

(2017) 12 DEL CK 0130

In the Delhi High Court

Case No : Execution First Appeal (Original Side) No. 31 Of 2016

Bhai Sarabjit Sabharwal @ Dr Sabi Sabharwal

APPELLANT

Vs

Bhai Balbir Singh & Ors

RESPONDENT

Date of Decision : 05-12-2017

Acts Referred:

Citation : (2017) 12 DEL CK 0130

Hon'ble Judges : Sanjiv Khanna, J; Prathiba M. Singh, J

Bench : Division Bench

Advocate : Ashish Mohan, Vikrant Singh Bloria, Akshit Mago, Akshay Ringe, Surabhi Dhar, Tusharika Mattoo, Anil Grover, Jitendra Kumar Tripathi, Mishal Vij, Noopur Singhal, Jasmeet Singh, Astha Sharma

Final Decision : Disposed Of

Judgement

Sanjiv Khanna, J

1. Bhai Sarabjit Singh has filed the present intra-Court appeal impugning the orders dated 24th November, 2016 and 1st December, 2016 passed by

the single Judge of this High Court in Execution Petition No.92/2016.

2. Bhai Balbir Singh and 11 others have been impleaded as respondents. Bhai Balbir Singh, Bhai Aditya Bir Singh, Bhai Balbir Singh (HUF) and Ms.

Chand Balbir Singh, respondent Nos. 1 to 4 are the contesting respondent and form a separate group. For the sake of clarity, we would refer to the

appellant as `BSS' and the respondent Nos. 1 to 4 as `BBS'.

3. Land and Development Office (L&DO) on 15th February, 1962 had given permission for division of land admeasuring 1.05 acres on Amrita

Shergill Marg into plot Nos. 9 and 9A, admeasuring 0.5 acres and 0.556 acres, respectively. Plot No 9 is in possession of BSS and plot No. 9A is in

possession of BBS.

4. A portion of the building, which was constructed on plot 9 was protruding into 9A, covering an area of 337 square yards in plot 9A.

5. Disputes arose in respect of the said area of 337 square yards and on account of construction of the boundary wall in the open area dividing the

plots into portions as demarcated by L&DO. The disputes were referred to the Sole Arbitrator, who had pronounced the award dated 3rd May, 2005.

The award was partly modified by the single Judge vide order dated 3rd January, 2007 passed in OMP Nos. 270/2005 and 274/2005, with the direction

the award would be implemented in a time bound manner within one year. This order was made subject matter of challenge in FAO(OS) No. 83/2007.

During the pendency of the said appeal, a settlement agreement dated 21st May, 2010 was entered into between BSS and BBS. On the basis of the

said settlement agreement, FAO(OS) No. 83/2007 was disposed of on 9th July, 2013 upholding the order passed by the Single Judge.

6. On 25th May, 2016, BBS filed Execution Petition No. 92/2016 seeking handing over of physical possession of 337 square yards from BSS in terms

of the settlement agreement dated 21st May, 2010.

7. During the pendency of the said execution petition, the Single Judge, on 27th September, 2016, appointed Mr. Anup N. Kothari, Architect to visit the

site, i.e., property 9 and 9A, Amrita Shergill Marg to identify construction of the new boundary wall, which was supposed to be 8.5 feet to the right of

the existing boundary wall from the side of the property at 9A. The Architect was also to determine the exact dimensions of the built up portions,

including the portions earmarked as DEFG and EIGL in the rough plan enclosed at page 119 of the documents. Reference was made to another plan,

which was to be attached to the order as Annexure-2. The Architect was to draw up a building plan on full scale and present it before the Court.

8. Pursuant to the aforesaid order, the Architect had visited the plots 9 and 9A at Amrita Shergill Marg and submitted his report dated 8th November,

2016.

9. On 10th November, 2016, some of the co-respondents in the present appeal through their counsel had requested for time to obtain instructions. In

spite of opposition by BBS, the Court granted time and fixed the case on 24 th November, 2016.

10. On 24th November, 2016, the Single Judge passed the following order:-

1. It is seen that due to inadvertence Annexure-1 and Annexure-II which formed part of the order dated 27th September, 2016 were not in fact

enclosed with that order. It is again directed, specifically, that the rough plan at page 119 of the documents filed by the Decree Holders (DHs)

(attached to this order as Annexure-I) should be read as Annexure I to the order dated 27th September, 2016. Likewise, the rough plan at Annexure-

B to the reply filed by the Judgment Debtor (JD) 2A (attached to this order as Annexure-II) should be read as Annexure II to the order dated 27th

September, 2016.

