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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. 1/2019 & IA 773/2019**

Date of Decision : 15th May, 2019

USHA CHATRATH

..... Petitioner

Through: Mr Akshay Makhija, Ms.Kirti
Awasth, Advs.

versus

J.B.KOHLI & ORS.

..... Respondents

Through: Mr.M.S. Khan, Mr.Varun
Kumar & Ms.Avshreya P.S.
Rudy, Advs. For R-2.
Mr.Abhimanyu Mahajan,
Ms.Anubha Goel & Mr.Sarthak
Mehrotra, Advs. For R-3.
Mr.Vineet Jhanji & Mr.Imran
Moulaey, Advs. For R-5.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Order/Award dated 19.12.2018 passed by the Sole Arbitrator. By the said Order/Award the Arbitrator has dismissed the application filed by the petitioner seeking termination of the arbitration proceedings.
2. The parties herein are legal heir of late Mr. B.C. Kohli who passed away on 15.04.1978. The disputes between the parties are related to the succession of following two properties:-

*“(1) Property known as 7, Crossroad, Dehradun,
and*

(2) Residential house bearing no.31, Golf Link, New Delhi.”

3. By an order dated 27.04.2007 passed in CS (OS) 73/2005 the parties were referred to arbitration. The Sole Arbitrator passed an Interim Award on 18.10.2012 in the following terms:-

“I, accordingly, hold that all the parties to these proceedings will be entitled to 1/8th share in the following properties:

- (1) Property known as 7, Crossroad, Dehradun, and*
- (2) Residential house bearing no.31, Golf Link, New Delhi.”*

4. Thereafter further proceedings continued before the Arbitrator. On 21.11.2012 a submission was made by the parties that the properties are not capable of partition by metes and bounds and should be sold and sale proceeds distributed equally amongst the eight owners. Further, the counsel appearing for respondent no. 2 herein submitted that the petitioner herein and respondent no. 7 have relinquished their shares in the aforesaid properties in favour of the respondent no. 2 herein because of which his share would be 3/8th in both the parties. Further submission was recorded that with this share he would be able to suggest how the property can be partitioned by metes and bounds.

5. By a subsequent order dated 28.01.2013, the Arbitrator again recorded the submission of the parties that as far as the Golf Link property is concerned, the same cannot be partitioned by metes and

bounds. On the submissions of the counsels that there were certain unauthorized construction in the said property and the L&DO Office may require the parties to deposit certain misuse charges for regularization and/or for removal of the alleged unauthorized construction, a Local Commissioner was appointed for perusing such matters with the authorities. Parties were directed to give a proposal about the manner and the price at which the said property can be sold in the market for consideration. As far as the Dehradun property is concerned, the counsel for respondent no. 2 submitted that the property can be partitioned by metes and bounds.

6. In subsequent proceedings held on 24.04.2014, the counsel for respondent no. 2 submitted that he would give an offer for the Dehradun property. On such submission, the Arbitrator *inter alia* passed the following directions:-

“Having heard learned counsel for the parties, I direct that the parties may give their offers, for the Dehradun property within the next two weeks. Parties may also inspect the premises along with the intended buyers and no obstruction would be caused by any of the parties to the inspection of the premises by the buyers provided that an advance notice will be given to the parties to these proceedings before any such inspection is carried out. In case no offer is given by Mr. Ramesh Kohli, the matter will be proceeded on the basis of the offers which may be before the Tribunal on the next date of hearing.”

7. In the order dated 31.07.2014, the Arbitrator dismissed the application filed by respondent no. 2 seeking appointment of a Local Commissioner to open the bank locker of Late Mr. B.C. Kohli holding

therein that even if the same contains any Will of late Mr. B.C. Kholi, the Interim Award passed on 18.10.2012 cannot be reviewed. As far as the two properties are concerned, the Arbitrator passed the following direction:-

“There are merits in the arguments advanced by Mr.Sawhney. As the properties cannot be partitioned by metes and bounds and have necessarily to be sold; In my opinion, it will not be a case of partial partition in case the same are sold separately and the proceeds of the sale are distributed among the co-owners in accordance with the shares determined by the Tribunal in the Interim Award. Point is decided accordingly.”

8. The arbitration proceedings have thereafter proceeded with the parties offering their respective bids and counter bids, however, the properties remain yet to be sold.

