband and wife, cannot be imposed upon the strangers including the Appellant. There is no express entitlement of the Respondent in the suit property, who has trespassed therein.

54. The criminal act of trespass, has been given a colour of civil dispute. The learned Court exceeded its jurisdiction in dismissing the Suit by observing that Mr. Aftab Ahmad had a share in the suit property and his wife / Respondent was entitled to stay in the same. Even, if the Will has been held to be not proved, it does not imply that the Plaintiff does not have locus standi to file the present Suit. He is admittedly a 50% shareholder in the suit property in his individual capacity, without prejudice to his being a co-owner with the mother, in respect of the remaining 50% of the share in the suit property.

55. The Defendant, who is the wife of his brother, cannot claim any right, since his brother Mr. Aftab Ahmad had no right, title or interest in the suit property. It has already been held that the Agreement dated 23.04.1996, did not confer any kind of ownership rights on Mr. Aftab Ahmad.

56. *The Declaration of Surrender dated 15.09.2008 Ex.PW-1/I* executed by Mr. Aftab Ahmad, in favour of the Plaintiff, has been erroneously rejected, by observing that it was neither stamped nor registered, as per Sections 17 and 49 of the Indian Registration Act.



57. It has been erroneously held that transfer of share by Respondent's husband / Mr. Aftab Ahmad, during the pendency of matrimonial disputes with the Defendant, would be hit by Section 39 of the Transfer of Property Act. The Declaration of Surrender in fact, had been executed prior to the divorce, which happened on 17.10.2008. It is submitted that the Judgment suffers from patent illegality.

Submissions heard and record perused.

58. The following **substantial question of law** was framed on **07.12.2015**:

“Whether the two courts below were justified in not granting the limited relief to the appellant as prayed for in the later part of prayer (c) in the plaint, namely, to restrain the respondent/defendant from entering and occupying any other portion of the property bearing no.G-45B, East of Kailash, New Delhi over and above the area of one room found to be in occupation of the respondent/defendant, particularly in view of the finding returned in para 93 of the original Judgment passed by the Trial Court dated 16.01.2014?”

59. The Plaintiff had sought possession of one room on the First Floor, which is in occupation of the Defendant / Respondent, and also to stop her from using the common facilities like latrine, bathroom and kitchen of the suit property, and also sought Damages and a decree of Permanent Injunction for restraining the Defendant from parting with the possession to a third party or trespassing into any other portion of the suit property.

60. It was an admitted case that Plaintiff / Appellant / Mr. Sheikh Firozuddin and his mother Smt. Saeedan Nisa @ Mst. Saidul Nisa, were



allotted the suit property bearing Plot No. G-45-B, East of Kailash, New Delhi, by DDA and they both became the co-owners.

61. Plaintiff, however, had claimed to have become an absolute owner, on the basis of the *Will dated 05.03.2008 Ex.PW-1/H, executed by Mst. Saidul Nisa in respect of her share, in favour of the Plaintiff.*

62. In order to prove the Will, he examined PW-5 Shakeel Ahmad, the attesting witness, who had deposed that he had attested the Will dated 05.03.2008 Ex.PW1/H. However, the *learned Civil Judge* had noted major discrepancies in the testimony of Shakeel Ahmad. It was found that he had nowhere stated that he had accompanied the Plaintiff to Tis Hazari for getting the Will typed. He also did not state that all the sons of Moht. Sadeedul Nisa were present, at the time of execution of the Will Ex.PW1/H. Rather, he deposed that his maternal grandmother had called him for execution of the Will in the presence of Mr. Shukla Ji and Advocate Lekh Raj Gambhir at 1156, Bali Maran, Chandni Chowk, Delhi, which indicated that Mr. Shukla Ji and Advocate Lekh Raj Gambhir, were also present at the time of execution of the Will.

63. Furthermore, it was also noted that the testimony of the other witnesses was inconsistent, with the claim of Shakeel Ahmad regarding his presence at the time of execution of the Will Ex.PW1/H. During his cross-examination, he was unable to tell the name of the person who had telephonically called him to be present as an attesting witness. It was, therefore, concluded that the presence of Shakeel Ahmad, the attesting witness, at the time of execution of the Will, was not beyond doubt.

