

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

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Date of decision: 3rd May, 2016

+ RFA 217/2014, CMs No.9307/2014 (for interim relief), 9308/2014 (for condonation of 1461 days delay in filing the appeal) & 179/2015 (u/O V R-20 CPC)

RICHH PAL & ORS

..... Appellants

Through: Mr. B.L. Gupta, Adv.

Versus

NIHAL CHAND & ORS

..... Respondents

Through: Mr. Prem Chhetri, Adv. for R-1,2,3,6,7,8 & 10..

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns (i) the final decree/judgment/decreed dated 30th January, 2014 and preliminary amended decree dated 6th May, 2010 of the Court of Additional District Judge (ADJ), Central – 14 in CS No.244/206; and, (ii) the “entire auction process” and seeks a direction allowing the five appellants to purchase the property.
2. The appeal is accompanied with an application for condonation of 1461 days delay in filing thereof.

3. Notice was issued and though all the ten respondents are reported to have been served but the counsel only for respondents no.1,2,3,6,7,8&10 appears. None appears for the other respondents who are proceeded against *ex parte*.

4. On 19th August, 2015, it was the contention of the counsel for the appearing respondents that against the preliminary decree for partition, RFA No.310/2010 had been preferred by the same five appellants and which stood dismissed.

5. In this light of the matter, the file of RFA No.310/2010 was also directed to be produced before this Court and has been received.

6. The trial court record requisitioned in this Court has also been perused.

7. What emerges is:

(i) That vide order dated 31st May, 2007 in the suit for partition from which this appeal arises, the following Issues were framed:

1. Whether the Plaintiff is entitled to the relief of partition, as prayed for? OPP

2. Whether the Plaintiff is entitled to the relief of mandatory injunction, as prayed for? OPP
3. Whether the Plaintiff is entitled to the relief of permanent injunction, as prayed for? OPP
4. Whether the suit is not maintainable? OPD
5. Whether the Plaintiff has no cause of action? OPD
6. Whether Chhotey Lal had executed the Will dated 04.06.1980. If so, its effect? OPD.
7. Relief.

and the suit listed for plaintiff's evidence and the respondent no.1 / plaintiff viz. Sh. Nihal Chand filed his affidavit by way of examination-in-chief but subsequently filed an application under Order XII Rule 6 of the CPC and vide order dated 20th January, 2010 the said application was allowed and it was ordered that the suit property be divided between the respondent no.1 / plaintiff and "defendants no.1 to 5" by metes and bounds by giving equal share to all the parties and a preliminary decree for partition was passed and a Court Commissioner appointed to divide the property by metes and bounds giving 1/6th share in the property to each of the respondent no.1 / plaintiff and the five defendants.

- (ii) Sh. Richh Pal and Sh. Braj Bhushan who are the appellants no.1 and 3 herein filed RFA No.310/2010 in this Court against the preliminary decree for partition dated 20th January, 2010; the said appeal was entertained and vide order dated 11th May, 2010 therein, the operation of the impugned judgment and decree stayed.
- (iii) However before that, vide order dated 26th February, 2010, the trial court finding that the property was very small and partition by metes and bounds was not feasible ordered the property to be sold by public auction with liberty to the defendant no.3 in the suit to purchase his share and appointed a Court Commissioner to sell the property.
- (iv) The respondent no.1 / plaintiff filed an application under Order I rule 10 of the CPC to implead the daughters of common ancestors of the parties and who are respondents no.6 to 8 in this appeal. The said application was allowed and the preliminary decree earlier passed on 20th January, 2010 was on 6th May, 2010 amended and instead of the preliminary decree

earlier passed being for division of the property into six shares, the property was ordered to be divided into nine shares.

(v) However, thereafter owing to the interim order dated 11th May, 2010 in RFA No.310/2010, further proceedings before the trial court were adjourned from time to time.

(vi) After the RFA No.310/2010 was dismissed in default on 25th February, 2013, the trial court proceeded with the auction of the property and a final decree for partition dated 30th January, 2014 was passed reporting that the property had been auctioned for Rs.47,00,000/-.

8. The counsel for the appearing respondents state that the auction purchaser has deposited Rs.47,00,000/- in the Trial Court and all the other sharers except the five appellants who represent 1/9th share in the property have withdrawn their share and have vacated the property and that the appellants have not vacated the property inspite of giving undertaking to the trial court to vacate the property and have instead filed this appeal.