2. It is further directed that the sentence in para 10 (i) of the order dated 27th September 2016 shall be corrected to read: "(i) To put forth a proposal

together with a plan for the construction of the bathroom of the same dimension of the bathroom marked as H' in Annexure I to this order.

3. The report submitted by the Architect in terms of the order dated 27th September 2016 has been perused. Attached to the said report is a copy of a

map (to scale) indicating where exactly the partition wall that separates the Property at 9-A from the property at 9 Amrita Shergill Marg is to be

located. The dimensions of the wall have also been suggested. All the parties agree to the suggestions of the Architect.

4. Accordingly it is directed that the DHs will now proceed to construct the partition wall in terms of the report of the Architect and the enclosed map

and in terms of the settlement dated 21st May 2010. All the other parties will extend their full cooperation in that exercise. To make the position clear,

the map enclosed with the report of the Architect is enclosed with this order as Annexure-A.

5. As regards seeking the permission of the Land & Development Office (L&DO) for the construction of the above wall, the Court notes that the

demarcation of the two portions of the property i.e., 9A and 9, Amrita Shergill Marg, New Delhi has already been recorded in the records of the

L&DO. The construction of the wall makes the demarcation even more explicit. The Court, therefore, does not envisage any objection by the L&DO

for the construction of the wall as recommended by the Architect. In any event, the DHs undertake that in the event the L&DO raises any query in

that regard, the responsibility of answering the L&DO and meeting any liability as

a result thereof will be entirely that of the DHs without any recourse to any of the other parties.

6. The other issue concerns the construction of a bath room inside 9, Amrita Shergill Marg, falling to the share of Judgment Debtor (JD) No. 2B in terms of para 4(c) of the Settlement dated 21st May, 2010. The DHs put forth a suggestion that the said bathroom would be constructed in the portion marked in green colour in the map enclosed with the report of the Architect (Annexure A to this order). It is pointed out that since such construction would be within the built up area, no permission of the L&DO will be required. However, the counsel for JD 2B states, on instructions, that JD-2B will on his own construct the bathroom at the portion marked blue in the same map i.e. Annexure A.

7. The DHs are agreeable to the above suggestion of JD 2B subject to the rider that if any query is raised by L&DO or any other agency in that regard, the responsibility of answering such query and meeting any liability as a result thereof will entirely be that of JD-2B without any reference to the DH or any of the other parties. It is ordered accordingly.

8. It is also understood that construction of the above bathroom can commence only after completion of the partition wall. Till such time the proposed bathroom is constructed at the portion marked in blue in Annexure A, JD-2B will continue to have access to and use the bathroom in 9A, Amrita Shergill Marg marked as H in Annexure I. The partition wall should be constructed within a period of one month from today and the proposed bathroom within a period of 20 days thereafter.

9. With the outstanding disputes having been resolved, no further directions are called for.

10. The execution petition and the pending application stand disposed of. If any difficulty is encountered in implementing the above directions, it will be open to the parties to apply to the Court.

11. Order be given dasti to learned counsel for the parties under the signature of the Court Master.â??

11. This order is impugned before us.

12. Subsequently BSS filed an application seeking review/recall of the order dated 24th November, 2016 vide EA (OS) No. 798/2016, which as

noticed above, has been dismissed by the second impugned order dated 1st December, 2016, which for the sake of convenience is also reproduced

below:-

1. Having heard Mr. Sandeep Sethi, learned Senior counsel appearing for the Applicant, the Court is not inclined to clarify the order dated 24th

November 2016 which is self explanatory. It requires to be recorded that the order dated 24th November 2016 reflects accurately what transpired in

the Court in the course of hearing on that day.

2. The application is dismissed.

13. The primary issue, which arises for consideration, is whether the appellant-BSS had by consent agreed to modification of the settlement agreement

dated 21st May, 2010 and had agreed to construction of the boundary wall thereby denying him access and right to use the portion EIGL mentioned in

the agreement dated 21st May, 2010. The other aspect, which arises for consideration, is whether the appellant-BSS had agreed to construction of the

boundary wall instead of the wrought iron grill in the open area. The last contention relates to the bathroom described as 'H' in the site plan

enclosed with the agreement dated 21st May, 2010.

14. In order to appreciate the controversy, we would like to reproduce the terms of settlement dated 21st May, 2010, the relevant portion of which

reads as under:-

.....It is therefore agreed by and between the parties as follows:-

1. Bhai Sarabjit Singh withdraws all his objections against the arbitration awards and decree dated 3.1.2007. Accordingly Bhai Sarabjit Singh shall

transfer 13.282% shares held by him of Bhai Sundar Dass Sardar Singh Pvt. Ltd. to Bhai Balbir Singh against the payment of Rs.22311661.89

alongwith proportionate interest accrued thereon, by the Registrar of the Delhi High Court from the amounts deposited by Bhai Balbir Singh.