64. Furthermore, as per the Plaintiff, the Will was drafted by Sh. Lekh Raj Gambhir, Advocate, at the instance of his mother, but it was nowhere



mentioned in the Will that it was drafted by Sh. Lekh Raj Gambhir. Both the Courts noted that Sh. Lekh Raj Gambhir was a material witness, who was not examined.

65. The learned Civil Judge as also the learned Additional District Judge, therefore, concluded that the Will Ex.PW-1/H had not been proved, in accordance with law. It is a finding of fact which cannot be re-appreciated in the present Regular Second Appeal.

66. Therefore, it has been rightly concluded that in the absence of a Will in favour of the Plaintiff by his mother, who was the owner of 50% of the property in question, he cannot claim to have acquired absolute ownership in the suit property. Therefore, the Plaintiff could not assert any right of having acquired the share of Mst. Saidul Nisa, as the exclusive owner of the suit property.

67. Furthermore, it has been rightly observed by both the Courts that the parties being Mohammedans, Mst. Saidul Nisa could not have bequeathed her entire share to the Plaintiff without the consent of all other legal heirs. Her bequest could be valid only to the extent of one-third of her share in the suit property. No such consent of the other legal heirs was proved on record. Thus, it was rightly held that the Will dated 05.03.2008 Ex.PW-1/H did not confer any exclusive ownership right in the suit property upon the Plaintiff.

68. It may also be noted that the ***Declaration of Surrender dated 15.09.2008, Ex.PW-1/I***, executed by Mr. Aftab Ahmad in favour of the Plaintiff, had been given after the execution of the alleged Will dated 05.03.2008 Ex.PW-1/H by Mst. Saidul Nisa. Under Mohammedan law, the consent of the other legal heirs to a bequest in favour of an heir, has to be given after the death of the testator, and a Declaration by one heir alone,



cannot be the consent of all the other legal heirs. Therefore, this Declaration of Surrender cannot be deemed to be the consent to the Will of the mother in respect of the entire share, but was a subsequent Deed of surrender/relinquishment, which required registration and also to be executed on the requisite stamp duty.

69. The defendant / Respondent had set up a defence that her husband, Mr. Aftab Ahmad, was the exclusive owner of the suit premises, by virtue of *family partition dated 23.04.1996 and Agreement Mark-A, which was claimed to have been executed by all the legal heirs.*

70. Admittedly, this was an Agreement executed inter-se six sons and three daughters of Mst. Saidul Nisa, and she was admittedly not a party to this Agreement. Secondly, it is also a copy of the Agreement Mark-A which has been produced by the Defendant and had not been proved by her, in accordance with law. Though PW-2 Aftab Ahmad, husband of the Defendant, had admitted his signatures on this Agreement and the same was not denied by the Plaintiff, the question remains what exactly was the import of the Agreement Mark-A. It was only an arrangement inter-se siblings wherein they agreed to be in occupation of their respective portions, as detailed therein. It did not state that the ownership would be transferred to the siblings as mentioned therein. Pertinently, no steps were ever taken by any of the parties to the Agreement to get the respective portions transferred in their names. There is also no evidence led on record that the respective portions were in their exclusive possession in the nature of ownership, to the exclusion of all others.

71. However, this Agreement Mark-A establishes that Aftab Ahmad, husband of the Defendant, had been living in the suit premises and the



Defendant had come to live in the suit premises along with him and her children. Subsequently, as disputes arose, Aftab Ahmad left the property while the Defendant continued to occupy one room, i.e. the suit premises. Essentially, the claim of the Defendant in respect of the suit premises rests on the premise that she has a right to occupy the suit property being the wife of Aftab Ahmad, the brother of the Plaintiff.

72. In this context, it is pertinent to observe that PW-2 Aftab Ahmad had deposed that he had divorced the Defendant on 17.10.2008 and there was also a written document. It is admitted by the Defendant that a Suit for declaration in regard to the Talaq/divorce has been filed by Aftab Ahmad, which is being contested by the Defendant and is still pending.

73. It is still not proved that the Defendant is legally divorced, as no Talaq-nama has been produced in the present proceedings and the factum of Talaq is disputed. It is thus, established that the Defendant came to reside in the property as the wife of Aftab Ahmad, who had earlier been in occupation of the suit property.