9. The appellants blame the advocate earlier engaged by them for the dismissal of the earlier appeal and for the delay in filing this appeal.

However upon it being asked as to how after the dismissal of earlier appeal, this appeal is maintainable and whether not Section 97 of CPC precludes the appellants from disputing the correctness of preliminary decree, the counsel for the appellants contends that the earlier appeal was against the preliminary decree dated 20th January, 2010 and the present appeal is against the preliminary decree dated 6th May, 2010 as well as against the final decree dated 30th January, 2014.

10. The condonation of delay of 1461 days in preferring the appeal against the preliminary decree dated 6th May, 2010 is sought pleading i) that the previous counsel for the appellant Sh. J.N. Singh, Advocate was to file an appeal against the preliminary decree dated 20th January, 2010 as well as amended decree dated 6th May, 2010 but was found to have filed the appeal only against the preliminary decree dated 20th January, 2010 and not against the amended decree dated 6th May, 2010 and which appeal had also been dismissed in default; ii) the appellants came to know about this fact only on 21st April, 2014 when they obtained internet copy of the order dated 25th February, 2014 in RFA No.310/2010 “after consulting their previous counsel who was also taking the matter lightly”; iii) that the delay in filing the appeal is due to the negligence on the part of the previous counsel.

11. A perusal of file of RFA No.310/2010 shows the same to have been instituted on 30th April, 2010 i.e. before the amendment on 6th May, 2010 of the preliminary decree dated 20th January, 2010, though the said RFA came up first before the Court only on 11th May, 2010. The statement of the appellants for seeking condonation of delay to the effect that they had instructed their counsel to in RFA No.310/2010 also impugn the amended decree dated 6th May, 2010 thus is found to be false. Also, while the appellants in the application for condonation of delay have blamed their “previous counsel Sh. J.N. Singh, Advocate” but RFA No.310/2010 is found to have been filed by Mr. G.K. Srivastava, Advocate who only continued to appear for the appellants therein till 8th February, 2011. Mr. J.N. Singh, Advocate / his proxy are found to have appeared only with effect from 20th April, 2011. The vakalatnama of Mr. Jainandan Singh and Associates, Advocates on the file of RFA No.310/2010 is of 10th February, 2011.

12. RFA No.310/2010 is found to have been dismissed in default on 25th February, 2013 after none appeared for the appellants therein on 22nd November, 2012, 22nd January, 2013 and 7th February, 2013. No application for restoration thereof also is found to have been filed.

13. A perusal of the trial court record shows:

- (i) the appellants through the same Mr. J.N. Singh, Advocate also filed CM(M) No.47/2011 against an order dated 8th December, 2010 in the suit from which this appeal arises;
- (ii) the vakalatnama of Sh. J.N. Singh, Advocate having been filed on behalf of the appellants before the trial court on 4th January, 2010 i.e. before the preliminary decree dated 20th January, 2010 (it is thus not as if Mr. J.N. Singh, Advocate was appearing for the appellants only in this Court and not in the trial court);
- (iii) the counsel for the appellants having taken an objection before the trial court on 12th April, 2010 that the daughters of the common ancestor had not been impleaded as a party to the suit;
- (iv) the respondent no.1 / plaintiff to have filed the application under Order I Rule 10 of the CPC to implead the daughters of the common ancestor in the light of the aforesaid objection of the appellants and the said application having been allowed on 6th May, 2010, without any objection on the part of the appellants or any other defendant;

- (v) the preliminary decree dated 20th January, 2010 having been modified on 6th May, 2010 on the request of all the parties and in which the counsel for the appellants also joined;
- (vi) the order and the preliminary decree dated 20th January, 2010 having merely been amended and no fresh decree having been passed;
- (vii) the order dated 8th December, 2010 of the trial court recorded the statement of the counsel for the appellants that they supported the respondent no.1 / plaintiff's case;
- (viii) the trial court, after the dismissal of RFA No.310/2010, in the presence of the appellants vide order dated 1st July, 2013 having appointed a Local Commissioner and vide order dated 21st August, 2013 having directed auction of the properties and settled the terms of the said auction;
- (ix) the trial court vide order dated 30th January, 2014, again in the presence of the appellants having recorded that one of the properties had already been partitioned and the dispute remained with respect to the other property only which was

ordered to be auctioned and was auctioned for Rs.47,00,000/- and having directed distribution thereof in terms of the preliminary decree and having directed all the parties to vacate the property;

- (x) no objection having been raised by the appellants at any time when the orders for auction of the property were made and when owing to the laxity in the respondent no.1 / plaintiff in taking steps therefor, the proceedings were adjourned from time to time.

