IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

C.R. No. 4052-2019
Date of decision:-15.07.2019

Dr. Karamvir Arya

...Appellant

Versus

Dr. Ram Kumar Arya (deceased) through his LR's and ors.

...Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

Present:- Mr. Anuj Balian, Advocate
for the petitioner

RITU BAHRI J.

The present revision petition is directed against judgment dated 09.05.2019 (P-6) and proclamation of sale deed dated 13.06.2019 (P-8) passed by learned ACJ (Sr. Divn) Panchkula.

Brief facts of case are that plaintiffs/respondents filed a suit against petitioner/defendant No. 1 and respondent No. 7/defendant No. 3 seeking partition by metes and bounds of booth No. 30, Sector 4, Panchkula and further sought permanent injunction restraining the petitioner from subletting the premises in question to any third person.

The suit was decreed vide judgment and preliminary decree dated 06.10.2014 declaring plaintiff Nos. 1 to 6 and defendant No. 1/petitioner as co-owner to the extent of 1/7th share each over the suit property i.e booth No. 30, Sector 4 Panchhkula (P-2). The judgment and preliminary decree dated 06.10.2014 was challenged by the petitioner in the Lower Appellate Court but the same was dismissed, vide judgment and decree dated 09.05.2016 (P-3). Subsequently, the plaintiff/respondent Nos. 1 to 6 filed an application before the learned ACJ (Sr. Divn.) Panchkula for drawing the final decree vide application dated 07.03.2017 (P-4) in which an order dated 09.05.2019 was passed issuing the warrants of sale of the subject property. Hence the present revision petition.

Learned counsel for the petitioner submits that the Court below instead of passing the final decree has passed the impugned order of sale of the subject property and thus, exceeded and wrongly exercised the jurisdiction vested in it. The learned Court below has erred in law in not drawing up the final decree and straightway exercising the powers of the Executing Court under Order 21 Rule 6 CPC.

Learned counsel has further argued that the Court below has failed to appreciate Section 10 of the Partition Act, 1893 which specifically provides that the provisions of the said Act are applicable only to the suits instituted before the commencement of the Act, in which no scheme for partition of the property has been finally approved by the Court.

Learned counsel has further argued that the petitioner is owner in shop in possession of the disputed shop in question from the very beginning with the consent of his brothers and sons of the applicant is running a mobile shop in the subject shop for the last eighteen years which is only source of livelihood and thus the shop in question cannot be put to auction.

Learned counsel is relying upon judgment of Hon'ble the Supreme Court of India in a case of ***Hasham Abbas Sayyad vs. Usman Abbas Sayyad and others, 2007 (2) SCC 355*** to contend that preliminary decree cannot be put to execution. It is the final decree proceeding which would be executable in nature. Without drawing a final decree proceedings, the Court could not have put the property on auction sale.

Heard learned counsel for the petitioner at length.

The judgment cited by learned counsel for the petitioner has been considered by Full Bench of Delhi High Court in a case of ***Indu Singh and anotther vs. Prem Chaudhary and others, 2018 (3) RCR (Civil) 241 wherein the***

matter was referred to Full Bench on following two issues:-

(i) When an order for sale of the property/properties is passed in a partition suit, whether such an order of sale is a final decree of partition or is just another preliminary decree passed after passing of the earlier preliminary decree declaring the shares of the parties in the property/properties of the partition suit.

(ii) On the answer to the aforesaid issue being given, a further consequential issue will have to be examined that if the order of sale is a final decree, then in such a case whether this final decree will be an "Instrument of Partition" as defined in Section 2 (15) of the Indian Stamp Act, 1899 and which "Instrument of Partition" is required to be stamped as per Article 45 of Schedule I of the Stamp Act.

Honble Delhi High Court has thereafter answered the reference as below:-

I. An order of sale passed under Section 8 of the Partition Act is a final decree in a partition suit, and all proceedings towards sale of the property which is subject matter of the final decree of partition, have to take place in execution proceedings of this final decree.

II. An order of sale in a partition suit passed under Section 8 of the Partition Act is an instrument of Partition under Section 2(15) of the Stamp Act and requires to be stamped in accordance with Article 45 of the Schedule thereof.

