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

Date of decision: 5th September, 2019

+ **CM(M) 702/2013, CM APPL. 10641/2013 & CM APPL. 6754/2016**

AFTAB MALIK & ORS.

..... Petitioners

Through: Mr. Neeraj Malhotra, Senior Advocate with Mr. M. N. Siddiqui, Mr. Aditya Gaur and Ms. Cassandra Zosangliani, Advocates (M:9999397097)

versus

SHRI SHYAM LAL & ANR.

..... Respondents

Through: Mr. Sher Afgon, Advocate for R-1 (i). (M-9811650754)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

1. This is a petition filed challenging the order dated 25th April, 2013 by which the Id. ADJ has appointed a *patwari* to specify the Khasra No. in which the suit property falls. The said order reads as under:

“ Sh. M. N. Siddiqui, counsel for the objector with objector in person.

Ld. counsel for the objector submits original documents. The same be kept on the record till the final adjudication of the objections. Ld. counsel for the objector shall also place list of documents.

Heard. In my considered opinion, let the concerned Patwari/Tehsildar/SDM be called and to state that the property for which execution has been filed and decree is to be executed, falls under which khasra number. The concerned Patwari /Tehsildar /SDM will specify in this regard. DH shall take steps to call the concerned person for 19/07/2013. The

original documents brought by the objector shall not be released till the final adjudication of the objections.”

2. Mr. Neeraj Malhotra, Id. Senior counsel appearing for the Petitioner submits that there is a long history of proceedings in respect of the suit property. Initially, a suit was filed by Mr. Shyam Lal against Mr. Aftab Malik in respect of property admeasuring 1000 sq. yards situated at Shaheen Bagh, Tayyab Gali, Okhla, New Delhi-110025. In the said suit, the suit property was stated to be located in Khasra No. 401. The said suit was, however, withdrawn by Mr. Shyam Lal by filing an application under Order XXIII Rule 1 CPC wherein the following averments are made:

“2. That it is submitted that the Plaintiff has verified and checked up the entire records with the concerned authorities with regard to the suit land measuring 1000 sq. yards and also from the neighbouring areas that the said plot of land is a part of Khasra No. 518/406 Min. situated in the revenue state of Village: Jasola, Tehsil Mehrauli, New Delhi now known as Abul Fazal Enclave, Phase-II, New Delhi and not the part of Khasra No. 401 as stated by the Plaintiff in the suit and also in the site plan filed by the Plaintiff alongwith the suit.

3. That the Plaintiff states and submits that it was due to bonafide mistake and inadvertence that in the site plan filed alongwith the plaint, the same was stated to be a part of Khasra No. 401, Village: Jasola Shaheen Bagh, Tayyab Gali, Okhla New Delhi.

4. That it is submitted that the said plot of land shown in the site plan filed alongwith the suit is in fact a part of Khasra No. 518/406 Min. situated in the revenue state of Village: Jasola, Tehsil Mehrauli, New Delhi now known as Abul Fazal Enclave, Phase-II,

New Delhi and is owned and possessed by Shri Aftab Malik, Shri Abid Malik, Mohd. Yusuf, Mohd. Nazmuzaman etc. and the Plaintiff has no concern with the same”

3. The application was accompanied by a mutual settlement deed dated 12th January, 2006. The said application under Order XXIII Rule 1 CPC was taken on record and the suit was dismissed as withdrawn as compromised.

4. Thereafter, a second application was filed by Mr. Shyam Lal seeking restoration of the said suit. In the said application it was alleged that the earlier application under Order XXIII Rule 1 was filed due to a fraud which was played upon him. In the said application the following order was passed:

“ Heard. Applicant submits that he wants to withdraw present application with liberty to take appropriate legal proceedings. Let his statement be recorded separately.

Statement of applicant recorded separately. I have perused the statement as well as application. Applicant is having his efficacious remedy by way of suit of declaration as it is averred in the application fraud has been played upon him. Hence, application in hand is dismissed as withdrawn with liberty to file fresh suit as per law. File be consigned to record room and summoned file be sent back to record room.”

5. Pursuant to the liberty granted above, a second suit was filed seeking the following prayers:

“i) to pass a decree of declaration in favour of the plaintiff and against the defendant thereby declare the plaintiff as an absolute, lawful and rightful owner of the suit property i.e. a piece of land measuring 1000

sq. yards situated and presently known as Shaheen Bagh, Tayyab Gali, Okhla, New Delhi-110025 out of Khasra No. 401 in the Revenue Estate of Village-Jasaula, Tehsil Mehrauli, New Delhi;

ii) to pass a decree of declaration in favour of the plaintiff and against the defendant thereby declare the compromised made on 21.03.2006, which is without the knowledge of the plaintiff, as null & void, relating to the suit property i.e. a piece of land measuring 1000 sq. yards situated and presently known as Shaheen Bagh, Tayyab Gali, Okhla, New Delhi – 110025 out of Khasra No. 401 in the Revenue Estate of Village-Jasaula, Tehsil Mehrauli, New Delhi;

iii) to pass a decree for permanent injunction thereby restrained the defendants, their agents, associates family members or any other person acting on his behalf etc. etc. from selling/ dispose off / partwith the possession and from dispossessing the plaintiff of the suit property i.e, a piece of land measuring 1000 sq. yards situated and presently known as Shaheen Bagh, Tayyab Gali, Okhla, New Delhi – 110025 out of Khasra No. 401 in the Revenue Estate of Village- Jasaula, Tehsil Mehrauli, New Delhi as more clearly shown in red colour in the site plan attached with the plaint;

iv) cost of the suit may also be awarded in favour of the plaintiff and against the defendant; ”