9. In the interregnum, by an order dated 31.08.2018, the Arbitrator after having noted that it was not feasible to partition the properties by metes and bounds and infact the exercise of *inter se* bidding could not be proceeded with in the manner it was required to proceed due to the uncooperative attitude of respondent no.2 and that the Tribunal had started the exercise relating to the last option, that is, sale of properties by public auction, on an application filed by the respondent no.2 under Order 12 Rule 2 of the Code of Civil Procedure, 1908, directed the petitioner and the legal heirs of Late Mrs. Vidyawati Sani (respondent no.4 herein) to carry out admission/denial of the Relinquishment Deeds set up by the respondent no.2 claiming that by these Relinquishment Deeds, the petitioner and respondent no.4 had

relinquished their rights in the said properties in favour of the respondent no.2. The Arbitrator rejected the argument of the petitioner and other respondents, except respondent no.2, that such an exercise would infact amount to reopening of the Interim Award which the Arbitrator has no power to do.

10. The petitioner thereafter filed an application claiming that with the direction by the Arbitrator that the two properties cannot be partitioned by metes and bounds and have to be necessarily sold; the arbitration proceedings terminated as the said order amounted to a Final Award. The only proceedings thereafter could have been taken in form of an execution /enforcement proceedings under Section 36 of the Act and the Arbitrator became *functus officio*.

11. By the Impugned Order /Award, the Arbitrator has rejected this application holding that the judgment of the Full Bench of this Court in ***Indu Singh vs. Prem Chaudhary***, 2018 SCC Online DEL 8951 is *per incuriam* and infact not applicable to the facts of the case. The Arbitrator further placing reliance on the judgment of the Supreme Court in ***Ganduri Koteshwaramma and Another vs. Chakiri Yanadi and Another***, (2011) 9 SCC 788 has held that the Arbitrator would have the power to modify the Interim Award till the Final Award is passed.

12. The counsel for respondent no. 2 submits that the petition is not maintainable inasmuch as the order dated 19.12.2018 is not an Arbitral Award which can be challenged under Section 34 of the Act. In his submission this is merely a Procedural Order.

13. I am unable to agree with the said submission of the learned counsel for the respondent no. 2. The effect of allowing the application of the petitioner would have been the termination of the arbitration proceedings. It was the final adjudication of the disputes between the parties as to whether with the passing of the order dated 31.07.2014 and in terms of the judgment of this Court in **Indu Singh** (Supra) the arbitration proceedings stood terminated or not and whether the Arbitrator became *functus officio*. In terms of the judgment of the Supreme Court in **Indian Farmers Fertilizer Cooperative Limited vs. Bhadra Products**, (2018) 2 SCC 534, such an order would amount to an Interim Award and can be challenged separately and independently under Section 34 of the Act.

14. On merit, the learned counsel for the petitioner submits that with the passing of the order dated 31.07.2014 and in terms of the judgment of this Court in **Indu Singh** (Supra), the arbitration proceedings terminated as the order dated 31.07.2014 amounted to the Final Award.

15. On the other hand, the learned counsel for the respondent no.2, who is the only respondent contesting this present petition, submits that the order dated 31.07.2014 does not amount to the Final Award. He further submits that after the passing of the said Order, the parties have appeared before the Arbitrator and have filed various applications before him clearly evidencing that the parties also did not consider the order dated 31.07.2014 to be the Final Award. He submits that the judgment of this Court in **Indu Singh** (Supra) would

not have any application to the facts of the present case due to the abovementioned conduct of the parties.

16. He further submits that the Order dated 31.08.2018 of the Sole Arbitrator has not been challenged by any party and has therefore, gained finality. He submits that the petitioner filed the application in question with a *mala fide* intent of avoiding compliance to the Order dated 31.08.2018. He further submits that in the earlier proceedings before the Arbitrator, the petitioner had admitted execution of the Relinquishment Deed in favour of the respondent no.2 and therefore, it was in the interest of justice that the arbitration proceedings be continued to determine the correct shares of the parties. He submits that the proceedings before the Arbitrator were akin to a partition suit and therefore, in terms of the judgment of the Supreme Court in ***Ganduri Koteswaramma*** (Supra), the Interim Award could be modified by the Arbitrator till passing of the Final Award.

17. I have considered the submissions made by the learned counsels for the parties. This Court in its judgment in ***Indu Singh*** (Supra) by majority of 2:1 has held as under:

“S. RAVINDRA BHAT, J

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2. I have had the benefit of going through the judgment of the other two judges. I agree with the judgment authored by Valmiki. J. Mehta, J which elaborately discusses the various nuances of provisions of the Partition Act, the Civil Procedure Code (CPC) and the Stamp Act as well as their interface with each other. I agree with the conclusions and most significantly,

that by reason of Section 8 of the Partition Act, a determination or order that furthers the preliminary decree in a partition suit (by deciding if a property can be in fact divided by metes and bounds) amounts to a final decree, the rights under which are to be worked out by the parties concerned through an execution proceeding. Consequently, the plaintiff's contention that the suit has to be given a closure only and only if the parties are actually put to possession of their respective shares (in the case of partition of property) or after the conduct of auction or other sale process, is negated.

