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

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Judgment delivered on: 01.12.2016

+ **FAO(OS) 336/2016 & CM APPL.43650/2016 & 43652-53/2016**

MKJ DEVELOPERS LIMITED

.... Appellant

versus

GREEN ACRE HOLDINGS LIMITED

.... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Arvind Nigam, Sr. Adv. with Mr K. Datta, Mr Sarvapriya & Mr Rahul Malhotra.

For Respondent : Mr Raashi Sen with Mr Mohit Sharma.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This appeal is directed against the order dated 18.10.2006 passed by a learned single Judge of this Court in CS(OS) No.719/2006. Earlier, a preliminary decree had been passed in the said suit on 15.07.2013. In the judgment of the same date, the learned single Judge, while declaring the shares of the parties, made it clear that the passing of the preliminary decree as prayed for in the suit would not affect any of the rights and

contentions of the parties in the suit in Calcutta (CS No.84/2006) which was pending between the parties. This observation was made as, according to the learned single Judge, it was consistent with the order dated 17.11.2009 of the Supreme Court holding that both the suits would go on, that is, the suit at Calcutta and the suit at Delhi.

2. The learned single Judge by virtue of the judgment dated 15.07.2013 made it clear that before further steps could be taken regarding the division of the property bearing no.3, Barapuilia Road, Nizamuddin East, New Delhi by metes and bounds, it was necessary to await the decision in suit no.84/2006 pending in the High Court at Calcutta. As a result, the learned single Judge directed that further proceedings in the CS(OS) 719/2006 be put on hold and consequently it was adjourned sine die to await the decision of the High Court at Calcutta in CS No.84/2006 and the parties would be at liberty to mention the suit CS(OS) 719/2006 for listing after disposal of CS No.84/2006 pending in the High Court at Calcutta.

3. The suit at Calcutta is still pending and the evidence is being led. As such neither party applied for further steps in CS(OS) 719/2006 but the Registry on its own listed the same on 23.07.2015 when another

learned single Judge issued court notices to the parties. On 07.01.2016, a Commissioner was appointed to suggest the ways and means of partition of the property by metes and bounds and the Commissioner filed a report suggesting partition of the property, which is stated to be an open piece of land.

4. The learned single Judge while passing the order dated 07.01.2016, however made it clear that the report of the Local Commissioner would not be given effect to till the verdict of the High Court at Calcutta in CS No.84/2006 is considered by the Court in Delhi. The matter was thereafter listed before Court on 18.10.2016 whereupon the impugned order was passed by another learned single Judge. By virtue of the impugned order, the learned single Judge has endeavoured to proceed with the suit (CS(OS) 719/2006) without awaiting the decision of the High Court at Calcutta. Some comments were also made in the impugned order with regard to there being serious doubts about the High Court at Calcutta having territorial jurisdiction in respect of the suit for specific performance being CS No.84/2006 which was pending before it. The learned single Judge observed as under:

“10. Though undoubtedly on 15th July, 2013, further proceedings in this suit were put on hold and the proceedings in the suit were adjourned sine die but the fact remains that there is no stay of the High Court of Calcutta with respect to the said suit. Even otherwise, I fail to see as to how passing of the final decree for partition in this suit would affect the suit at Calcutta. If the final decree for partition is of division of the property by metes and bounds, the defendant, if succeeds in the suit at Calcutta can always, in pursuance to the decree if any in its favour in the suit at Calcutta, get the portion of the property which as per the said final decree of partition falls to the share of the plaintiff. Conversely, if the final decree for partition is by sale of the immovable property, the defendant can if obtain orders from the High Court of Calcutta for preservation of the sale proceeds of the share of the plaintiff or can itself bid and seek appropriate direction with respect to the share of the plaintiff.

11. Moreover, if the lis before the High Court of Calcutta is without that Court having territorial jurisdiction, in any case no purpose will be served in keeping the suit pending before this Court.

12. I may also mention that it cannot be left to the parties to choose the pace at which they want the lis to be decided by the Court. Once the lis is before this Court, it is the bounden duty of this Court to see to its logical conclusion as per its diary and keeping such suits pending is to the detriment of the image of the Court and erodes the faith of the people in the judicial process.