74. It is settled law that as the wife of Aftab Ahmad, she has a right of residence in the suit premises, but her claim is essentially against her husband, Aftab Ahmad, for which she has already initiated multiple litigations including under the Domestic Violence Act, criminal prosecution under Section 498A IPC and such other litigations. Unfortunately, though it is settled that in such like litigations the husband should be impleaded as a party so as to ensure that the woman or the deserted wife of such person is not left without any protection, Aftab Ahmad has not been made a party to secure the right of residence of the Defendant.



75. Therefore, in these proceedings, it has been rightly held that the Plaintiff cannot seek dispossession of the Defendant. Though the right to claim possession is of the rightful person, the right of the Defendant to continue in the suit property is subject to securing her right of maintenance against her husband, under the Domestic Violence Act. Till such time as her right is crystallized in the other litigation, she cannot be dispossessed, from the suit property, in which her husband is shown to have some share in that of the mother, who was half owner of the suit property. This is so, as the plaintiff had not been able to establish that Aftab Ahmed has no share in the suit property

76. The Defendant, who was the wife of the Plaintiff's brother Mr. Aftab Ahmad, cannot be considered as a trespasser in the suit property, especially in the absence of proof that Mr. Aftab Ahmad (her husband) had relinquished his share of the suit property in favour of the Plaintiff (his brother). The Declaration of Surrender dated 15.09.2008 executed by Mr. Aftab Ahmad in favour of the Plaintiff, Ex.PW-1/I, was neither properly stamped nor registered and was hit by Section 17 read with Section 49 of the Registration Act, 1908 and therefore, could not be considered as a valid document for relinquishing the share of Mr. Aftab Ahmad, in favour of the Plaintiff.

77. Furthermore, Section 39 of the Transfer of Property Act provides as under:

“39. Transfer where third person is entitled to maintenance.—

Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred,



the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.”

78. In view of Section 39 of the Transfer of Property Act, Mr. Aftab Ahmad (Defendant's husband) could not have transferred his share in favour of the Plaintiff (his brother), while there was matrimonial litigation pending between the Defendant and her husband Mr. Aftab Ahmad, purely to defeat and deprive the Defendant's right of maintenance. Therefore, it was rightly held that the Declaration of Surrender Ex.PW-1/I could not defeat the Defendant's right to residence in the suit property.

79. It was held by the learned Civil Judge in the Judgment dated 16.01.2013 that the Plaintiff could not claim exclusive ownership and the Defendant, being the wife of his brother Mr. Aftab Ahmad, even though divorced, was entitled to protection under Section 39 of the Transfer of Property Act and consequently, the Suit was dismissed.

80. The learned Additional District Judge, vide Judgment dated 27.02.2015, after re-appreciating the entire evidence, arrived at the same conclusion and upheld the dismissal of the Suit of the Plaintiff, by the learned Civil Judge.

81. The limited relief sought by the Plaintiff was to restrain the Defendant from entering and occupying any portion of the suit property beyond the one room, found to be in her occupation. In paragraph 93 of its Judgment dated 16.01.2013, the learned Civil Judge specifically held that the Plaintiff had led no evidence to establish that the Defendant was attempting to trespass into or occupy any other portion of the suit property in his possession.



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Notwithstanding the allegations of the earlier attempts at trespass, no subsequent attempt or breach of the interim order dated 12.05.2011 was established. This is a finding of fact, which has not been shown to be perverse or contrary to the evidence on record. In the absence of evidence establishing a threatened entry into any other portion in the Plaintiff's possession, the limited relief of injunction was rightly declined by both the Courts below.

82. Even otherwise, it may be noted that once it is held that the Defendant was occupying the suit property as the wife of Mr. Aftab Ahmad, who was a co-owner, no such Injunction could be granted. The only option with the parties is to seek partition and get their respective shares demarcated or to arrive at a Settlement. Till such demarcation is made or the ownership is settled by executing the documents in accordance with law, the Defendant cannot be restrained in the manner as claimed by the Plaintiff in his Suit.

83. Further, the Plaintiff failed to establish his exclusive ownership of the suit property, which remains joint and undivided amongst the co-owners.

Conclusion:

84. In the light of aforesaid discussion, it is held that the evidence has been rightly appreciated and there is no merit in the present Regular Second Appeal, which is hereby dismissed. The pending Applications are disposed of, accordingly.

**(NEENA BANSAL KRISHNA)
JUDGE**

OCTOBER 13, 2026/R