

**IN THE HIGH COURT OF PUNJAB AND HARYANAAT
CHANDIGARH**

Regular Second Appeal No. 2809 of 2014(O&M)

Date of Decision: April 10 , 2019.

Mohinder Kumar Malhotra

..... APPELLANT (s)

Versus

Narinder Kumar Malhotra and others

..... RESPONDENT (s)

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. Ranjan Lakhanpal, Advocate
for the appellant.

Mr. Rajan Bhargava, Advocate for
Mr. Vishal Aggarwal, Advocate
for respondent No.1.

Mr. Aman Dhir, Advocate
for respondents No.2 to 4.

Ms. Promila Nain, Advocate and
Ms. Arti Gupta, Advocate
for respondent No.6.

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

LISA GILL, J.

CM No.18083 of 2018

This is an application for preponement of the hearing of the main appeal which is fixed for 13.05.2019. This application was filed on 03.12.2018

by respondent No.6.

Heard.

It is not in dispute that on 21.04.2018, it was observed by a coordinate Bench of this Court while adjourning the appeal to 10.09.2018, that no further adjournment shall be afforded to the appellant to argue the matter. However, on 10.09.2018 the appeal could not be taken up for hearing due to paucity of time and was adjourned to 11.10.2018. None had appeared on behalf of the appellant on 11.10.2018 and the matter was adjourned to 01.11.2018. Learned counsel for the appellant was directed to be notified of the date fixed by the Registry. The appeal could not be taken up for hearing due to heavy roster, hence the matter was adjourned to 16.11.2018. In the meanwhile, an application was filed by the appellant praying for early hearing of the application filed by him seeking transfer of the shop-cum-flat after a successful bid in the auction of the property, in question. Early hearing of the same was not ordered and application was dismissed as the main appeal was listed on 16.11.2018. Due to a heavy list and paucity of time, the matter was however adjourned to 13.05.2019.

Respondent no.6 has moved the present application i.e., CM No.18083-C of 2018 for early hearing of the matter in which notice was issued to learned counsel for non-applicants. CM No.17219-C of 2018 moved by the applicant/appellant, with a prayer that the property in question be not demolished and CM No.18209-C of 2018 for placing on record certain documents with a further prayer that the property be not demolished pursuant to the auction, were also taken up on 14.12.2018. All the applications were adjourned to 30.01.2019.

Another application i.e., CM No.823-C of 2019 was filed by the appellant with a

prayer not to demolish the shop in dispute during the pendency of the appeal. Said application was adjourned on 24.01.2019 for 30.01.2019 to be heard alongwith the other miscellaneous applications.

It is to be noticed that on 30.01.2019, none had appeared on behalf of the appellant. It was brought to the notice of this Court that the property in question stood transferred in favour of respondent No.6 after court orders by the Estate Officer, U.T. Chandigarh subject to decision of this appeal. It was further contended that the appellant is moving various applications in this appeal, but is not coming forward to argue the matter. Learned counsel for the appellant was again directed to be notified of the date fixed by the Registry.

Learned counsel for the appellant appeared on 08.02.2019 and prayed for last opportunity to address arguments in the main appeal alongwith the applications. Matter was adjourned to 27.03.2019 when arguments were addressed by both the parties in the main appeal as well. For certain clarifications the matter was adjourned to 08.04.2019 and then to 10.04.2019. It is not in dispute that the appeal has, in effect, been heard at length on merits on the dates as mentioned above and today as well.

Therefore, application is allowed and the main appeal pending for 13.05.2019 is directed to be listed for today itself.

RSA No.2809 of 2014

This appeal has been filed by the appellant, who was arrayed as defendant No. 1 before the learned trial Court. Appellant is aggrieved of order dated 02.08.2012 passed by the learned Civil Judge (Junior Division),

Chandigarh as well as judgment dated 24.08.2013 passed by the learned Additional District Judge, Chandigarh.

Brief facts necessary for adjudication of the case are that, respondent No. 1 – Narinder Kumar Malhotra (appellant's real brother) preferred a suit for declaration on 05.10.1994, which was thereafter converted into a suit for possession by way of partition of 1/6th share of the plaintiff in SCF No. 12, Sector 20C, Chandigarh. Learned trial Court vide judgment and decree dated 24.09.2001 directed that the suit property be partitioned between the plaintiff – respondent No. 1 and other members of the family, the plaintiff being entitled to 1/6th share alongwith others and comprehensive decree for final partition was decreed.

Appeal preferred by the appellant was partly allowed by the learned Additional District Judge, Chandigarh on 12.09.2005 while directing that decree dated 24.09.2001 be treated as preliminary decree.

