

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

% **Date of decision: 23rd February, 2016.**

+ **RFA 626/2015 & CM No.20631/2015 (for stay)**

SHOBHA DHAWAN

..... Appellant

Through: Mr. Yatinder Nath, Mr. Deepak Saini
and Ms. Jyoti, Advs. with appellant in
person.

Versus

RAMESH CHANDRA KAPOOR & ORS

..... Respondents

Through: Mr. Sunil Malhotra and Mr. Amit
Sanduja, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The appeal impugns the judgment and decree dated 21st October, 2014 of the Court of Additional District Judge (ADJ)-09 (Central), Tis Hazari Courts, Delhi in CS No.148/2009 titled ***Ramesh Chandra Kapoor Vs. Vijay Kumar Kapoor.***

2. Notice of the appeal was issued and the parties directed to maintain *status quo*.

3. Though the respondent No.5 remains unserved but the counsel for all the five respondents appears.

4. Finding that the impugned judgment and decree is the final decree in a suit for partition of property and is in terms of the statements made by the parties before the learned ADJ, it has been enquired from the counsel for the appellant, how an appeal can be maintained against a consent / compromise decree and whether the appellant had preferred an appeal against the preliminary decree for partition, inasmuch as Section 97 of the Civil Procedure Code, 1908 (CPC) bars a party aggrieved from a preliminary decree from questioning its validity in an appeal against the final decree.

5. The counsel for the appellant has though not made any contention with respect to the maintainability of the appeal against a consent decree but contends that the appellant indeed preferred an appeal against the preliminary decree being RFA No.433/2014 titled ***Smt. Shobha Dhawan Vs. Shri Ramesh Chandra Kapoor & Ors*** but the said appeal was disposed of vide order dated 17th August, 2015. It is further stated that the respondents, who are the brothers of the appellant who is their sole sister, took the consent of the appellant forcibly and in a hasty manner and the appellant is thus entitled to setting aside of the preliminary decree also.

6. The counsel for the respondents states that even the order dated 17th August, 2015 disposing RFA No.433/2014 is a consent order.

7. A perusal of the order dated 17th August, 2015 disposing of RFA No.433/2014 preferred by the appellant and against the preliminary decree and in which the appellant was represented by the same Advocate by whom she is represented today shows that:

- (i) it was the counsel for the appellant who on that date placed before the Court the proceedings of the Trial Court wherein the appellant had stated that she accepts the report of the Local Commissioner and the site plan appended to the report;
- (ii) that the appellant in the statement before the Trial Court stated that the suit property be divided amongst all the parties in accordance with the site plan;
- (iii) though the appellant in her statement before the Trial Court had stated that her said statement was without prejudice to the outcome of the appeal preferred against the preliminary decree but the appellant nevertheless went ahead and vacated the portions of the property in her possession and which as per the report of the Local Commissioner had fallen to the share of the others;
- (iv) this Court noticed that the partition by metes and bounds had already taken place.

It was in this state of affairs that this Court disposed of the appeal against the preliminary decree.

8. A perusal of the impugned judgment and final decree of partition shows:

(a) that though the appellant who was the defendant No.5 before the Trial Court had filed an application under Order VII Rule 11 of the CPC, again through the same Advocate as appearing for her today, but withdrew the same;

(b) that statements of the parties were recorded and the final decree passed in terms thereof;

(c) that the same Advocate who appears for the appellant today identified the appellant before the Trial Court also.

9. The counsel for the appellant argued that the impugned judgment and decree were obtained fraudulently and that the bar of Section 97 of the CPC applies only where no appeal had been preferred against the preliminary decree; here the appellant had preferred an appeal.

10. Section 97 of the CPC is 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.”

11. The purport of the aforesaid provision is to bar a challenge to the preliminary decree for partition in the appeal against the final decree. A party to a suit for partition who though prefers an appeal against the preliminary decree but whose appeal has been dismissed, cannot be in a better position than a party to the partition suit who has not preferred an appeal against the preliminary decree. The appellant having allowed the order dismissing his appeal against the preliminary decree to attain finality, cannot now in this appeal against the final decree, challenge the preliminary decree for partition.

12. Supreme Court as far back as in ***Sital Parshad Vs. Kishorilal*** AIR 1967 SC 1236 held where the preliminary decree has been confirmed *in toto* and the appeal therefrom has been dismissed and the final decree is in terms of the preliminary decree, no challenge to the final decree can be entertained. In ***Venkatrao Anantdeo Joshi Vs. Sau. Malatibai*** (2003) 1 SCC 722 it was held that non-challenge to a preliminary decree precludes a party from disputing its correctness in any appeal which may be preferred from the final

decree. In ***Manjit Singh Vs. Punjab & Sind Bank*** 1994 (31) DRJ 299 (DB) an *ex-parte* preliminary decree for partition was passed, application under Order 9 Rule 13 of the CPC for setting aside thereof was dismissed and the order of dismissal was upheld in appeal. It was held that the preliminary decree became final and the final decree passed on the basis of preliminary decree was not liable to challenge in appeal, as the decree had attained finality. Reference in this regard may also be made to ***Patel Ranhhodbhai Bhaichanddas Vs. Rabari Jiva Java*** AIR 1998 Guj. 207 and ***Tapan Kumar Bhattacharjee Vs. Ratan Kr. Bhattacharjee*** AIR 2004 Gau. 27.

13. Reference may also be made to Section 96(3) of the CPC providing that no appeal shall lie from a decree passed by the Court with the consent of the parties. Though in view of the said clear provision, there is no need to refer to any judgment but reference, if any required, can be made to ***Katikara Chintamani Dora Vs. Guntreddi Annamanaidu*** (1974) 1 SCC 567, ***Pushpa Devi Bhagat Vs. Rajinder Singh*** (2006) 5 SCC 566 and to ***Inder Kumar Kathuria Vs. Krishan Kumar Kathuria*** MANU/DE/4880/2013 (DB).

14. Thus, this appeal against the final decree to the extent impugning the preliminary decree is barred by Section 97 CPC and is otherwise also not maintainable, the final decree being compromise decree.

Dismissed.

No costs.

Decree sheet be drawn.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 23, 2016

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