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9. The above discussion points to considerable authority in favour of the proposition that in a partition suit whereas a preliminary decree finally determines the shares of parties, the final decree is when the court decides on the basis of the evidence led, whether and to what extent the partition of properties is to be effectuated by a sale. This determination is finally dispositive of the suit and is deemed to be a decree under Section 8 of the Partition Act. There may be myriad situations, entirely fact dependent, with infinite variations, such as cases involving multitude of properties, settlement of accounts or mesne profits for the interregnum and pendent lite period or periods, dispute over movables etc. that may require court intervention on a close "hands on" basis. This involvement however, necessarily is part of the execution process. The suit ends with the final decree that gives expression to the rights that crystallize in the preliminary decree. Any other interpretation would as correctly commented, by Justice Mehta, be straining the language of Section 8 by boggling the imagination and refusing to accept its plain and contextual meaning. The decree cannot be like a curate's egg (a thing that intrinsically cannot answer two disparate descriptions or perform contradictory functions), i.e. a decree for something and not a decree for another.

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VALMIKI J. MEHTA, J.

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17.(i) So far as the issue as to whether an order of sale is or is not a final decree of partition, the issue is no longer res-integra in view of the ratio of the judgment of the Supreme Court in the case of Hasham Abbas Sayyad v. Usman Abbas Sayyad, (2007) 2 SCC 355. In this judgment the issue which was decided was as to whether an order of sale is to be passed after drawing up a final decree or before passing a final decree, and it has been held by the Supreme Court that sale proceedings are post the drawing up of a final decree and not before drawing up of a final decree. The relevant paras of this judgment are paras 2, 3, 12, 13 and 18 to 20 and which paras read as under:-

"2. The appellant, Respondent 1 and Respondent 2 are brothers. A suit for partition was filed by Respondent 1. A preliminary decree was passed on 16-3-1999. An application purported to be a special darkhast was filed by him on 29-11-1999. An Advocate Commissioner was appointed. He was of the opinion that the property was impartible. A proposal was mooted that the property be put on sale in between the co-sharers. The appellant accepted the Commissioner's report. He however filed an application for putting the said suit property on auction-sale and for equal distribution of the proceeds thereof amongst the co-sharers. An objection to the report of the said Advocate Commissioner was filed by the appellant. The court allowed the appellant to appoint an architect at his own cost. He, however, failed to comply with the said order. A sale proclamation was issued. The appellant expressed his intention to buy the said property at the valuation made by the government valuer. A valuation report was filed by the appellant on 4-5-2005 against which Respondent 1 filed an objection. The appellant was called upon to deposit 2/3rd of the amount stated in the valuation report. He failed to do so. On or about 21-11-2005, he filed an application expressing his willingness to deposit shares of Respondents 1 and 2. He also sought for permission to deposit an amount of Rs. 2.5 lakhs. By an

order dated 22-11-2005, the trial court held that since the property was put on auction-sale, the highest bid would be treated to be the best price of the suit property and there was no need for appointment of any valuer to ascertain the market price thereof. Another objection was filed by the appellant stating that in view of the facts and circumstances of the case, he should be allowed to buy the shares of other co-sharers. The said application was rejected by an order dated 14-12-2005. By an order dated 15-4-2006, the learned trial Judge held that it was not necessary to initiate a final decree proceeding and the said purported special darkhast filed by Respondent 1 was treated to be an application therefor. A writ petition filed by the appellant was dismissed by the High Court by reason of the impugned order.

3. The short question which, inter alia, arises for consideration is as to whether the property in suit could be put on auction sale without initiating a formal final decree proceeding.

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12. The question came up for consideration before this Court in Shankar Balwant Lokhande v. Chandrakant Shankar Lokhande [(1995) 3 SCC 413] wherein it was opined: (SCC p. 416, para 3)

"Both the decrees are in the same suit. Final decree may be said to become final in two ways: (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest court; (ii) when, as regards the court passing the decree, the same stands completely disposed of. It is in the latter sense the word 'decree' is used in Section 2(2) CPC. The appealability of the decree will, therefore, not affect its character as a final decree. The final decree merely carries into fulfilment the preliminary decree."

13. Taking note of the fact that a final decree proceeding is required to be drawn upon a stamped paper, it was observed: (SCC p. 416, para 2)

"2. The crucial question for consideration is as to when the limitation begins to run for filing an application to pass final decree on stamped papers. There is no direct decision of this Court on this point. Therefore, after hearing counsel at length, we reserve the judgment in the appeal and independently made detailed examination. There is divergence of opinion in the High Courts on this question."

