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

Reserved on: 9th December, 2019

Date of decision: 15th January, 2020

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CM (M) 72/2015

RAJ KUMAR SETH

..... Petitioner

Through: Mr. Rajeev Kumar, Advocate.
(M:9868592272)

versus

PAWAN KUMAR SETH AND ANR.

..... Respondents

Through: Mr. Rajinder Mathur, Mr. Sandeep Kapur
and Mr. R.K. Kataria, Advocates for R-1.
(M:9810085889) Mr. R. P. Luthra and Mr.
Sourabh Luthra, Advocates for R-2.
(M:9818133399)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The Petitioner - Mr. Raj Kumar Seth and the Respondents - Mr. Pawan Kumar Seth and Mr. Vijay Kumar Seth are the three sons of late Mr. K.K. Seth. A suit for partition was filed by Mr. Pawan Kumar Seth in respect of the suit property E-2/11, Krishna Nagar, Delhi-110051. A settlement was entered into between the brothers on 24th April, 2010 and the suit was decreed on 10th May, 2010. The terms of the settlement are as under:

“1. That the above noted matter is settled between the parties as they are real brother & living together at suit

premises at the following terms and conditions.

2. That suit property bearing no. E-2/11 measuring about 236 sq. yards is belong to Plaintiff & defendants.

3. That all the parties are agreed to divide said property in three equal portions.

4. It is further agreed between the parties that defendant no. 1 i.e. Mr. Raj Kumar will take the portion situated at three side open & after that defendant no. 2 Sh. Vijay Kumar & remaining will be the portion of Plaintiff i.e. Sh. Pawan Kumar.

5. It is further settled between the parties that plaintiff Sh. Pawan Kumar & Defendant no. 2 are at liberty to either sell out or construct their portions respectively together.

6. That it is further agreed between the Plaintiff and defendant no.2 that within six month they will either construct or sell their portion as they both are agreed for either construction or sell together.

7. That till the construction will start plaintiff & defendant no. 2 will not ask the defendant no. 1 to vacate the premises.

8. That after the settlement before the court of Ms. Nirja Bhatia, Senior Civil Judge in this matter then plaintiff Plaintiff will withdraw all the cases filed against the defendant no. 1 & 2.

9. That the above-said agreement is out of freewill and wish of both the parties and without any pressure or coercion from any corner or any threat.

10. Both the parties have agreed and undertaken to abide by all the terms & conditions of the present settlement. ”

2. As per the above settlement, the brothers agreed to divide the property in three equal portions and the exact portions were also demarcated. Two of the brothers i.e., Mr. Pawan Kumar Seth and Mr. Vijay Kumar Seth had the option of selling out or constructing their respective portions, however, until the said construction was started, Mr. Raj Kumar Seth would not be asked to vacate the premises. After the settlement was entered into, according to the Petitioner-Mr. Raj Kumar Seth, no application was made for sanctioning of plans for construction and thus, he cannot be asked to vacate the portion of the property, which is under his occupation.

3. In effect though the brothers agreed for one-third share each in the property, the manner in which the agreement was drawn showed that the practicable implementation of the same had become difficult, and in effect Mr. Raj Kumar Seth continued to remain in his portion of the property, which was larger than the portion which fell in his share. An execution petition to enforce the settlement decree came to be filed, in which the executing court came to the conclusion that there were reciprocal promises which were imposed. The court held that execution of the decree is not possible as there were obligations on all the parties and the executing court cannot go behind the decree. The observations of the executing Court are relevant and are set out below:

