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

+ CM(M) 85/2015 & CM No.1595/2015

NAVEEN CHAND RASTOGI Petitioner
Through Mr.K.Sunil, Adv.

versus

JAGDISH PRASAD & ORS Respondent
Through Mr.K.Venkatraman, Adv. for R-4
Mr.Sunil Ahuja, Adv. for LR's of R-6
& R-7

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

ORDER

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28.07.2016

1. By the present petition the petitioner seeks to impugn the order dated 4.12.2014 passed by the trial Court dismissing his application under Section 151 CPC seeking directions. The facts of this case have a very chequered history. The suit is filed by the plaintiff/respondent No.1 seeking a preliminary decree of partition in respect of Shop No.2382(Old) and 3603(New) and Balakhana i.e. First floor of property No.3603 with joint staircase bearing No.3604 and second floor constructed by the predecessor of defendants No.1 to 5 situated in Ward No.IX, Bazar Sita Ram, Delhi-110006 shown as red in the plan annexed to the plaint in favour of the plaintiff and against defendants No.1 to 9 declaring share of the plaintiff as 10% and of defendants No.1 to 9 as 10% each. Other connected reliefs were also sought.

2. A preliminary decree was passed by the Court on 27.5.2004. The trial Court concluded that the suit of the plaintiff/respondent No.1 stands proved

and passed a preliminary decree in respect of property as prayed for. A Local Commissioner was appointed to suggest the mode of partition.

3. The petitioner moved an application before the trial court under Order 21 CPC questioning the area of the suit property. The trial Court held that there was no objection filed at any stage by the petitioner on the record, objecting to the description of the suit property during the entire trial. The trial Court also noted that defendant No.1/petitioner did not file an appeal against the preliminary decree despite expiry of six years. The Court held that the challenge to the factual matrix cannot be a subject matter of a petition under Order 21 CPC and a party to the suit cannot re-open the entire issues in this manner. The petition was dismissed on 18.12.2010 with the cost of Rs.9,000/-.

4. Against the preliminary decree dated 27.05.2004 the petitioner/ Naveen Chand Rastogi filed an RFA being RFA No.28/2011 i.e. 7 years after passing of the preliminary decree. On 16.4.2013 the petitioner withdrew the RFA with liberty to challenge the order dated 18.10.2010 inasmuch as dispute relates to identification of 25sq.yds. area in respect whereof the preliminary decree has been passed. This Court gave liberty to the petitioner to avail appropriate legal remedies and disposed of the RFA as withdrawn.

5. Subsequently, the petitioner challenged the order dated 18.12.2010 and filed a Civil Miscellaneous Petition No.539/2013 before this court. The petitioner chose to withdraw the same with liberty to move an appropriate application before the concerned Court. This Court on 20.5.2013 dismissed the CM(M)539/2013 with liberty so sought. In view of this the petitioner has now moved the present application under Section 151 CPC which has

been dismissed by the trial Court by the impugned order.

6. A perusal of the impugned order shows that the trial Court has noted the objection of the petitioner that the area of the property in question was not mentioned in the judgment and decree dated 27.5.2004 and that the portion could only be in respect of a property admeasuring 25 sq.yds and not beyond the area of 25 sq.yds. The Court noted the history of earlier litigation indulged in by the petitioner and noted that the petitioner/defendant No.1 had not disputed the area of the suit property in the written statement. Plaintiff/respondent No.1 had proved the site plan of the suit property as Ex.PW1/2 during his examination in chief and no objection was raised by the petitioner. The disputed questions which were raised in the present application were also subject matter of an application under Order 6 Rule 17 CPC and which was also dismissed. Hence, the trial Court dismissed the said application in the light of the conduct of the petitioner.

7. Learned counsel for the petitioner has strongly urged that a perusal of the sale certificate issued by the Court by which the predecessors of the parties had purchased the property would clearly show that the area of the suit property measures only 25 sq.yds. In response to a question posed by this Court as to what is the Municipal number of the property to which the petitioner objects as not forming a part of the suit property, he submits that the said property has no Municipal number but is on the rear side of the property which is the subject matter of the plaint filed by respondent No.1.

8. At this stage, the Court posed another question to the petitioner as to how he claims title to this rear portion of the property behind the suit property as described in the plaint. The answer to the same is that it is by

way of adverse possession inasmuch as the said property has been in his occupation and in hostile possession of the petitioner adverse to all the respondents.

9. Learned counsel for the respondent has submitted that the petitioner is in possession of substantial portion of the suit property and these objections are being raised now to delay the actual physical partition of the suit property. The preliminary decree is of 2004 and the petitioner is only trying to retain physical possession of the suit property. He submits that it would be in the interest of justice that the present petition be dismissed.

10. A perusal of the plaint which was filed by the respondent No.1 shows that a detailed description of the property is given in para 3 and para 4 of the plaint. In the written statement the petitioner has stated “that para 3 and 4 of the plaint are not denied”. The written statement also admits that the construction raised on the second floor would devolve upon the parties and the respondent No.1 would be entitled to claim share in the second floor construction.

11. It is also an admitted fact that in the course of evidence no such plea was raised by the petitioner, at any stage. The pleas now sought to be raised are raised only after the preliminary decree was passed and the Local Commissioner was appointed.

12. The contention of the petitioner that the need and occasion to raise these pleas arose only after the Local Commissioner sought to partition the area on which the petitioner has exclusive rights is misplaced and cannot be believed in view of the conduct of the petitioner as reflected in the pleadings and evidence led by the petitioner. The written statement filed by the petitioner and the evidence led by the petitioner do not show this

objection/contention being raised, at any stage. Implicit in this conduct is that the petitioner had accepted the description of the property as given in the plaint.

13. Further, I may point out that the petitioner has repeatedly challenged the various orders before this court including the preliminary decree which was passed on 27.5.2004 by means of RFA, an order dismissing the objections of the petitioner on 18.12.2010 before this Court by means of CM(M)539/2013 and on each occasion he has merely withdrawn the petition instead of taking the challenge to its logical conclusion.

14. In my opinion, there is merit in the contention of learned counsel for respondent No.4. The preliminary decree has been passed in 2004. Despite lapse of 12 years, the actual partition has not made any progress. The petitioner is needlessly delaying matters.

15. I see no infirmity in the impugned order passed by the trial Court. The present petition is accordingly dismissed.

JAYANT NATH, J.

JULY 28, 2016/n