

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

RSA No.2265 of 2011 (O&M)

Date of Decision.04.11.2016

Mahavir Dayal (since deceased) through LR

.....Appellant

Vs

Rajnish Gupta and others

.....Respondents

Present: Mr. Shailendra Jain, Senior Advocate with
Mr. Sahil Nayyar, Advocate
for the appellant.

Mr. M.K. Mittal, Advocate
for respondent Nos.2 to 7.

Mr. Subhash Rana, Advocate
for Mr. P.R. Yadav, Advocate
for respondent No.33.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

-.-

AMIT RAWAL J. (ORAL)

The appellant-defendant No.15 is aggrieved of the impugned judgment and decree whereby the final decree in pursuance to the application for passing of the final decree for possession by partition, has been allowed and the objections have been dismissed.

Mr. Shailendra Jain, learned Senior Counsel assisted by Mr. Sahil Nayyar, Advocate submits that on 25.04.1950, the civil suit bearing No.436/368 was instituted seeking partition of the movable and immovable shops and business, much less, for rendition of accounts for certain business on the ground that the property is joint family property and they have been carrying on business under the various names and styles as per the list of businesses attached to the plaint, though according to him the businesses were defunct. The claim of the respondents-plaintiffs was decreed to the

extent of the property mentioned at Sr. Nos.2, 4, 6, 8, 9, 13, 14, 16, 18, 19,

21, 22, 23, 25 and 27 in the list 'B/1' filed by defendant Nos.1 to 16 and rest of the claim was dismissed vide judgment and decree dated 17.04.1954. The Regular First Appeal was preferred in the year 1961 against the said judgment and decree and the same was dismissed by the Division Bench on 19.04.1961, except ordering that the item of property which the defendants have proved to be the exclusive property of the plaintiffs i.e. Item No.26 in List B attached to the plain, be not partitioned and given exclusively to the plaintiffs.

During the interregnum period, many of the legal heirs have died. After a period of long 38 years, an application was moved by one Gansham Dass-defendant No.2 along with Parkash Gupta and Purshotam Dass Gupta-defendant Nos.6 and 7 respectively for drawing a final decree for possession by actual partition. Objections were filed against the same, which were dismissed vide order dated 19.09.2000. On 03.10.2000, the trial Court appointed a local commissioner for the purpose of demarcation of the property. He was directed to partition the properties in dispute as per the shares determined in the preliminary decree and to submit the proposed partition. However, on 13.02.2004, another order was passed whereby the same local commissioner, who was present in court, was directed to furnish the report in compliance of the previous order suggesting the mode of partition of the properties.

He also draws attention of the Court to the subsequent order dated 16.04.2004 regarding the awaiting of the report of the local commissioner, thus, in substance, local commissioner submitted his two reports i.e. one dated 20.09.2001 Ex.P8 and another one dated 06.05.2004, Ex.P3. Against the report of the local commissioner, objections were filed

by one Rajneesh Gupta, one of the legal heirs of Harish Chander-defendant No.4, taking as many as 8 objections. In sum, they are reproduced as under:-

(i) that the local commissioner had allotted the property mentioned at Sr. No.22 of List B-1 to the judgment debtor including the objector.

(ii) that the local commissioner had acted in collusion with the representative of decree holder without assigning reasons. He could not have allotted the property to the decree holder, in essence, cannot withdraw from the share of judgment debtor because of the fact that after allotment of aforementioned properties to the judgment debtor vide LC report dated 20.09.2001, objection qua this property was made and it was prayed to be given to the decree holder.

(iii) that the objector had also submitted objections with regard to the measurements of the property which was not commensurating with the sale deeds. The demarcation was also not proper.

(iv) that the local commissioner arbitrarily mentioned the rate of the property in Annexure J as ₹10,000/- per square yard instead of ₹2100/- sq. yards, in essence, the local commissioner failed to assess the value of the construction of the property in question as per the collector rate.

He submits that the report of local commissioner was/is incomplete, improper and not according to the directions of the Court below. The said objections have been dismissed by the trial Court. The appeal was filed by the said objector and as well as by defendant No.15-

Rajneesh Gupta. The appeal was withdrawn and only the cross objection of defendant No.1 remained pending. The grounds of appeal were identical one to the objections taken by Rajneesh Gupta and therefore, the lower Appellate Court has abdicated in dismissing the appeal by not appreciating the aforementioned facts. The final decree is totally erroneous and not in accordance with the preliminary decree, much less, the previous report, thus, the subsequent report is vitiated, beyond the scope of provisions of Order 26 Rule 14 CPC. The local commissioner has not been examined and therefore, the appellants have been prevented to ascertain the truth in cross-examination, thus, urges this Court for setting aside the judgment and decree rendered by the lower Appellate Court.

Per contra, Mr. M.K. Mittal, learned counsel appearing for respondent Nos.2 to 7 and Mr. Subhash Rana, Advocate for Mr. P.R. Yadav, Advocate for respondent No.33 submit that the order dated 30.10.2002 is self-contained as it had not only directed the local commissioner to demarcate the property as Annexure A filed by the objector Rajneesh Gupta with the help of the relevant record but he was also directed to furnish his report upon the properties mentioned at Sr. Nos.19 and 22 and thereafter, another occasion arose for the Court on 16.04.2004 to direct the demarcation of all the suit properties afresh. The said order has never been assailed by either of the parties. The aforementioned order reads as under:-

“Order dated 16.04.2004

Present: Sh. M.S. Gupta, Advocate for the DH.