“9. A perusal of the decree sheet, which essentially incorporates all the terms of the mediation settlement, reflects that obligations and counter-obligations were imposed on both the sides. It further reflects that

obligations and counter-obligations were interlinked to each other. The mediation settlement had cast an obligation on Sh. Pawan Kr. Seth and Sh. Vijay Kr. Seth to either start construction or sell their portion within 6 months and that till the time the construction does not start, Sh. Raj Kumar Seth would not vacate the premises. In other words, Raj Kr. Seth was obliged to vacate the premises under his occupation only when the construction commenced. There are some problems with this kind of an obligation imposed upon Sh. Pawan Kr. Seth and Sh. Vijay Kr. Seth. When clauses no. 3 & 4 had already mandated that the property would be partitioned in three equal portions then, to my mind, it could not be the concern of anyone as to what would they do with their portion. The obligation imposed upon them that they should either sell out or construct their side within 6 months is also problematic. In practical terms, selling out could possibly ensue only when the property was partitioned by metes and bounds. Not only this, why should the Court decree ask the party, to whose share the property has come upon partition, to sell it out? It is entirely the domain of that party to sell it out, or lease it out, or mortgage it, or gift it, or bequeath it by Will, or exchange it or create some sort of a charge upon it. Not only this, can the Court force them to sell out their portion of the property if they choose instead to gift it or bequeath by Will. The decree is also not clear if Raj Kr. Seth would vacate or not vacate the portion of the property under his occupation if they exercise their option to sell out and not to construct. This problem is further compounded by the fact that in terms of the decree Raj Kr. Seth could not be asked to vacate the premises till the time the 'construction' actually commences. Now the initiation of construction is also

linked with the process of obtaining permission from the municipal authority. The sum and substance of all this is that the obligations and counter-obligations imposed on both the sides are so reciprocal and interlinked to each other that they cannot be separated. And any attempt to tinker with them or to sever them out from each other would be to defeat the directions of the decree and go behind it, which this executing Court cannot at all do.

...

10. As held in Jai Narain Ram Lundia (supra), it is my view that the execution in the present case cannot be ordered for the reason that the obligations imposed on the parties are so conditioned that performance by one is conditional on performance by the other. And in this eventuality, Sh. Pawan Kr. Seth could, have obtained execution of the decree only if he showed to the Court that he along with Sh. Vijay Kr. Seth had started performance of their part of the obligations by selling out or applying and taking the necessary permission from the concerned municipal authority for 'construction' of their portion of the property.

*11...When an execution application under Order XXI of CPC is filed the executing Court cannot perhaps go about amending the decree so as to remove any ambiguity. The mandate of the Civil Court in the form of the decree has to be executed as a whole. The executing Court would not go about sifting the terms of the decree and amend them with a view to set at rest the ambiguities therein. I have gone through the judgment of **Abdul Salik Khan** (supra). This judgment does not say that an executing Court can go about amending the decree so as to remove ambiguities.*

*Secondly, the reasoning that the decree could not be said to be a non-executable one inasmuch as it was a consent decree drawn up on the statement of both the sides is also not entirely correct. In **Chen Shen Ling v. Nand Kishore Jhajharia**, AIR 1972 SC 726, the Apex Court held that the decree, even though a consent one, could not be executed if the obligations were reciprocal and interlinked and the applicant did not show that he had performed his side of the obligations. That apart, even if the argument that the objections cannot be re-agitated as it already stands dismissed is accepted, yet the fundamental problem that would remain with this executing Court would be as to how to go about executing the terms of the decree which imposes reciprocal obligations on the parties, and which obligations are closely interlinked to each other.*

*12. I have no doubt in my mind that the decree in question, even though a consent one, cannot be executed in view of the principles laid down in **Jai Narain Ram Lundia** (supra), and **Chen Shen Ling** (supra). The execution stands dismissed. The execution file be consigned to record room."*

4. Thus, the executing Court dismissed the execution petition, however, revived the suit thereafter. The observations of the executing Court while reviving the suit are as under:

"13. However, the fact that the execution stands dismissed cannot leave Sh. Pawan Kr. Seth remediless. His suit has to be necessarily revived. It is ordered accordingly. The civil suit stands revived. It be registered as civil suit.

14. Now that the civil suit stands revived, this court is not circumscribed by the provisions of Order XXI, CPC or section 47, CPC.