13. I therefore do not see any reason to keep the suit pending.

14. The counsel for the defendant however states that he is not prepared since the suit was expected to remain stayed and seeks adjournment to consider all the aforesaid aspects.

15. While adjourning the matter, I may in this regard notice that the defendant if so desires can, in the interregnum, also make appropriate application before the High Court of Calcutta.

16. The plaintiff may also consider the aspect of territorial jurisdiction and take appropriate steps before the High Court of Calcutta.

17. List on 29th November, 2016. No further adjournment shall be granted.”

5. The appellant is aggrieved by the fact that although in the preliminary decree itself, a direction that no further steps be taken in the suit (CS(OS) 719/2006) is embedded, by virtue of the impugned order, the learned single Judge has endeavoured to take the matter further despite the fact that the suit at Calcutta has not been decided.

6. According to the learned counsel for the appellant, this is not permissible in law as that would amount to re-writing the preliminary decree which could only be corrected by way of an appeal, which neither of the parties preferred. The learned counsel for the appellant drew our attention to a decision in the case of **Mool Chand and Others v. Deputy Director, Consolidation and Others: (1995) 5 SCC 631** wherein the Supreme Court made observations with regard to the nature of a preliminary decree as under:

“24. But the matter, so far as preliminary decree is concerned, does not end here.

25. Preliminary Decree is an appealable decree. Section 97 of the Code of Civil Procedure provides as under:

"97, Appeal from final decree where no appeal from preliminary decree - Where any party aggrieved by a preliminary decree passed after the commencement of this Code 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."

26. Thus, if an appeal is not filed against the preliminary decree and its correctness is not challenged, it becomes final and the party aggrieved thereby will not be permitted to challenge its correctness in an appeal against final decree.

27. The Privy Council in Ahmed Musaji Saleji and others v. Hashim Ebrahim Saleji and Others, AIR (1915) PC 116, held that failure to appeal against a preliminary decree would operate as a bar to raising any objection to it in an appeal filed against final decree. Thus Court in Venkata Reddy v. Pothi Reddy has held that the impact of Section 97 is that the preliminary decree, so far as the matters covered by it are concerned, is regarded as embodying the final decision of the Court passing that decree. It observed as under:

"A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as embodying the final decision of the Court passing that decree,.....".

This decision was relied upon in Gyarsi Bai and Ors. v. Dhansukh Lal in which it was observed as under :

"It is true that a preliminary decree is final in respect of the matters to be decided before it is made. It is indisputable that in a mortgage suit there will be two decrees, namely preliminary decree and final decree, and that ordinarily the preliminary decree settles the rights of the parties and the final decree works out those rights.""

7. Referring to the above, the learned counsel for the appellant submitted that the preliminary decree embodies the final decision of the Court passing that decree. It was submitted in this context that the preliminary decree passed in the present matter categorically required no further proceedings in the present suit until and unless there was a decision by the High Court at Calcutta in the suit pending before it. The appellant is therefore, aggrieved by the very fact that the learned single Judge took steps in furtherance of the preliminary decree when the preliminary decree itself prohibited any further steps till the suit at Calcutta was decided.

8. We have also heard the learned counsel for the respondents.

9. We find that the course of action which the learned single Judge has endeavoured to undertake by virtue of the impugned order is not

permissible in law. The Court at Delhi would have to await the decision of the High Court at Calcutta. We also note that certain observations have been made by the learned single Judge with regard to the High Court at Calcutta not having territorial jurisdiction in respect of the case before it. We find that these observations ought not to have been made particularly in the backdrop of the principle of comity of courts. It is for the High Court at Calcutta to determine as to whether it has or does not have territorial jurisdiction in respect of the suit before it? We are informed by the learned counsel for the respondent that the issue of territorial jurisdiction is very much alive before the High Court at Calcutta and it is for that Court to decide that issue.

10. In view of the above discussion, we set aside the impugned order dated 18.10.2016. This is without prejudice to the rights and contentions of the parties in the suit at Calcutta. Henceforth, the suit shall be listed before the learned single Judge only to ascertain as to whether the suit at Calcutta has been decided or not and to proceed further only after the suit at Calcutta is decided.

11. The appeal stands allowed as above. There shall be no order as to costs.

12. All the pending applications stand disposed of.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

DECEMBER 01, 2016
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