

\$~22

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

Decided on: 26th April, 2018

+ C.R.P. 96/2017 and CM APPL.14440/2017 (stay)

SMITA CHAUDHRY & ORS Petitioners

Through: Mr. Anil Airi, Senior Advocate with
Mr. Ashutosh Chaudhary, Ms.
Sukanya Lal, & Ms. Sadhna Sharma,
Advocates

versus

LT COL GAJ SINGH & ORS. Respondents

Through: Mr. Kuljeet Rawal, Advocate for R-1
& R-2.
Mr. Ravi Verma, Advocate for R-3.
Mr. Anil Sapra, Senior Advocate with
Mr. Ajay Bahl, Adv. for R-10.
Lt. Col. Atul Chaudhary in person.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT (ORAL)

1. The petitioners are legal representatives of Satish Chandra Yadav son of Surat Singh, who was impleaded as second defendant in the civil suit (presently registered as CS-DJ-12592/2016), pending on the file of additional district judge-14 of Central District at Tis Hazari Courts Complex. The suit was instituted seeking a decree of partition of the estate of Chaudhary Shib Sahai by Lt. Col. Gaj Singh Yadav

(the plaintiff) he having passed away and now represented by first and second respondents (his legal heirs).

2. The suit was presented on the original side of this court in 1975 and was registered initially as Suit No.562/1975. Having regard to the copy of the amended plaint presented on 17.09.1984, copy whereof has been presented with the paper book, the prayer for partition was made with reference to certain ancestral properties at Delhi (Schedule 'A') and certain properties located in District Rohtak, Haryana (Schedule 'B'). The controversy which is the subject-matter of the present petition pertains to the agricultural un-irrigated land described as admeasuring 2 acres (16 kanals) forming part of Khasra No.261, Rect. No.4, square No.23,24 and 25 in Halqa Kosli in District Rohtak, Haryana.

3. The suit was contested, *inter alia*, by the predecessors-in-interest of the petitioners by common written statement in which certain other defendants (including first, third and fourth defendants) had joined him. Having regard to the copy of the written statement submitted by the said set of defendants on 16.12.1976, it is clear that a plea was taken to the effect that the agricultural land comprised in the said estate in Halqa Kosli was more than 16 kanals as had been mentioned in the plaint, the plea of the defendants being that the land was more than 70 bighas. It was in that context that an objection was also taken that since all the properties at Kosli had not been included, the suit was not maintainable it being for partial partition only.

4. The record would show that on 07.10.1985, a learned Judge then in *seisin* of the case on the original side of this court, framed issues, the second issue specifically pertaining to the aforementioned objection to address the question as to whether the suit had been filed “*for partial partition*” and if so, to what effect.

5. The learned counsel on both sides have taken the court through various proceedings that came to be recorded in the wake of the framing of the said issues when the case had entered trial. It appears that the plaintiff of the case had taken the position that the suit had been rightly filed for partition with reference to the aforementioned land in Halqa Kosli, District Rohtak, Haryana, describing it as admeasuring 16 kanals, some explanation having been offered in this context by the plaintiff Gaj Singh Yadav by his affidavit in evidence, it having been sworn on 20.01.1988. It may be noted here that, in the said affidavit, Gaj Singh Yadav would concede that initially the land comprised in the estate of Chaudhary Shib Sahai was admeasuring 129 Kanals and 10 Marlas (73 bighas), this being the position at the time of his death in 1938. But, reference was made to a decree dated 25.05.1964 in suit No.254/1963 granted by the court of Sub-Judge First Class, Delhi, in the wake of which agricultural land admeasuring 113 kanals and 10 marlas came to be sold. It was also the stand of Gaj Singh Yadav that Jagdish Singh son of Chander Singh and Sultan Singh son of Gopal had purchased the said land which was mutated accordingly in their favour and further that he later had purchased back 2/3rd share of Jagdish Singh this, as per him, consequently being his “*self acquired and separate property*”.

6. Objections to framing of some of the issues including the one relating to the plea of the suit being bad on account of it praying for partial partition were raised. Eventually, by order dated 05.08.1988, the court concluded that only three issues needed to be decided, they including the question as to whether the mortgage existing over certain building (Shib Sahai building) in favour of the Life Insurance Corporation (LIC) had any effect on the partition suit and as to what were the shares of the parties excepting the LIC building. The court concluded that no evidence was required to be recorded on any of the said issues, this being the conceded position for the parties as submitted through their respective counsel.