15. In the mediation cell, the parties had agreed that each of them have 1/3rd share in the suit property. This portion of agreement which was voluntarily entered into between the parties before the mediation cell is a valid one. Thus this portion of agreement is liable to be accepted by the Court. However as per the legal procedure, no preliminary decree was drawn up thereby prescribing the shares of the parties, though, it ought to have been drawn. This mistake on part of the court needs to be corrected now so as to prevent further complications.

16. Accordingly, a preliminary decree is being separately drawn up in the civil suit by holding that each of the parties (Pawan Kumar Seth, Raj Kumar Seth and Vijay Kumar Seth) to the case have 1/3rd share in the suit property bearing no. E-2/11, Krishna Nagar, Delhi. Attested copy of this order be placed in the civil suit. Civil suit shall come up for hearing on 02.12.2014. The execution file be consigned to record room.

5. The submission of the ld. counsel for the Petitioner- Mr. Raj Kumar Seth is that the executing court, while dismissing the execution petition, could not have directed revival of the civil suit, inasmuch as this was beyond the power of the executing court. The Petitioner's case is that the executing court could not have modified the decree and drawn up a preliminary decree holding that each of the brothers has a 1/3rd share.

6. This Court has perused the settlement. The clauses of the settlement, do not impose any reciprocal obligations. The features of the settlement are:

- i. That the property shall be divided into three equal portions - one for each of the brothers.
- ii. The portion which is three-side open was to fall in the share of Mr. Raj Kumar Seth. The remaining two portions fell in the share of Mr. Pawan Kumar Seth and Mr. Vijay Kumar Seth.
- iii. Mr. Pawan Kumar Seth and Mr. Vijay Kumar Seth were at liberty to either construct or sell their share of the property.
- iv. The said sale or construction had to happen within a period of six months.
- v. Till construction starts, Mr. Raj Kumar Seth would not be asked to vacate the premises.

7. In the above settlement, an impasse has been created because of the last term of the settlement and the manner in which the same is being interpreted by the parties. The settlement itself was entered into in 2010, and almost ten years have passed since then. For whatever reasons i.e., either due to non-sanctioning of plan, sub-division not being permissible etc., there have been practical problems for sale and construction of the property by the two brothers of their respective portions. These problems

may not have been anticipated by them at the time when the settlement was entered into. The case of the Respondents is that the Petitioner is occupying a larger portion of the premises than what falls in his share and in fact has deprived the Respondents of enjoyment of their share in the suit property.

8. The executing Court has erred in holding that this is a settlement which contains reciprocal obligations. In fact, this is a settlement, which imposes a positive obligation on Mr. Raj Kumar Seth to vacate when construction is commenced by the other two brothers. The settlement itself makes it clear that the construction was to be started within six months, which appears to have not been possible due to reasons that this Court does not wish to go into.

9. Under such circumstances, can the entire settlement be set at naught ? The answer is clearly 'NO' and the settlement has to be given effect to, failing which great injustice would be caused to the parties concerned. The three brothers have been litigating since 2010, even after the passing of the decree. This is clearly because one party i.e., Mr. Raj Kumar Seth, is in occupation of a larger portion of the premises than what falls in his share as per the settlement and the *status quo* enures to his benefit. The other two brothers cannot be deprived of the enjoyment of their share in the property only because they cannot sell their shares or commence construction. Under these circumstances, the executing Court ought to have given effect to the spirit of the settlement. A person in whose share a particular property vests, is free to use it in the manner which he prefers. The respective portions of

the property falling in the share of Mr. Pawan Kumar Seth and Mr. Vijay Kumar Seth are liable to be enjoyed by them as per their own will. The portion which is falling in the portion of Mr. Raj Kumar Seth would be liable to be enjoyed by him, but he cannot claim any right to continue to enjoy the portions which fall in his brothers' shares.

10. Accordingly, this Court is of the opinion that firstly, when a settlement agreement is drawn, Courts and mediation cells ought to ensure that there is no ambiguity in the same. Initially, the mediation cell/trained mediators have to record the terms of settlement in a manner so as to leave nothing in the area of doubt. Implementation of the settlement ought to be kept in mind while drawing up the settlement agreement.