2. Bhai Sarabjit Singh does not dispute the allotment and allocation of the shares held by late Bhai Trilochan Singh and Bhai Trilochan Singh HUF in

M/s Bhai Sundar Dass Sardar Singh Pvt. Ltd. to Bhai Balbir Singh. And accordingly being one of the legal heirs of Bhai Trilochan Singh, allows the

transfer of the said shares to Bhai Balbir Singh against the payment of the proportionate amount to Bhai Sarabjit Singh. As regards the balance

decretal amount due to to Bhai Trilochan Singh, which may have come to the shares of Bhai Trilochan Singh (HUF) and BTS individually, the same

shall be deposited in the Test Case No. 2/2008, the monies as regards those shares shall stands transferred by the Registrar of The Delhi High Court

to that suit. Bhai Sarabjit Singh agrees and consents that his individual as well as his share in Bhai Trilochan Singh HUF in Bhai Sunder Dass Sardar

Singh Pvt. Ltd. shall be transferred to Bhai Balbir Singh Group.

3. Bhai Sarabjit Singh gives up all his claim in respect of Bhai Sunder Dass Sardar Singh Pvt. Ltd. and shall support Bhai Balbir Singh and his group in

respect of any of the decisions of the said company present or in future.

4. In consideration of the above Bhai Balbir Singh and his group agrees to a modification of the Judgment and decree dated 3.1.2007 in OMP No. 270

and 274 of 2005 to the following extent as regard the transfer and delivery of possession of 337 sq yards of 9A Amrita Shergill Marg as decreed. A

representative plan of the shifting of the wall and the terms therefor is enclosed as ANNEXURE A;-

a) From the front the existing brick wall shall be moved along L&DO line and shall be extended to an extent of 66 feet in length from the front wall of

9 Amrita Shergill Marg between Point A and B marked in Enclosed plan ANNEXURE A.

b) The new partition in front portion shall be aesthetically pleasing wrought iron grill of 5 ft height shall be installed/built by Bhai Balbir Singh along the

L&DO line which shall be 8 ft 11 inches from the start of the existing brick wall from the side of 9A Amrita Shergill Marg, New Delhi as shown as A,

B and C in the plan attached. The area which comes in possession of BBS and his group after installation of the Wrought Iron grill/wall shall be

maintained permanently by BBS as a Green zone/area with plants/shrubs and trees. The endeavour of BBS shall be that the wrought iron wall

remains invisible to the extent that the shrubs and trees are always of a height higher than that of the grill. This grill shall be maintained by BBS and

his group. In case of transfer of 9, Amrita Shergill Marg to a third person not belonging to the family of Bhai Sunder Dass, the said Grill shall be

converted into a Brick Wall of 7 Ft height.

c) As regards the constructed portion protruding into 9A Amrita Shergill Marg marked as D,E,F,G in the Plan, along the existing wall line shall be

handed over to BBS and his Group excluding the small bathroom at the end of the strip of the constructed portion marked A in the plan. A

bathroom shall be constructed by BBS behind the L&DO line in 9 Amrita Shergill Marg, and shall be handed over to BSS as when it is made ready till

then BSS shall use the bathroom marked B in the plan.

d) As regards the back portion of the wall, it shall be shifted on the L&DO line as directed by the Ld. Single Judge which will be a regular wall of 7

feet height.

e) As regards the constructed area remaining in the possession BSS which ought to come to BBS under the decree, marked E, I, G, L in the plan shall

remain in possession of BSS till the entire house is demolished and reconstructed or sold.

f) In case of demolition/reconstruction/sale to a third party, of the entire of 9 Amrita Shergill Marg, the present constructed portion E,I,G,L in the Plan

shall be transferred entirely to BBS and his group or his transferees who shall then be entitled to put a brick wall from the front till the end on the

L&DO line as per the orders of the Ld. Single Judge.

5. The parties agree and acknowledge that with this settlement the parties shall not make any allegations against each other and neither will they make

any claims against each other except as mentioned in the present settlement. The parties also agree and undertake that they shall support each other

in other litigations amongst other family members and the present parties. BBS agrees that he shall support the will of Late Smt. Somawanti dated

3.1.1981 where BBS is one of the executor and he shall furnish an affidavit acknowledging the Will dated 3.1.1981 and the BBS shall withdraw any

objections which he may have filed. BBS further undertakes that any share which may devolve upon BBS in 9 Amrita Shergill Marg, from the estate

of Late Somawanti, the same shall stand relinquished in favour of BSS permanently. The parties state that no court order is being infringed by the

present settlement which is mutual. The parties undertake to abide by this settlement.

