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

+ RFA 217/2015 & CMs No.6017/2015 (for stay) & 6020/2015 (u/S 149 CPC)

NEELAM BAWA NEE AHLUWALIA & ANR Appellants
Through: Ms. Nitika Bhutani, Adv.

Versus

SUDARSHAN BATRA & ANR Respondents
Through: Mr. Yudhvir Singh, Adv. for Mr.
Nishant Datta, Adv. for R-1.
Mr. Satyalipsu Ray, Adv. for Mr.
Neeraj Kumar, Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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09.03.2016

1. This first appeal impugns the “final judgment” dated 24th November, 2014 of the Court of Additional District Judge (ADJ)-06 (West), Tis Hazari Courts, Delhi in CS No.287/2014 titled *Sudershan Batra Vs. Mrs. Eisha Warrik & Ors.* By the said “final judgment”, on perusal of the report of the Architect, it was concluded that the property cannot be partitioned by metes and bounds and the property has to be auctioned.
2. The appeal came up before this Court first on 6th April, 2015 when notice thereof was issued.
3. The counsel for the respondent No.1 Sudershan Batra as well as counsel for the respondent No.2 Eisha Warrik have chosen not to appear and have sent proxy counsels who do not know anything about the case and merely seek adjournment.

4. I have enquired from the counsel for the appellants, whether any appeal was preferred against the preliminary decree for partition.
5. The counsel for the appellants states that in fact there is no preliminary decree and no final decree and neither has been drawn up.
6. I have perused the Trial Court record requisitioned in this Court and find that on 8th May, 2001, on the statement of the defendant No.1 i.e. Smt. Eisha Warrik that she had no objection to the passing of a preliminary decree for partition and the defendant No.2 i.e. appellant herein Smt. Neelam Bawa being *ex-parte* and on the statement of the counsel for the defendant No.3 i.e. the appellant No.2 Sh. Ashok Kumar Sardana that his client has also no objection to the passing of the preliminary decree for partition, a preliminary decree for partition was passed holding the respondent No.1/plaintiff Sudershan Batra to be entitled to 50% share and the defendants No.1&2 Eisha Warrik and Smt. Neelam Bawa to be entitled to 25% share each in the property and an Architect appointed to suggest whether the property could be divided by metes and bounds.
7. On enquiry, whether the appellants had preferred any appeal against the said preliminary decree, the counsel for the appellants states that since it was not a preliminary decree, an application under Order VII Rule 11 of the Civil Procedure Code, 1908 (CPC) was filed and dismissed and the order of dismissal whereof was upheld till the Supreme Court.
8. Section 97 of the CPC provides that where any party aggrieved from a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

9. The appellants thus in this appeal cannot dispute the shares of the parties as declared on 8th May, 2001.

10. As far as the contention of the counsel for the appellants of the preliminary decree having not been drawn up, the same was not a bar to the appellants appealing thereagainst, inasmuch as CPC after amendment provides for appeal against the judgment and not against the decree. Under the earlier regime also, the appellants were entitled to prefer an appeal treating the last paragraph of the judgment as a decree. The appellants having not challenged the said declaration of shares, cannot now challenge the same and the challenge in the present appeal has to be confined to the conclusion of the property being not devisable by metes and bounds.

11. The counsel for the appellants is unable to say anything as to how the conclusion of the property being not devisable by metes and bounds is erroneous. In fact, she is not able to point out any site plan even of the property. The property concerned is House No.H-2, Kirti Nagar, New Delhi and in the absence of anything to show that it can be divided by metes and bounds so as to put in each party into possession of separate portion of the property representing value of his / her share, no case for interference with final decree of partition by sale of the property and appropriation of sale proceeds in accordance with the shares of the parties is made out.

12. The appeal is accordingly dismissed.

No costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MARCH 09, 2016/bs..