

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

% Judgment delivered on: 19.02.2010

+ RFA (OS) 13/2010

**SURJIT KAUR & ORS.**

..... Appellants

Through: Mr. Prem Kumar with Mr. Shiv K. Goyal,  
Mr. Ashok Bansal and Mr. Nilesh Sahni,  
Advocates

-versus-

**SMT. NIRMAL KAUR**

..... Respondent

Through: Mr. Raman Kapur with Mr. Dhiraj  
Sachdeva, Advocates

**CORAM:-**

**HON'BLE MR. JUSTICE SANJAY KISHAN KAUL**

**HON'BLE MS. JUSTICE VEENA BIRBAL**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in Digest?

**SANJAY KISHAN KAUL, J (ORAL)**

**CM No. 3183/2010 (exemption)**

Allowed, subject to just exceptions.

**RFA (OS) No. 13/2010 & CM No. 3181/2010 (u/o 41 R 25 CPC for framing of issues), CM No. 3182/2010 (for additional evidence) & CM No. 3180/2010 (stay)**

Admit.

Learned counsel for the respondent accepts notice.

At the request of learned counsel for the parties, appeal is taken up for final disposal.

A suit for partition was filed by the respondents in respect of property bearing no. C-18, Mansarovar Garden, New Delhi measuring 800 sq. yds. Late Shri Chanan Ram was the original owner of this property and prior to his demise executed a Will dated 27.03.1979 giving rights in terms thereof of 50 per cent each to the predecessors of the appellants and respondents respectively. This Will is not in dispute nor the shares of the parties as specified in the Will.

The defence raised by the appellants in their written statement is that the cause of action for filing of the suit has been wiped out on account of the memorandum of partition executed between the two groups dated 22.04.1994. The original document was not filed by the appellants who claimed that the same was in possession of the respondent.

A preliminary decree was passed by the learned Single Judge of this court on 29.09.2008 after all endeavours of Mediation had failed. In terms of the preliminary decree, shares of the two groups were declared as 50 per cent each and a Local Commissioner was appointed to suggest the mode of partition.

The order dated 29.09.2008 was assailed by the appellants in RFA(OS) No. 1/2009. The only ground urged by the counsel appearing for the appellants therein was that an issue was liable to be cast on the basis of the defence raised by the appellant as to whether a preliminary decree was at all required to be passed in view of the earlier memorandum of partition. The appeal was decided by the Division Bench on 07.01.2009. The Division Bench

noted that the sole defence raised was based on the Deed of Partition, a copy of which was on record and the relevant Clause 3 of that Deed was interpreted not to amount to a partition of the property requiring no further partition. The plea of the counsel for the appellants was based only on this Clause which reads as under:-

“3. That a plot No. 18-C, measuring 800 sq. yds. situated at Mansarover Garden, New Delhi was given to both the parties through a Will dated 27.03.1979 by Shri Chanan Ram son of Jatti Ram. In the half portion of this plot Ravi Dhiman is running a workshop, the name of which is Ravi Autos. In this land the party No. 2 has ½ share i.e. 400 sq. yds. But all the members of party No. 2 have right and share in this workshop. All parties are owners and in possession and responsible as per their shares. This writing has been executed, therefore, the same may be used at the time of need.”

The relevant observations of the Division Bench are as under:-

“It is the submission of the learned counsel for the appellants that the aforesaid clause amounts to a partition of the property in question and thus no further partition is required. The plea is thus predicated only to this clause of the said deed.

A bare reading of the aforesaid clause shows that no partition by metes and bounds has taken place. All that has been stated is the declaration of the shares of the parties and as to who is in occupation. Learned Single Judge thus rightly passed a preliminary decree for partition declaring the undisputed shares of the parties with a local commissioner to suggest the mode of partition.

It is trite to say that it is open to the appellants to plead before the learned Single Judge as to what should be the appropriate mode of partition keeping in mind that present position of occupation of the property. That will be an aspect to be considered when passing the final decree.

At this stage, learned counsel for the appellants also submits that there is an application pending for framing of issues to the aforesaid extent. Once we have come to the conclusion that no issue is required to be framed in this behalf, the application really does not

survive and that is the purport and intent of the impugned order.

We find no merit in the appeal.

Dismissed.”

The appellants aggrieved by this order preferred a Special Leave to Appeal (Civil) No. 2140/2009 in which the following order was passed on 09.02.2009.

“Heard counsel for the petitioner and Mr. R. Sundervardhan, learned Senior Advocate and Mr. Rahul Shukla on behalf of the respondent.

We do not find any reason to interfere with the impugned order.

However, all questions shall remain open, including the question about the report of the Local Commissioner.

The special leave petition is disposed of with these observations.”

The Local Commissioner proceeded to suggest the mode of partition dividing the property in equal share which suggestion has been accepted and a final decree was passed on 23.12.2009 which is now sought to be assailed by the appellants.

Learned counsel for the appellants fairly submits that his real grievance is that there was no need to repartition the property in view of the partition which had already occurred. He thus concedes that in case it is held that no partition had earlier taken place, then he cannot fault the report of the Local Commissioner or the conclusion arrived at by the learned Judge at the time of passing of the impugned order.

In our considered view, the question as to whether an issue was required to be cast and a trial held on the aforesaid aspect of there being earlier partition cannot be raised by the appellants once again in view of the order of the Division Bench dated 07.01.2009 in RFA(OS) No. 1/2009 which has received the impromptu of the Supreme Court in terms of the order dated 09.02.2009. The order dated 07.01.2009 categorically held that there was no prior partition and the division should take place by metes and bounds. The appellants, thus, chose to invite an order on merits on the premise on which the preliminary decree had been passed and thus the question of there being a prior partition was foreclosed by the Division Bench on 07.01.2009. The matter did not rest at this since the SLP filed by the appellant was dismissed categorically stating that there was no reason to interfere with the impugned order of the Division Bench dated 07.01.2009.

Learned counsel for the appellants, however, seeks to take strength from the observation in the order of the Supreme Court dated 09.02.2009 where, after observing that there was no reason to interfere with the impugned order, it has been further added "However, all questions shall remain open, including the question about the report of the Local Commissioner."

In our considered view, if the order is read as a whole, the only conclusion which can be drawn is that post passing of the preliminary decree insofar as the mode and manner of division is concerned, including the aspect of the report of the Local Commissioner would be examined by the learned Single Judge. The

order does not imply that once again the appellants can have a second round of litigation on the question of there being an earlier partition and, thus, not requiring the subsequent partition as prayed for by the respondents in the suit.

Learned counsel for the respondents has rightly pointed out to us that the repeated prolongation is occurring in the litigation on account of the fact that the appellants are in possession of the site while the respondents have been excluded which fact has been verified by the Local Commissioner in his report dated 08.11.2006 observing in Para 5 of the report:-

“That on site inspection it is clear that the plaintiff is not in possession of any part of the suit property No. C-18, Mansarovar Garden. The suit property is entirely in possession of Defendant No. 4.”

We must deprecate the endeavour of the appellants to again and again rake up the same issue which stands decided by the Supreme Court. Not only that, interim applications have been filed once again seeking framing of issues which relief has been declined by the order of the Division Bench dated 07.01.2009. There is also no ground to permit any additional evidence at this stage.

The appeal and applications are accordingly dismissed with costs of Rs. 15,000/- to be paid within 15 days.

**SANJAY KISHAN KAUL, J.**

**VEENA BIRBAL, J.**

FEBRUARY 19, 2010/kks