15. In order to appreciate the terms of settlement, we would also like to refer to the site plan enclosed with the settlement agreement. A diagrammatic

coloured representation of the relevant portion of the site plan, with the duly identified demarcations is set out below:

(Colouring added by the Court)

As is seen, the site plan had demarcated three separate portions described as H (purple coloured), DEFG (green coloured) and EIGL (red coloured).

These portions were to form part of plot 9A, but were in the building constructed on plot 9. 'H' was a small bathroom of about 50 square feet in size.

DEFG was a separate area and has been referred to in clause 4(c) of the settlement agreement dated 21st May, 2010. As per the said clause, the

portion marked DEFG was to be handed over to BBS and his group, except for the small bathroom H. BBS was to construct a bathroom behind the

L&DO line in plot 9 and handed over the same to BSS. BSS was entitled to use bathroom H till the time the new bathroom was constructed in plot by

BBS. Upon construction of the new bathroom in plot 9, the possession of the bathroom H was to be given to the holders of plot 9A.

16. With regard to the portion EIGL, clauses (e) and (f) in paragraph of the settlement had stipulated that the same would remain in possession of BSS

though it was part of the constructed portion of plot 9, till the entire house is demolished, re-constructed or sold. This is further clarified by clause (f),

which stipulates that on demolition/re-construction/sale to a third party of the entire plot 9, the constructed portion EIGL in the plan will be transferred

entirely to BBS and his group or his transferees. They shall be thereafter entitled to construct a brick wall from the front till the end on the L&DO line

as per the orders of the single Judge.

17. The BBS group as recorded above has filed a execution petition for enforcement of the terms of settlement dated 21st May, 2010. The impugned

order in respect of the portion EIGL, modifies the terms of settlement dated 21st May, 2010. The contention of the BBS group is that as per the

report given by the Architect and in terms of the order dated 24th November, 2016 read with order dated 27th September, 2016, BSS had agreed and

consented to giving up rights in EIGL portion notwithstanding the earlier agreement dated 21st May, 2010. In other words, the appellant-BSS had

agreed to the construction of the wall so as to give up their right to use of EIGL portion even though the conditions of demolition/reconstruction or

sale to third party as postulated in clauses (e) and (f) of the said agreement had not become operational and effective.

18. Counsel for the respondent-BBS group specifically refers to paragraphs 1, 3,

6 and 7 of the order dated 27th September, 2016 and paragraphs

3, 4, 6 and 7 of the order dated 24th November, 2016. In order to appreciate the aforesaid contention, we would like to also reproduce for clarity the

relevant paragraphs 1, 3, 6 and 7 of the order dated 27th September, 2016:-

1. The parties have agreed that some modality will have to be worked out in order to implement the Award of Justice P.K. Bahri, as modified by

this Court by order dated 3rd January 2007, which has been affirmed by the Division Bench by order dated 9th July, 2013 in FAO(OS) 83 of 2007 and

the further modification brought about by the settlement dated 21st May, 2010 executed between the Decree Holder (DH) and the Judgment

Debtor 2B.

2. XXXXX

3. There are questions as to the feasibility of erecting a wall within the constructed portion, as an extension of the new boundary wall between the aforementioned two properties wall as proposed by Justice Bahri's Award.

4. XXXXX

5. XXXXX

6. The Court, accordingly, appoints Mr. Anup N.Kothari, Mobile No. 9811228526, an Architect on the Panel of the Delhi International Arbitration

Centre (DAC) to visit the site i.e., both the properties at 9A as well as 9 Amrita Shergill Marg to identify the new boundary line which is

supposed to be about 8.5 ft. to the right of the existing boundary wall from the side of the property at 9A. The Architect will also visit the constructed

portion of 9 Amrita Shergill Marg to determine the exact dimensions of the built up portions therein including the portions earmarked as DI LF and

DEGF in the rough plan at page 119 of the documents, a copy of which is attached to this order as Annexure-I. Another rough plan is at Annexure-B

to the reply filed by JD 2A which is attached to this order as Annexure II. The site plan and the building plan drawn to Scale will be presented to the

Court by the Architect by the next date.