14. The appellants as aforesaid have already suffered dismissal of RFA No.310/2010 against the preliminary decree dated 20th January, 2010 and which dismissal has been allowed by the appellants to attain finality. The distinction sought to be drawn by the counsel for the appellants by contending that while RFA No.310/2010 was against the preliminary decree dated 20th January, 2010 and this appeal is against the amended preliminary decree dated 6th May, 2010 is also fallacious and a sham argument. A perusal of the memorandum of this appeal shows that the grievance urged by the appellants is not with respect to the amendment dated 6th May, 2010 of

the preliminary decree for partition dated 20th January, 2010 and whereby the property was ordered to be divided between nine shareholders instead of between six shareholders as had been decreed on 20th January, 2010 but against the decree dated 20th January, 2010 only.

15. The other grievance made by the appellants in the memorandum of appeal is with respect to the manner in which the property was auctioned.

16. However the remedy of the appellants if were aggrieved thereform, was by objecting thereto before the trial court and which the appellants admittedly did not do. The only explanation therefor in the memorandum of appeal is that the proceedings in the trial court were in English language which the appellants did not understand. Else, it is contended that the price fetched by the property of Rs.47,00,000/- is less as the valuation of the property as per circle rate also is Rs.50,69,986.31p. The appellants also offer to purchase the property therefor. However the appellants admittedly did not make any bid at the time of auction nor offered before the trial court to purchase the property themselves. The offer now, after all the other eight shareholders have vacated the property and received their share of sale proceeds is only to put a spoke in the eviction of the

appellants from the property pursuant to the decree and with an intention to extract more monies from the auction purchaser on the ground of otherwise delaying their eviction by using the process of the Court but which according to me would be abuse of the process of this Court and which this Court cannot allow the appellants to indulge in.

17. The appellants have also not made out a case of having been the victim of their advocate. The appellants have not taken any action against the advocate whose victim they claim to be. The ground of blaming the advocate cannot again be allowed to perpetuate the possession of the property and that too at the cost of another. The appellants are found to have been personally attending each and every date of hearing before the trial court and having consented to the various orders of the trial court and cannot for this reason also now by engaging a new advocate put the blame on the earlier advocate engaged and who has had no opportunity even to meet the blame put on him.

18. The counsel for the appellants in his written submissions handed over in the Court has annexed a plethora of judgments to allege non compliance of various provisions of the CPC qua the auction. However as aforesaid no

grievance in this respect was urged before the Trial Court. There is accordingly no adjudication by the trial court on any of the grievances urged before this Court for the first time. The appellants can prefer an appeal to this Court only against an order of the trial court and as aforesaid there is no such order. I also entertain serious doubts as to the very maintainability of the appeal in so far as against the auction proceedings. The proceedings post the decree for partition are by way of execution and the appellants cannot club this appeal against the amended preliminary decree dated 6th May, 2010 with the challenge to the proceedings in the execution of the decree.

19. However need is not felt to delve in detail on all these aspects or to deal with the judgments annexed by the counsel for the appellants to his written submissions as I am of the view that the appellants are abusing the process of the Court. As aforesaid, one of the two properties has already been partitioned and the appellants have availed of the benefit thereof and are now not allowing the partition of the other. Moreover, once it is found that there is no cause for condoning the delay in appealing against the amended decree dated 6th May, 2010, the challenge to the other proceedings in pursuance thereto is in any case barred by Section 97 CPC supra.

20. The proceeding is also found to be by way of re-litigation and for this reason also abusive.

21. The appeal is accordingly dismissed.

22. The appellants are burdened with costs of Rs.20,000/- to be deducted out of their share of the auction proceeds and to be deposited with Delhi High Court Bar Association Lawyers' Social Security and Welfare Fund, New Delhi.

Decree sheet be drawn.

RAJIV SAHAI ENDLAW, J.

MAY 03, 2016

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(Corrected and released on 17th June, 2016).