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HIGH COURT OF DELHI AT NEW DELHI

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RSA 215/2013

Decided on : 01st October, 2013

AVTAR SINGH THROUGH LRS Appellant

Through None.

versus

TRILOK SINGH (DECEASED)
THROUGH LRS AND ORS Respondent

Through Mr. Sanjeev Sindhwani, Sr. Adv.
with Mr. Naresh Kumar Beniwal, Adv.
For Lrs. Of R-3 Late Shri Ranjit Singh.

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

1. This is a Regular Second Appeal filed by the appellant against the judgment and decree dated 28th May, 2013 passed by the learned ADJ in RCA-II/2009.

2. I have heard Dr. N.K. Khetrapal, learned counsel for the appellant on the last date of hearing. The matter was kept for today for obtaining instructions as to whether the appellant would like to surrender the excess area over and above the share to which he is entitled in terms of the concurrent finding of the two

courts below. However, today despite second call neither the counsel has appeared nor the appellant is present.

3. I do not find that any substantial question of law is involved in the matter. On the last date the learned counsel for the appellant was not able to point out any substantial question of law being involved, although he had made three submissions assailing the judgment and decree passed by the First Appellate Court.

4. The first submission raised by the counsel was that the judgment and decree passed by the First Appellate Court upholding the judgment and decree of partition passed by the trial court is not sustainable in the eyes of law inasmuch as no valuation of the property was got done either by the Local Commissioner or by the court and as a consequence of which the share which has been given to the appellant at the rear portion of the suit property commands much lesser value in comparison to the share in the front portion of the building which has been given to the respondents.

5. The second submission was that even if the report of the Local Commissioner in terms of the judgment and decree is

accepted, the share which has been allocated to the appellant does not provide any passage from the building to have an access to his portion, and consequently the portion which is shown to have fallen to his share becomes landlocked and therefore the judgment and decree of partition with regard to both preliminary and final partition of the suit property is unsustainable in the eyes of law.

6. The third submission which was urged by the learned counsel was that even if the argument of the learned counsel for the respondent is accepted, that the appellant could have access to his portion from the adjoining street/gali purported to be of 17 ft. in width even then the appellant has the difficulty in obtaining permission for opening of a door in the gali as the area falls within the prohibited/regulated zone in terms of the Ancient Monuments & Archaeological Sites and Remains Act, 1958. Therefore, the judgment and decree deserves to be set aside and the matter deserves to be remanded back to the courts below for the purpose of allocation of the shares of the parties.

7. None of the submissions rendered by the learned counsel for the appellant involve any question of law much less substantial

question of law. Keeping in view the submissions made by the learned counsel, it would be pertinent here to give a brief background of the case.

8. A suit for partition was filed by one Ranjit Singh s/o Shri Trilok Singh against Shri Trilok Singh s/o Shri Dewan Singh, Kartar Singh s/o Shri Trilok Singh and Shri Avtar Singh s/o Shri Trilok Singh, for partition. It may also be worthwhile to mention here that Ranjit Singh, Kartar Singh and Avtar Singh are the real brothers while respondent Trilok Singh was an outsider. The case set up by Ranjit Singh was that he has got $\frac{1}{2}$ share in the suit property whilst the Trilok Singh has got $\frac{3}{20}$ share, Kartar Singh has got $\frac{1}{4}^{\text{th}}$ and Avtar Singh got $\frac{1}{10}^{\text{th}}$ share in the suit property. Since there was no dispute about the ownership of each of the parties, learned ADJ passed a preliminary decree way back on 21.5.1981, in respect of the share of the aforesaid four parties. The said preliminary decree was passed on the basis of the consensus of the parties and therefore the same never came to be challenged subsequent thereto.

9. The court appointed a Local Commissioner for the purpose of preparing a report as to how a property can be

partitioned amongst the co-sharers. It was also observed in the preliminary decree that as far as possible the Local Commissioner shall make minimum displacement of persons/co-sharers from the portions which were under their occupation. Mr. R.K. Vats, Local Commissioner furnished a report and gave the total area of the property as 1786.60 sq. yards which is equivalent to 16079.40 sq.ft. The Local Commissioner also prepared a tabulation with regard to the actual portion of the suit and the occupation of various parties in comparison to the portions or the area to which they were entitled. The said tabulation is being reproduced as under :

S.N o	Name of party	Area in possession sq. ft.	%age	Area as per Court's order	Area in Sq. ft.
1.	Late Shri Ranjit Singh	4908.40	30.53	52.50	8441.69
2.	Late Shri Kartar Singh	4901.00	30.48	27.50	4421.84
3.	Shri Avtar Singh	3148.00	19.58	12.50	2009.93
4.	Late Shri Hakim Singh	-----	-----	2.50	401.98
5.	Late Smt. Ram Piari	-----	-----	2.50	401.98
6.	Late Smt.Balwant Kaur	-----	-----	2.50	401.98
7.	Open area jointly used by parties	3122.00	19.41		
Total		16079.40 sq.ft or 1786.60 sq.yds.			16079.40 sq. ft or 1786.60 sq.yds.