Sh. D.P. Nadwani, Advocate for the JD.

Shri S.N. Verma, Advocate for the LC.

The report of the LC suggesting mode of partition of the suit property not received. The LC Shri S.N. Verma, has stated at bar that he could not prepare the requisite report suggesting mode of

partition of the suit property as the parties did not cooperate with him. Upon it, learned counsel for the parties assured full cooperation to the LC. Hence, as proposed by this Court. The LC Shri S.N. Verma, has informed both the parties in the court itself that he would visit the spot this Sunday on 18.4.2004 at 10.00 AM sharp and that it should be treated as due notice to the parties from his regarding his proposed visit.

At this stage, learned counsel for the DH contended at bar that first of all his objections earlier preferred by him be decided as certain properties as mentioned in his objections could not be demarcated properly. Heard. When asked upon by this Court, the LC agreed to conduct the demarcation of all the suit properties afresh. Therefore, the LC is directed to conduct the demarcation of all the suit properties afresh prior to suggesting mode of partition. Accordingly, the objections preferred by the DH earlier in this regard stands disposed of. Now let the report of the LC in compliance of interlocutory order dated 30.10.2002 passed by the learned predecessor court coupled with the report suggesting mode of partition of the suit properties be awaited for 29.04.2004.

*CJ(SD), Rewari.
16.04.2004.”*

Decree holders were to get 2/3rd share whereas the judgment debtor 1/3rd share as per the preliminary decree. He also draws attention of this Court to the report dated 06.05.2004 attached as Annexure P-3 whereby every explanation has been given. The appeal of the appellant-defendant No.15 was not maintainable in the absence of objections to the report, thus, urges this Court for confirming the finding rendered by the lower Appellate Court.

I have heard learned counsel for the parties, appraised the paper book and of the view that there is no force and submission of Mr. Jain. This Court stood flabbergasted qua the manner in which the preliminary decree of the year 1954 and drawing of the final decree, has been assailed as late as

application for drawing of the final decree was moved in the year 1992 but the fact remains that from 1992 onwards till 2011, the defendants have been successful in not bringing it to its logical end. The order dated 16.04.2004 leaves no manner of doubt that no objection had been raised by any of the parties for re-demarcation of all the properties afresh. Even the appellant-defendant had never filed any objection against the report of the local commissioner but as noticed above, Rajnish Gupta had withdrawn his appeal. In my view, defendant No.2 cannot step into the shoes of Rajnish Gupta and other defendants by raising the objections for the sake of it. The litigants who made all possible attempts in causing every possible impediment/hindrance in the execution of the decree, particularly as noticed in the instance case, should be dealt with heavy hands. In my view, filing the present appeal and as well as before the lower Appellate Court was nothing but arm-twisting tactics, in essence, the attempt was to tire out the decree holders so that they succumb to the pressure being wielded/mounted. There is always an attempt of the party not to accept the verdict/regard the judgment but cool their heels in the court rooms desiring deprivation of the fruits of the decree to the actual person.

It is a matter of record that during the interregnum, many persons have left for heavenly abode yet appellant-defendant No.15 had been audacious enough to raise all possible objections as noticed above. Rather the filing of the appeal, the appellant-defendant No.15 should challenge the report of the local commissioner for the purpose of drawing the final decree, as the order dated 16.04.2004 is crystal clear. There was no objection to the same.

As per the report, Annexure P3, local commissioner has taken

care of every aspect by taking into consideration the Collector's rate and measured the property at the spot. Some time it happens that with regard to the property mentioned in the sale deed, exact area is not the same as per the site. Even the previous order also dealt with regarding the property bearing No.19 & 22. For the sake of brevity the order of the Court below dated 30.10.2002 reads as under:-

“Sh. S.N Verma, Advocate, appointed LC in this case. Arguments on objections heard. Learned counsel for the applicant/DH made a request that there is a dispute regarding actual dimension in the disputed property made by LC. The LC present in the Court have also stated that there can be clerical mistake regarding demarcation of the property, same can be ascertained again by demarcation. This request was also opposed by DH as such. Shri S.N. Verma, Advocate is directed to demarcate the property as Annexure A filed by the applicant Rajnish with the help of their relevant record. The LC is also directed to furnish his report upon the property mentioned at Sr. No.19 and 22. He may take the help of the draftsman. The fee of LC is fixed Rs.4,000/- which shall be paid by the applicant Rajnish. Now for awaiting of report to come up on 20.11.2002. Copy of original report may be given to the local commissioner.”

For the foregoing reasons, I do not find any illegality and perversity in the judgment and decree rendered by the lower Appellate Court as the same is based upon correct appreciation of fact and law, much less, no substantial question of law arises for consideration. No ground for interference is made out. The second appeal is dismissed.

(AMIT RAWAL)
JUDGE

November 04, 2016
Pankaj*

Whether speaking/reasoned Yes

Whether reportable Yes