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*18. We have referred to the aforementioned decisions to clear the air in relation to one aspect of the matter, namely, although final decree may be required to be **duly stamped**, or the same may not have anything to do for the purpose of computing the period of limitation, the preliminary decree as such cannot be put to execution.*

19. Although, in regard to the period of limitation in execution of the final decree proceeding there are somewhat different views, but all decisions of this Court clearly state that it is the final decree proceeding which would be executable in nature. Without drawing a final decree proceeding, the court could not have put the property on auction-sale.

20. It is true that the house property was found to be an impartible one; but a preliminary decree having been passed, the valuation thereof and final allotment of the property could have been done only in a final decree proceeding. Only when final allotments were made or a determination is made that the property should be put on auction-sale, a final decree in respect thereof should have been passed. It is appealable. Only a final decree could be put to execution."

(emphasis added)

17(ii) Therefore it is clear from the ratio of Hasham Abbas's case (supra) that sale of a property with respect to which a preliminary decree is already passed, will be in execution proceedings after preparing a final decree, and which final decree is passed when an order is made that the property is not capable of being partitioned (with or without Owelty) and has to be sold for dividing the net sale proceeds between the co-owners as per shares decided by the preliminary decree.

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25. I therefore answer the reference by holding that order of sale which is passed in a partition suit is a final decree and that this final decree is a final order of partition under Section 2(15) of the Stamp Act with the consequence that such final order/decreed of partition will have to be stamped as per Article 45 of Schedule I of the Stamp Act. In proceedings for enforcement of rights under a final decree of partition, including of one or more co-sharers seeking possession of one or more joint properties; whether wholly or in part; the same will be by execution proceedings of the final decree of partition. The proceedings and steps for sale of the joint property/properties as ordered in terms of order passed under Section 8 of the Partition Act will be steps in execution of the final decree and would not be steps prior to the passing of the final decree. An order of sale passed under Section 8 of the Partition Act is not a preliminary decree but is a final decree under Section 2(2) CPC as no further rights are required to be adjudicated but the declared rights only have to be enforced thereafter and which enforcement would be in execution proceedings of the final decree for partition being an order of sale of the joint property/properties."

18. In the above judgment, therefore, it has been clearly held that an order of sale which is passed in a partition suit is a Final Decree and

the rights of the parties thereafter are to be carried out by the parties concerned through an execution proceeding.

19. As submitted by the counsel for respondent no. 2 itself, the present arbitration proceedings were akin to a suit of partition. Therefore, with the passing of the order dated 31.07.2014 wherein the Sole Arbitrator held that the properties in question cannot be partitioned by metes and bounds and have to be put to sale, the Arbitrator is deemed to have passed the Final Award for the rights *inter se* between the parties, thereafter to be determined in an enforcement proceeding under Section 36 of the Act.

20. Reliance of the Arbitrator and the counsel for the respondent no. 2 on the judgment of the Supreme Court in ***Ganduri Koteswaramma*** (Supra) is ill-founded inasmuch as in the said case the report of the Commissioner appointed for division of the properties in question therein was yet to be considered by the Court and Final Decree was yet to be passed. It was in that factual background that the Supreme Court held that before passing of the Final Decree the court has the power to revise the Preliminary Decree or pass another Preliminary Decree if the situation or the change in the circumstances so demand. The Court was not considering the question as to whether the preliminary decree can be modified by the Court even after the Final Decree has been passed in the suit.

21. As far as the admission of the petitioner to the execution of the Relinquishment Deed is concerned, in light of my finding that the Arbitrator had become *functus officio* and his mandate had terminated

on the passing of the Final Award in form of his order dated 31.07.2014, the Arbitrator had no jurisdiction to consider this question any further.

22. Section 32(1) of the Act provides that the arbitral proceedings shall be terminated by the Final Arbitral Award. Sub-Section (3) to Section 32 further provides that subject to Section 33 and sub-Section (4) of Section 34, the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings. Therefore, with the passing of the Final Award, the Arbitrator has no jurisdiction to modify his Final Award, except in exercise of power under Section 33 of the Act or on an order of the Court under sub-Section (4) of Section 34 of the Act. This cannot change merely because the parties, on an incorrect appreciation of the law, continue to appear before the Arbitrator.

23. The respondent no. 2 would, however, be free to agitate its claim on the Relinquishment Deeds in accordance with the law in other appropriate proceedings.

24. In view of the above, the Impugned Order/Award dated 19.12.2018 is set aside. There shall be no order as to cost.

NAVIN CHAWLA, J

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