Present appellant filed RSA No.2176 of 2007 before this Court and vide judgment dated 12.05.2010 the said decree was modified to the extent that plaintiff-respondent No.1 as well as defendants No.3 and 4 would have 1/6th share each in the suit property while defendants No.1 (present appellant) and 2 would be entitled to 1/4th share each in the suit property with defendant No. 5 being left with no share in the property in view of relinquishment deed dated 22.01.1990 executed by her. SLP No. 25653 of 2010 filed by the appellant was dismissed on 20.09.2010.

Thereafter, the plaintiff – Narinder Kumar Malhotra preferred an application for passing the final decree, which is the subject matter of the present Regular Second Appeal. Plaintiff prayed that as the property, in question, cannot

be partitioned by metes and bounds due to the nature of its construction, therefore, the co-owners at the first instance be given an opportunity to bid for the same and if not possible, the property be put to public auction and the proceeds divided amongst the parties as per their share. The property in question, it is mentioned, could not be fragmented as per local laws.

Learned trial Court passed the final decree vide impugned order dated 02.08.2012. Appeal preferred by the present appellant was dismissed by the learned Additional District Judge, Chandigarh vide decision dated 24.08.2013.

Aggrieved therefrom, present appeal has been filed.

Learned counsel for the appellants vehemently argues that both the decisions passed by the learned courts below are liable to be set aside as auction of the property could not have been ordered in this case without taking into account all the available options and possibilities and then deciding on the mode of partition. Moreover, there is a violation of Section 2(15) of the Stamp Act. He relies upon a judgment of the Delhi High Court in Indu Singh and another v. Prem Chaudhary and others, 2018(3) RCR(Civil) 241. It is further argued that the appellant is, in fact, the eldest brother of all the siblings. He left his studies in order to settle them in their lives. Therefore, they are not entitled to the share in the property as directed. It is thus prayed that both the impugned decisions dated 02.08.2012 and 24.08.2013 and 23.10.2017 passed by the learned Civil Judge(Junior Division), Chandigarh and the learned Additional District Judge, Chandigarh, respectively, be set aside.

Learned counsel for respondents No.1 to 4 refute the abovesaid contentions while submitting that the property has been rightly auctioned.

Dismissal of the appeal is prayed for.

Learned counsel for respondent No.6 submits that proceedings before the learned executing court were stayed by this Court on 14.03.2016. However, vide order dated 30.05.2016 passed by this Court, interim order dated 14.03.2016 was vacated and the executing court was directed to make an endeavour to conclude the proceedings expeditiously. Learned counsel argues that it was brought to the notice of this Court that application filed by the judgment-debtor i.e., the present appellant, seeking dismissal of the execution application/petition was dismissed by the learned Civil Judge (Junior Division), Chandigarh vide order dated 20.02.2016, which is attached with CM No.5014 of 2016. The appellant, it is observed in order dated 30.05.2016, was holding the property for more than two decades to the exclusion of the respondents and the conduct of the appellant was duly summed up by the learned Civil Judge (Junior Division), Chandigarh as reflected in order dated 20.02.2016 (Annexure R6/1). Observation of the learned Civil Judge(Junior Division), Chandigarh in order dated 20.02.2016 is reproduced as under:-

“18. It is of utmost importance that conduct of the applicant be put to scrutiny so as to understand the pendency of the present partition proceedings for almost two decades. It is relevant to mention that JD No.1/applicant is in possession of the property in question since very beginning. It is alleged that his own brothers are in state of vagrancy and despair due to pendency of the present execution. JD No.1 changed number of lawyers in the case who all filed separate applications on different occasions. During the pendency of the present proceedings, he even filed a separate suit for partition which was later got dismissed in default for the reasons best known to him

as clear from order dated 15.04.2013 placed on record during the course of arguments. This case is a classic example of misusing the process of law for one's gain and at one's own whims and fancies”.

It is specifically observed in order dated 20.02.2016 passed by the learned Civil Judge(Junior Division), Chandigarh that the application moved by the present appellant was only a ploy to derail the execution proceedings as there is no necessity for filing a separate execution of a final decree, once the share has already been determined by the court. It is further submitted that CR No.3108 of 2016 filed by the appellant challenging order dated 20.02.2016 has been dismissed on 23.09.2016 with a specific observation that the appellant filed the application in question, merely to delay execution proceedings. Learned counsel for respondent No.6 submits that it was noticed by this Court that the factum of order dated 20.02.2016 was concealed by the appellant at the time of obtaining interim order dated 14.03.2016. Respondent No.6, it is argued, is the successful auction-purchaser, having deposited the entire consideration thereafter. It is submitted that except the present appellant, all the other co-sharers have withdrawn the consideration amount deposited by the auction purchaser. It is further submitted that as per Section 17(2)(vi) of the Registration Act, a decree or order of a Court is not subject to compulsory registration. Reference is also made to the judgment of the Hon'ble Supreme Court in Bhoop Singh v. Ram Singh Major and others, 1995(5) SCC 709, while submitting that the partition of the property was ordered between parties who had a clear pre-existing right in the suit property. All charges subsequent to the auction have been deposited by respondent No.6, the auction purchaser. Learned counsel submits that there is no

ground whatsoever to interfere in the impugned judgments and this appeal be dismissed.