10. In the light of the aforesaid report, the Local Commissioner also observed that keeping in view the location of the plot as two sides are open and each of the parties will have uninterrupted right of passage and light and also their original occupancy can be maintained so as to cause minimum displacement. It may also be pertinent to mention that by the time the Local Commissioner furnished his report, the matter had been transferred to the Court of learned Civil Judge on account of enhancement of pecuniary jurisdiction and the learned Civil Judge accepted the report of the Local Commissioner.

11. The deceased appellant Mr. Avtar Singh filed objections to the report of the Local Commissioner which was on the same lines on which the submissions have been urged in appeal before this court. All the objections were considered by the learned Civil Judge and the same were disposed of vide a detailed order dated 19.9.2005, culminating into a final decree.

12. The appellant feeling aggrieved by the said judgment and decree passed by the learned Civil Judge filed an appeal before the court of learned ADJ titled as *Avtar Singh Vs. Tirlok*

Singh(deceased) & Ors. bearing RCA No. 11/2009 and the same was also dismissed on 28.5.2013

13. Feeling dissatisfied, the appellant filed the present Regular Second Appeal. The points which have been now raised by the learned counsel for the appellant are three fold as stated above. The learned counsel has raised objection with regard to the non valuation of the property and has placed reliance on ***Niranjana Lal Aggarwal Vs. Shri Prem Nath Aggarwal, 1998 V AD(DELHI) 999*** and ***Saraswati Debi & Ors. Vs. Satya Narayan Gupta, AIR 1977 Calcutta 99***. In both these judgments no doubt the court while passing a final decree of partition has observed that valuation of the property ought to have been done but the facts of both these cases are totally different from the facts of the case in hand. No doubt the valuation of the property is the fundamental principle which has to be followed by the court in a case where the Local Commissioner gives a report that the property cannot be partitioned by metes and bounds but in the instant case, the Local Commissioner has not given any such report that the property in question cannot be partitioned by metes and bounds. More so, when the built up area of the property was huge which was to the

extent of 17000 sq ft. approx., and this was to be shared amongst the four co-sharers, now the legal heirs. Further the share of the appellant happens to be only 12.5% and the share of remaining parties happens to be only 87.5%. When the parties who are owning substantial portion of the share do not raise any objection on account of non-valuation, in such a contingency the valuation of the property was not necessary and it is raised only to prolong the matter. In addition to this the mandate of the court in the very first order when the preliminary decree was passed was that the Local Commissioner will ensure that the partition takes place on the basis of minimum displacement of the parties from their respective portions of occupation. The suit for partition having been filed in 1975, the appellant has been successful in prolonging the partition by metes and bounds for almost 35 years. The appellant admittedly as on date is entitled to 2009 sq. ft of area while at present he is holding 1000 sq. ft., more area for the last more than almost 35 years. In such a contingency the plea of valuation of the property is not only mala fide but further to prolong the disposal of the case.

14. The second point which has been raised by the learned

counsel for the appellant that the portion which has been allotted to him has become land locked and the third point with regard to the objection of opening a door in the gali on account of prohibition by the authorities under the ASI is interconnected.

15. Mr. Sindhvani, learned Senior counsel for the respondent has referred to the judgments of the Apex Court in *Shub Karan Bubna alias Shub Karan Prasad Bubna Vs. Sita Saran Bubna and Ors.*; (2009) 9 SCC 689 and *Niranjan Lal Aggarwal Vs. Sh. Prem Nath Aggarwal*; 1998 V AD (Delhi) 999, where it has been laid that once a preliminary decree for partition is passed so far as to passing a final decree is concerned, that is only ministerial in nature and it has to be done only after obtaining a report of the Local Commissioner. If this court is to go by the judgments of the Apex Court then once the share of the parties was determined the subsequent passing of the final decree by the court after obtaining report of the Local Commissioner was only an act which was ministerial in nature, and the same could not be assailed by filing the second appeal and raising any question much less a substantial question of law with regard to the ministerial act. No judgment to the contrary has been cited by the learned counsel for the appellant

in this regard.

16. The third point with regard to opening of a door in the 17 ft. wide gali where the portion which is falling to the share of the appellant is concerned, the contention of the learned counsel for the appellant is that his share has become land locked is not correct. The submission that he will have difficulty in obtaining permission from ASI for opening of a door in the gali because the area is falling in prohibited area near the monument, it may be pertinent to mention here that the appellant has never applied for grant of such a permission. My attention has been drawn by the learned counsel for the respondent to Rule 6.4.1 of the Unified Building Bylaws of 1983 which clearly lays down that for the purpose of opening a window and a door which opens in the street or gali and which is not opening in somebody's portion, no permission of MCD is required. The relevant rule reads as under:

“6.4.1 No notice and building permit is necessary for the following alterations, which do not otherwise violate any provisions regarding general building requirements, structural stability and fire safety requirements of the Bye-laws.

a)... ..

b)... ..

c)... ..

d) Opening and closing windows, ventilators and doors not opening towards other's property.”

17. If that is so then there is absolutely no permission required for opening a door in the gali by the appellant. Even otherwise also, the appellant can always apply to the ASI for grant of such a permission and if the permission is refused then he can have appropriate recourse of law. All the three submissions in my considered opinion which have been made before this court by Dr. Khetrapal on the last date of hearing are not raising any question of law much less substantial question of law which cannot be entertained by this court. I accordingly feel that the Regular Second Appeal is without any merit and the same is hereby dismissed.

V.K. SHALI, J

OCTOBER 01, 2013/mg