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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ RFA No.646/2015, CM No.21581/2015 (for stay), CM No.22642/2015 (of the appellant for early hearing) and CM No.21582/2015 (for condonation of 143 days delay in filing the appeal).

NIKHIL SHARMA Appellant

Through: Appellant in person.

Versus

KRISHAN BAL SHARMA & ORS Respondents

Through: Mr. Amarjit Singh, Adv. for R-1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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24.02.2016

1. The appeal impugns a final decree for partition of immovable property by metes and bounds.
2. The appellant did not take steps for service of notice of the appeal on the respondents no.2&3. Only the counsel for the respondent no.1 appears.
3. The appellant appearing in person states that he will be pursuing the appeal in person. He also states that defendant no.1(b) to the suit Smt. Yamni Bhardwaj died in February, 2011 i.e. during the pendency of the suit and no steps were taken by the respondent no.1/plaintiff for substitution of her legal heirs.
4. The counsel for the respondent no.1/plaintiff states (a) that in the suit originally filed Shri Brij Mohan Sharma was the only defendant; that on his death his daughters Smt. Shalini Sharma, Smt. Yamni Bhardwaj, his widow Smt. Bimla Devi, his sons Shri Akhilesh Sharma and the appellant herein

were impleaded in his place; (b) that the interest of all the said heirs of Shri Brij Mohan Sharma was common and in fact it was the appellant only who had been contesting the suit and he alone is in possession of the property and none of the other legal heirs of Shri Brij Mohan Sharma are in possession of the property. He further states that the appellant at no time informed the respondent no.1/plaintiff or the Trial Court of the demise of Smt. Yamni Bhardwaj and is disclosing the said fact for the first time today. The counsel for the respondent no.1/plaintiff further states that the final decree of partition has already been executed and the respondent no.1/plaintiff has on 28th January, 2016, in execution of the final decree for partition, taken possession of half portion of the property from the appellant.

5. The appellant confirms the said position.

6. I may in this regard notice that the appellant in this appeal has not impleaded Smt. Shalini Sharma or the legal heirs of Smt. Yamni Bhardwaj as parties hereto and has only impleaded his mother Smt. Bimla Devi and his brother Shri Akhilesh Sharma as respondents no.2&3.

7. The appeal is also accompanied with an application for condonation of 143 days delay in filing thereof.

8. Considering the fact that the respondents no.2&3 were not appearing before the Trial Court also, their service with the notice of the appeal is dispensed with.

9. I have heard the appellant appearing in person and the counsel for the respondent no.1/plaintiff.

10. The final decree for partition under challenge in this appeal is in pursuance to a preliminary decree dated 5th September, 2008 of partition of

(i) property no.14/3 measuring 170 sq. yds. at Chhota Bazar, Shahdara, Delhi; and, (ii) Shop no.239/8, Shop no.240/8, godown no.20/3 and land of *Kothri of Kalwa Chamar*, and declaring the share of the respondent no.1/plaintiff therein to be 50% and declaring the appellant, respondents no.2&3 and the aforesaid Smt. Shalini Sharma and Smt. Yamni Bhardwaj together as owners of the remaining 50% share in the said properties.

11. The counsel for the respondent no.1/plaintiff states that as far as the other properties besides the property at Chhota Bazar are concerned, the dispute qua them already stood resolved earlier and thus the relevance of the final decree for partition is only qua the Chhota Bazar property.

12. The appellant appearing in person also confirms the same.

13. On enquiry it is informed by the counsel for the respondent no.1/plaintiff that no appeal was preferred against the preliminary decree for partition. The appellant in person also confirms the said position.

14. Section 97 of the Code of Civil Procedure, 1908 (CPC) provides that where no appeal is preferred from the preliminary decree, the correctness thereof cannot be challenged in the appeal against the final decree. Thus the scope of the challenge in this appeal has to be confined only to the mode of division of the Chhota Bazar property. The final decree of partition divides the property into two equal parts of 85 sq. yds. each and orders erection of a partition wall by the respondent no.1/plaintiff at his own cost for so dividing the property.

15. What I have been able to understand from the appellant appearing in person is that the respondent no.1/plaintiff in execution has taken possession of more portion of the property than 85 sq. yds. It also appears to be the case

of the appellant that there are other portions also of the Chhota Bazar property which have not been disclosed in the site plan Exhibit PW-1/9 with reference whereto partition has been effected.

16. However the preliminary decree for partition being with reference to Exhibit PW-1/9 and the final decree for partition having also been effected in terms thereof, the plea of Exhibit PW-1/9 not depicting the entire property cannot be dealt with at this stage in appeal against the final decree. As far as the first contention of the appellant, that the respondent no.1/plaintiff in execution of the decree has taken more portion than ordered is concerned, the remedy of the appellant thereagainst is before the Executing Court and not by way of this appeal.

17. Thus *de hors* the aspect of delay, I do not find any merit in the appeal which is dismissed.

No costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 24, 2016

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