I have heard learned counsel for the parties and have gone through the record.

It is relevant to note that in pursuance to the notice served upon the parties in the execution proceedings, they had appeared before the competent court and had expressed their inability to purchase the property and it is thereafter the schedule of auction was drawn up. Mode of partition, in fact, stood affirmed. It is not in dispute that the property in question is not partible as per the local municipal laws. There can be no fragmentation of the said property. Ultimately, respondent No.6 purchased the property in an auction, which was conducted under a specific order dated 20.01.2014 passed by the competent court. Auction was carried out on 21.03.2015. Respondent No.6 was the highest bidder and auction was confirmed. Respondent No.6 was impleaded as a party to this appeal vide order dated 30.05.2016 while simultaneously vacating interim order dated 14.03.2016.

It is further a matter of record that CR No.5607 of 2016 was filed by the present appellant challenging order dated 04.08.2016 whereby appellant's application under Order 21 Rule 11 CPC was dismissed. CM No.22035-CII of 2016 was moved in the said revision petition by the present appellant stating that he did not press his claim on merits, but sought time to enable him to vacate the premises, in question. Revision petition was, thus, dismissed as withdrawn without prejudice to the rights of the appellant to file an appropriate application before the executing court seeking time to vacate the premises, in question.

Possession has been taken by respondent No.6 and property stands transferred in his name by the Estate Officer, Chandigarh subject to decision of this Court.

Learned counsel for the appellant while addressing arguments has sought to re-agitate the entire controversy which stands finalized in the proceedings culminating right upto the Hon'ble Supreme Court in SLP No. 25653 of 2010 on 20.09.2010.

Learned counsel for the appellant has pointed out to an application i.e., CM No.18209-C of 2018 for placing on record documents to show that it was the appellant, who had paid the remaining loan amount/installments of the property in dispute after eleven installments had been paid by their father. As noticed above, controversy in question already stands finalized and it is not open to the appellant to re-agitate this matter afresh, at this stage. Admittedly, auction of the suit property was held on 21.03.2015, in which respondent No.6 was declared to be the purchaser of the property, being the highest bidder in an open auction for the site in question. It is further a matter of record that objections filed by the present appellant under Order 21 Rule 11 read with Sections 47 and 151 CPC were dismissed vide order dated 04.08.2016 passed by the learned Civil Judge (Junior Division), Chandigarh. Appellant's revision petition i.e., CR No.5607 of 2016, also stands dismissed as withdrawn, without prejudice to his rights to file an appropriate application before the executing court seeking time to vacate the premises, in question. At the same time, the appellant filed various applications in the present appeal for a direction to de-seal the property and handover possession of the same to him. CM No.9595-C of 2017 was moved on 20.07.2017. There is no merit in the argument raised by learned counsel for the

appellant that the defendants are not entitled to the share in question. It bears repetition that it is not open to the appellant to re-agitate the matter which has admittedly attained finality.

Furthermore, once it is proved on record that due notice was issued to the parties for purchasing the property at the first instance, both the appellant and respondent No.1-Narinder Kumar Malhotra had expressed their inability to purchase the share of others. It is in this situation, there being no other option, that public auction of the property was held. It is not denied by learned counsel for the appellant that the property in dispute is not partible and cannot be subject to fragmentation in view of the local laws applicable. Therefore, argument raised by learned counsel for the appellant in respect to mode of partition is untenable and hence, rejected. Similarly there is no denial that partition was ordered in favour of the parties who admittedly had a pre-existing right in the property. Respondent No.6 has deposited all dues pursuant to the auction in which he was the successful highest bidder.

No other argument has been raised.

Learned counsel for the appellant is unable to point out any perversity, infirmity or illegality in the impugned order dated 02.08.2012 passed by the learned Civil Judge (Junior Division), Chandigarh as well as judgment dated 24.08.2013 passed by the learned Additional District Judge, Chandigarh.

Appeal is accordingly dismissed with no order as to cost.

April 10 , 2019.
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(LISA GILL)
JUDGE

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No