III. The judgments of this Court in the cases of K.N. Khanna 2000 (55) DRJ 544: 2000 (87) DLT 286 (DB) and Sushil Kumar Gupta v. Smt. Prem Gupta and Ors. 2013 (135) DRJ 341 (DB) are hereby overruled.

In para 83 and 94, it has been observed as under:-

83. Order XX Rule 18(2) CPC, by its last limb - "and giving such further directions as may be required" - confers on the civil court the

widest possible discretion, power and jurisdiction to take all such measures as are necessary, in the wake of preliminary decree (which only declares the rights) for effecting the partition, the possible "further directions" that may be issued in such regard including what is permitted by Sections 2, 3 and 4 of the Partition Act in case such law is invoked or any other direction (in case Partition Act cannot be applied or its invocation does not lead to resolution). The issuance of commission under Order XXVI Rule 13 CPC, noticeably, is with the intent ―to make the partition or separation‖. Therefore, should the commissioner be able to ―divide the property‖ - which would be by metes and bounds, his report, if accepted as fair, equitable and just, leads to the partition being effected by shares being allotted to the respective shareholders - the element of owelty being added, as envisaged in Order XXVI Rule 14(1) CPC. The order of the court confirming the report of the commissioner (may be with some variance) in terms of Order XXVI Rule 14 CPC leads to the final determination of the rights of the parties by ―effecting a partition‖ and being an order which is "final" would undoubtedly be an "instrument of partition" within the meaning of Section 2(15) of Indian Stamps Act, 1899 attracting the stamp duty. In such result of the litigation, the rights of the parties as to their respective shares in the property having been declared by the preliminary decree, the right to specific share earmarked by division of the property by metes and bounds stands determined and ―vested‖ in each of them and, therefore, such order disposes of the suit (qua the particular property), it consequently being a decree that is final.

94. It is not necessary, at the same time, that the court having passed a preliminary decree declaring the rights of the parties and determining

their respective shares and also having reached the conclusion that the property is not divisible by metes and bounds and, therefore, sale and distribution of sale-proceeds be the only method of partition and having passed a decree to such effect must also undertake and complete the task of sale, come what may. The court is obliged to continue with such process only if the parties, or any one of them, so request. The parties may not need the assistance of the court in further steps to effectuate the partition or division. They may proceed to sell the property to a third party on their own and divide the sale proceeds as per shares declared by the preliminary decree. One of the parties, with the consent of others, may purchase the share(s) of others paying to them the respective value / price satisfying their claims. One of the shareholders may abandon his share thereby reviving the feasibility of, or facilitating, the division of the property "by metes and bounds". One of the parties may pass away and his interest may devolve on those remaining in the fray making it now possible to divide it by metes and bounds. If there were only two shareholders and one dies mid-process - after order for sale - his estate having been inherited by the one surviving, the need for partition could come to an end. In such eventualities, the orders earlier passed declaring the rights and directing the sale (undoubtedly, both decrees) need not be put to execution through court and the fact that the stamp duty was not paid thereupon and further that it was not registered under section 17 of the Registration Act, 1908 would not render it anything less than a decree that is binding [Radhesh Singh (supra)].

Applying the ratio of the above mentioned judgment to the facts of the present case, the present revision petition is liable to be dismissed, as in the present case, initially the decree was passed declaring plaintiff Nos. 1 to 6 and defendant No. 1/petitioner as co-owner to the extent of 1/7th share each over the suit property i.e booth No. 30, Sector 4 Panchhkula (P-2).Since the booth was a small property, it could not be divided amongst all co-sharers, therefore, in the application for final decree, it was ordered to sold the property through auction and the sale proceeds be distributed among the shareholders.

The impugned order has rightly been passed and does not require any interference by this Court as the Court below has rightly given the direction to sold the property through auction, as the property could not be partitioned and only the money decree can be passed.

Dismissed.

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15.07.2019 (***RITU BAHRI***)
G Arora ***JUDGE***

Whether speaking/reasoned ***Yes***
Whether reportable ***No***