In this suit, the ld. ADJ recorded a detailed order dated 26th April 2008, while dismissing the suit for non-prosecution. Costs were also imposed.

6. Meanwhile, an agreement to sell was purportedly entered into on 27th July, 2006 between Mr. Shyam Lal with Mr. Karamvir Tyagi. The said Mr. Karamvir Tyagi filed suit no. 250/2006 seeking specific performance of the agreement to sell dated 27th July, 2006. In suit no. 250/2006, Mr. Aftab

Malik was not impleaded as a party. In the said suit a compromise decree was passed under Order XXIII Rule 3. The operative portion of the order dated 8th December, 2006 reads as under:

“3. In terms with the compromise arrived at between the parties, plaintiff has paid a sum of Rs. 1,00,000/- in cash to the defendant towards full and final consideration of the suit property and it has been agreed between the parties that defendant shall execute the sale deed of the suit property in favour of plaintiff within a period of 30 days from 8/12/06. Both the parties, in the counsel of their statements brought on record the terms of their compromise as Ex.X and stated that they shall be bound by their statements.

4. In view of statements of parties, I am satisfied that the suit has been wholly adjusted by way of a lawful compromise. As such the application under consideration is allowed.

5. Consequently suit is decreed as compromised in terms with Ex.X.

6. Decree sheet be accordingly drawn in terms with Ex.X thereby directing the defendant to up in terms with execute sale deed within a span of 30 days with effect from 08/12/2006 and file be consigned to record room leaving the parties to bear their own cost.”

7. An execution petition being execution no. Ex no. 35/11 was then filed by Mr. Karamvir Tyagi against Mr. Shyam Lal in which notice was issued on 20th October, 2011. In the said execution petition, Mr. Aftab Malik filed objections under Section 47 CPC. While the objection petition was pending, the impugned order dated 25th April, 2013 was passed.

8. It is submitted by Id. Senior counsel that the appointment of the *Patwari* is completely premature in as much as the question of the Khasra

Nos. where the suit property is located is no longer left open, in as much as, the original owner Mr. Shyam Lal has accepted in the application under Order XXIII Rule 1 that the property is located in Khasra No. 518/406 and not 401. He submits that without going into the entire history of the litigation instituted by Mr. Shyam Lal at various points of time, the impugned order has been passed pursuant to a decree which was obtained by collusion between Mr. Shyam Lal and Mr. Karamvir Tyagi.

9. On the other hand, Id. counsel for the Respondent submits that the only issue is the question as to where the suit property is located and the same would be resolved by appointing a *Patwari*. Further, he submits that the application under Order XXIII Rule 1 and the mutual agreement was obtained by fraud and the same cannot be relied upon by the Petitioner herein. It is submitted that even the Id. counsel who appeared and presented the application under Order XXIII Rule 1 was not instructed to withdraw the suit by Mr. Shyam Lal. All these issues would have to be first adjudicated in the execution and the appointment of a *Patwari* would facilitate the process.

10. The Court has heard the Id. counsels for the parties and has also perused the records. There is no doubt that the impugned order is completely silent on the history of the proceedings in respect of the suit property. The appointment of a *Patwari* would be needed only when there is *bona fide* dispute as to the Khasra number. The first step to be taken in the execution petition proceedings is to hear the objections filed by the Petitioner No. 1 - Mr. Aftab Malik herein who has been a Defendant in at least two proceedings filed by Mr. Shyam Lal. The history of the said proceedings needs to be gone into by the Id. Trial Court prior to passing any order in the execution petition. This becomes all the more important as in

the decree which is sought to be executed, the Petitioner No. 1 herein was not made a party by Mr. Shyam Lal.

11. Accordingly, the impugned order is set aside. As a first step, the executing Court is directed to hear and dispose of the objections filed by Mr. Aftab Malik. Upon the decision being rendered in the objections filed by the Petitioner herein, further orders in the execution petition shall be passed. The Petitioner herein is also stated to have filed a suit challenging the compromise decree which is under execution. The said submission shall also be considered by the executing Court. List before the Executing Court on the date already fixed.

12. The petition and all pending applications are disposed in the above terms. *Dasti.*

SEPTEMBER 05, 2019

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**PRATHIBA M. SINGH
JUDGE**