11. A Court before whom a settlement agreement is placed also has an obligation to read through the settlement and record its satisfaction as to the legality and practicality of the same. If the Court finds any ambiguity, the same ought to be resolved before the decree is passed. In ***Bhavan Vaja And Ors. vs Solanki Hanuji Khodaji Mansang (1973) 2 SCC 40.***, the Supreme Court has held as under:

“19. It is true that an executing court cannot go behind the decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For construing a decree it can and in appropriate cases, it ought to take into consideration the pleadings as well as the proceedings leading up to the decree. In order to find out the meaning of the words employed in a decree the court, often has to

ascertain the circumstances under which those words came to be used. That is the plain duty of the execution court and if that court fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it. Evidently the execution court in this case thought that its jurisdiction began & ended with merely looking at the decree as it was finally drafted. Despite the fact that the pleadings as well as the earlier judgments rendered by the Board as well as by the appellate court had been placed before it, the execution court does not appear to have considered those documents. If one reads the order of that court, it is clear that it failed to construe the decree though it purported to have construed the decree. In its order there is no reference to the documents to which we have made reference earlier. It appears to have been unduly influenced by the words of the decree under execution. The appellate court fell into the same error. When the matter was taken up in revision to the High Court, the High Court declined to go into the question of the construction of the decree on the ground that a wrong construction of a decree merely raises a question of law and it involves no question of jurisdiction to bring the case within Section 115, Civil Procedure Code. As seen earlier in this case the executing court and the appellate court had not construed the decree at all. They had not even referred to the relevant documents. They had merely gone by the words used in the decree under execution. It is clear that they had failed to construe the decree. Their omission to construe the decree is really an omission to exercise the jurisdiction vested in them."

Thus, the executing court has to construe the decree and give effect to the same. Litigants cannot be allowed to litigate even after settlements are entered into and decrees are passed. The ambiguity in drawing up of decrees

is a short-coming in the system, first of the lawyers, then of the mediator in this case, finally of the court which accepted the settlement and decreed the suit without removing the ambiguity. No litigant can be put to hardship due to the said shortcomings.

12. In the present case, the settlement agreement, did not contemplate the consequences of non-commencement of construction and the question of vacation by Mr. Raj Kumar Seth, if the construction does not start. This was a clear vacuum in the settlement agreement leading to ambiguity in its implementation.

13. A Court is not powerless in such a situation. A settlement agreement resulting in a decree has to be given effect to and implemented in order to ensure that litigants do not enter into settlement agreements and completely renege/ walk out on the same. Settlement decrees are expected to bring finality to disputes and are not intended to lead to further disputes, as has happened in the present case.

14. Accordingly, this Court is of the opinion that since, for whatever reasons, the two brothers have been unable to commence construction in their respective portions, the Petitioner - Mr. Raj Kumar Seth is obliged to move into his portion of the property as per clause 4 of the settlement. The remaining two portions shall then be in the respective shares of Mr. Pawan Kumar Seth and Mr. Vijay Kumar Seth. The site plan, which is placed on record has clearly demarcated the respective portions as follows:

- Red portion (A) (3-side open): Raj Kumar Seth
- Blue portion (B): Pawan Kumar Seth
- Green portion (C): Vijay Seth

The said site plan, which is filed as Annexure X at page 186 of the paperbook shall operate as the final decree between the parties.

15. The executing Court was empowered to get the property physically demarcated as per the said site plan which this Court directs shall now be done. Accordingly, it is held that the Petitioner, Mr. Raj Kumar Seth shall handover vacant and peaceful possession of portions marked B and C, within a period of three months, to his brothers, Mr. Pawan Kumar Seth and Mr. Vijay Kumar Seth and move into his portion i.e., portion A. The site plan is attached to this judgment in order to obviate any ambiguity/dispute in the same. The matter is sent back to the executing Court in order to give effect to the order passed today.

16. The petition is disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

JANUARY 15, 2020/dj

SITE PLAN