7. The Architect will inform the parties through their respective counsels at least one week in advance of the date and time of his visit. One

representative of each party is allowed to remain present during his visit. The Architect will indicate the best possible way to give effect to the

demarcation of the new boundary wall including the built up portion of 9 Amrita Shergill Marg.â??

19. Having gone through the said orders and also the settlement agreement, including clauses (e) and (f) thereof, it is not possible to accept the

contention raised by BBS that the appellant-BSS by consent had given up his claim of right to use the portion EIGL as also possession thereof. In fact,

we do not find any good ground or reason why the appellant-BSS would have given up the right of use the portion EIGL for which there had been

contest and proceedings pending since 2005 culminating into settlement agreement dated 21st May, 2010 and then a decision of the FAO(OS) No.

83/2007 on 9th July, 2013. The settlement agreement dated 21st May, 2010 had given specific rights to the appellant-BSS in the portion EIGL in plot 9.

When we read the order dated 27th September, 2016 and the order dated 24th November, 2016, we cannot make out that the appellant-BSS had

understood and had agreed and consent to give up and had consented to the modification of clauses (e) and (f) of the settlement agreement dated 21st

May, 2010. In case this was the intent and the appellant-BSS was ad idem on the said aspect, a clear and categoric statement was required. No doubt,

order dated 24th November, 2016 is a consent order, albeit it refers to consent given by the appellant-BSS in respect of the construction of the outside

boundary wall and in respect of the bathroom. We do not understand the said orders as recording a consent of BSS, giving up his right to use in the

EIGL portion. Counsel for the parties have accepted that there is already a wall having doors demarcating the portions DEFG and EIGL.

20. We have also gone through the Architect's letter dated 8th November, 2016 and in particular paragraph 2 thereof, which was relied upon by the

counsel appearing for BBS group. Paragraph 2 of the said letter reads as under:-

â??Constructing a partition wall 9â? thick, 4â?-1/2â? from the centre line on both sides of the L&DO line, this wall erected will give effect to the best

possible way for the demarcation of the new boundary wall including the built up portion of 9 Amrita Shergill Marg, New Delhi.â??

21. The plan prepared by the Architect has been shown to us today in the Court. The said plan does not specifically refer to the portions DEFG and

EIGL. Looking at the plan given by the Architect, would not indicate that it was envisaged that the demarcation wall would be constructed so as to

deprive the appellant-BSS of the portion EIGL. We would, therefore, observe that even if this was the intent, it ought to be specifically pointed out and

explained to the appellant-BSS before it can be construed and accepted that he had willingly given his consent to give up that portion.

22. Counsel for the BBS group was repeatedly asked why and for what reason will the appellant-BSS agree to give up his right on the portion EIGL.

After all, certain rights had been given to appellant-BSS and this had resulted in the settlement agreement dated 21st May, 2010 bringing to an end a

long drawn litigation. We do not read any of the orders as indicative of the fact that the appellant-BSS had consciously and clearly consented to give

up his rights under clauses (e) and (f) of the settlement agreement dated 21st May, 2010.

23. Learned counsel for the appellant-BSS had also objected to the construction of the boundary wall in the outside portion and in the portion DEFG

stating that only a wrought iron grill could be affixed. Contention was also raised with regard to the right to use bathroom H. However, we do not think

appellant-BSS can succeed on the grounds. The direction given in the impugned order is to construct a boundary wall in the outside portion which

demarcated plots 9 and 9A instead of a wrought iron grill. To this extent, we find that the order passed by the single Judge was with the consent of

parties. This was the intent and the reason for passing order dated 27th September, 2016 and subsequent order dated 24th November, 2017. With

regard to the bathroom at point H, we are not inclined to interfere with the impugned order as the appellant-BSS had understood that the bathroom has

to be built in the portion in his occupation in plot No. 9 as per the demarcation carried on by L&DO dividing plots 9 and 9A. These were stipulation

and time limits on construction of bathroom as portion of plot 9 as per agreement dated 21st May, 2010. It has been 17 years since then. Consent was

given, in the express terms and recorded in respect of the Bathroom H. To that extent, we do not see any reason to interfere with the impugned order

and the directions given therein. We are not aware whether the appellant-BSS requires permission for construction of the bathroom. If any such

permission is required, the same would be obtained. In case permission from the NDMC is sought, we hope and trust that NDMC would decide the

same in accordance with law and grant permission expeditiously. In case of difficulty, the parties can move the single judge by filing an application in

the execution petition. As time lines would undergo a change, parties would approach the single Judge.

24. The appeal is disposed of in the aforesaid terms. There will be no order as to costs.

25. Interim orders to the extent they are at variance with the order passed today stand vacated/modified.