7. On 04.04.1989, the parties agreed to a preliminary decree being passed, the statement of the plaintiff having been recorded at length indicating the shares of different stake-holders, the defendants making separate statements through their respective counsel, they concededly including the predecessor-in-interest of the petitioners herein. These statements eventually led to the preliminary decree being passed on 19.04.1989. The order dated 19.04.1989 again noted the three issues that had been mentioned in the order dated 05.08.1988 on which separate conclusions/finding were rendered. The preliminary decree passed was with reference to the properties included in Schedule 'A' and Schedule 'B', it indicating the share percentage of various parties, the said Schedules directed to be made "*part of the decree*".

8. The proceedings in the suit thereafter continued for purposes of exploring the possibility of physical division of the properties by metes and bounds, though not much progress could be made.

9. On 10.03.2004, the legal heirs of the second defendant – petitioners herein – moved an application for amendment of the plaint – specifically Schedule ‘A’ – invoking Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, 1908 (CPC) referring in this context to the issues that had been earlier framed on 07.10.1985 on the objection taken about the maintainability of the case, it being “*for partial partition*”, *inter alia*, contending that it had been discovered that the land which was forming part of the estate at Village Kosli was actually admeasuring 80 bighas and that it had been wrongly mentioned as 16 bighas only. In this context, reliance was placed also on the pleadings in a previous suit for partition that had been presented on 16.03.1963.

10. A copy of the amended plaint dated 16.03.1963 of the aforesaid previous suit has been submitted with the paper book. It would indicate it was also filed by Gaj Singh, though in his capacity as the attorney of certain other stake-holders including Umrao Kaur, Uma Yadav, Usha Yadav and Jaswant Singh. The predecessor-in-interest of the petitioners was also included in the array of defendants, he being the second defendant. A decree was thereby sought with reference to the properties mentioned in Schedule ‘A’, first part whereof indicated the agricultural land comprised of 80 bighas at village Kosli, District Rohtak, Haryana.

11. The above-mentioned application for amendment of the plaint remained pending till 19.08.2016 when it was withdrawn and instead an application under Order XX rule 18 CPC read with Order 8 Rule 1-A (2) and (3) and Sections 151 and 152 CPC was filed, the prayer being for inclusion of 80 bighas of land of village Kosli in the preliminary decree dated 19.04.1989 in place of 16 kanals, as indicated in the schedule referred to earlier or, in the alternative, for a preliminary decree for the remaining joint agricultural property “*left out*” at Kosli, Haryana and for its partition to be granted.

12. The aforesaid application primarily under Order XX Rule 18 CPC has been dismissed by the additional district judge before whom the case is presently pending, it having been transferred from the original side of this court to the district court on account of change of pecuniary jurisdiction. The order dated 03.02.2017 whereby the application was dismissed with costs of Rs.20,000/-, with observation that it was an abuse of the process of court, is under challenge by the present petition.

13. Having heard both sides at length and having gone through the record with the assistance of the learned senior counsel for the parties, this court finds no error or infirmity in the order passed by the learned additional district judge. Though there was no specific order passed by the court at any stage striking off the issue framed on the objection of the petitioners as to the maintainability of the suit for reason, per their submissions, it was a suit for “*partial partition*”, it is clear from the proceedings that came to be recorded on various dates leading to

the preliminary decree being granted that the petitioners had abandoned the said objection. The preliminary decree infact was passed with consent of both sides. The court had indicated, more than once, that only three issues arose, each of which was duly addressed. The issue of partial partition was not pressed and, therefore, by implication such issue which had been framed earlier will have to be treated as struck off.

14. It is not fair on the part of the petitioners, after elapse of such a long period of time, to make an attempt to put the clock back and revive the proceedings and to re-agitate that it is a case of partial partition. They became aware of the explanation offered by Gaj Singh Yadav as to the status of the remainder land at village Kosli when his affidavit in evidence had come on record in January, 1988. If they had a case to the contrary to be brought so as to seek adjudication, they had ample opportunity to do so by joining issue. The fact that they did not pursue that course and instead agreed to the consent preliminary decree being passed, the recourse to the process of amendment first by moving an application respecting plaint under Order VI Rule 17 CPC presented in the year 2004, it having been kept pending for almost fourteen years, followed by the application respecting preliminary decree on the decision from which the present petition arises, is nothing but a gross abuse of the judicial process, as rightly concluded by the court below.

15. The preliminary decree has become final and binding and there is no reason why it should be re-opened, particularly in the manner

sought to be done, more so when there was no opportunity to the other side, especially the plaintiff, to give answer to the pleadings of the petitioners with reference to remainder land to which the petitioners seek to lay a claim, no issues having been pressed and no inquiry worth the name into such issues having been held at any stage.

16. For the above reasons, the petition and the application filed therewith are dismissed with costs of Rs.2,00,000/-, to be deposited with Delhi High Court Legal Services Committee, within 30 days.

17. The trial court record shall be returned forthwith.

APRIL 26, 2018

vk

R.K.GAUBA, J.