

(2019) 09 DEL CK 0144

In the Delhi High Court

Case No : Civil Suits (OS) No. 2209 Of 2008

Neety Gupta

APPELLANT

Vs

Usha Gupta & Ors

RESPONDENT

Date of Decision : 05-09-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 20 Rule 12, Order 20 Rule 18

Citation : (2019) 264 DLT 207

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Sumeet Anand, Pratyush Parimal, Harsha Peecharia, Kriti Sinha, Sweety Gupta

Final Decision : Dismissed

Judgement

IA No.12270/2019 (of the plaintiff u/S 152 r/w S/151 CPC)

1. The applicant/plaintiff seeks amendment of the decree dated 19th September, 2016 in this suit.

2. The applicant/plaintiff instituted this suit for partition of two immovable properties, one at Safdarjung Enclave, New Delhi and the other at Pitampura, New Delhi. On 27th September, 2011, a preliminary decree for partition was passed, declaring the applicant/plaintiff and the four defendants to be having 1/5th undivided share in each of the properties and a Commission issued to explore the possibility of division of the property by metes and bounds.

3. The applicant/plaintiff thereafter filed IA No.22524/2014 under Order XX Rule 12 of the Code of Civil Procedure, 1908 (CPC) seeking mesne profits. Reasoning that no evidence having been led before passing of the preliminary decree for partition and the applicant/plaintiff having not pressed the relief of mesne profits in the suit, no damages/mesne profits could be ordered at that stage, the said application was dismissed vide order dated 28th January, 2016.

4. Review Petition No.146/2016 filed by the applicant/plaintiff with respect to the order dated 28th January, 2016 supra was also dismissed on 17th February, 2017 as withdrawn with liberty to file an appeal against the impugned order.

5. Vide order dated 19th September, 2016, a final decree for partition of the two properties aforesaid was passed, of sale thereof and of distribution of sale proceeds amongst the parties as per their shares declared in the preliminary decree for partition.

6. RFA(OS) No.32/2017 preferred by one of the defendants in the suit against the final decree for partition dated 19th September, 2016 was dismissed on 30th May, 2017.

7. On 29th October, 2018, vide judgment dated 29th October, 2018, FAO(OS) No.81/2017 preferred by the applicant/plaintiff against the order dated 28th January, 2016 declining mesne profits was allowed by the Division Bench of this Court and it was ordered that "an enquiry for mesne profits in terms of Rule 18 of Order XX CPC be undertaken in execution proceedings".

8. The applicant/plaintiff has now filed this application seeking amendment of final decree for partition dated 19th September, 2016 in terms of judgment dated 29th October, 2018 in FAO(OS) No.81/2017.

9. To say the least, the application is in ignorance of law and CPC and it appears that even professionals are drafting and filing the applications without checking the law or the CPC. A decree is not required to be amended in terms of the appellate decree. The appellate decree stands on its own footing. In law, the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement. Once the decree of the first Court merges with the decree in appeal, the amendment, even if necessary for any reason, has to be of the decree in appeal and not of decree of the first Court. Reference can be made to Commissioner of Income Tax, Bombay Vs Amritlal Bhogilal AIR 1958 SC 868, Gojer Bros. Pvt. Ltd. Vs. Ratal Lal Singh (1974) 2 SCC 453 and Chandi Prasad Vs. Jagdish Prasad (2004) 8 SCC 724. M.C. Chagla, Chief Justice, also, in Hussain Sab Wallad Husan Sab Gaima Vs. Sitaram Vigneshwar Bhadti AIR 1953 Bom 122 held that if a decree of confirmation is passed by the appellate Court, the decree of Trial Court merges in the decree of the appellant Court and it is impossible to say that the decree of Trial Court is still in existence and it could be amended. To the same effect are the views in Deba Nand Naithani Vs Jaya Nand 1961 SCC Online All 86, Kannan Vs. Nrrayani AIR 1980 Ker 76 (FB), S. Brahmanand Vs. V. Rajan 2012 SCC Online Ker 14521 and Haradhan Malik Vs. Biswanath Malik 2013 SCC Online Cal 18623.

10. The ignorance practised on behalf of the applicant/plaintiff is in fact visible throughout and which has led to, not only the complications aforesaid but even this application having been filed. At the outset, it may be stated that on 28th January, 2016, the law as laid down by the Supreme Court as far back as in R.S. Maddanappa Vs. Chandramma AIR 1965 SC 1812, Bhagwati Prasad Vs.

Chandramaul AIR 1966 SC 735, and Gopalakrishna Pillai Vs. Meenakshi Ayal AIR 1967 SC 115 was not cited by/on behalf of the counsel for the applicant/plaintiff. If the law had been cited and which is in fact evident from a bare reading of Order XX Rule 12 of the CPC itself, the application for mesne profits would not have come to be dismissed. Even otherwise, this Court in Seth Girdhari Lal Vs. Seth Gaja Nand 1973 SCC OnLine Del 228 had made it amply clear that even under Order XX Rule 18, it is open to the Court to pass directions regarding mesne profits even in the absence of a prayer in that regard, and which judgment was also not cited by the counsel for the applicant/plaintiff. Reference in this regard may also be made to Ajit Gogna Vs Jitender Gogna 2019 SCC OnLine Del 7517.

11. Not only so, even thereafter, before the Division Bench on 29th October, 2018, the prayer for passing a decree for an enquiry into mesne profits was not pressed and it appears that no decree has been drawn up in terms of the judgment dated 29th October, 2018 of the Division Bench, though it is obvious that the Division Bench, conscious of the decree, has directed an enquiry into mesne profits to be undertaken in execution proceedings.

12. The remedy of the applicant/plaintiff is to seek execution in terms of order dated 29th October, 2018 of the Division Bench, and not to seek amendment of the decree. Decrees, even when set aside/modified in appeal, are not required in law to be amended, and it is for the person entitled to execution, to seek execution of the appellate order/decreed and not seek modification of the decree of the Trial Court.

13. The counsel for the applicant/plaintiff obviously has not done any homework before moving the application and which has led to considerable time being wasted not only in reading the file beforehand but also in dealing with the application, wasting Court hours.

14. Thus the application is dismissed with costs of Rs.20,000/- to be deposited by the applicant/plaintiff with the Delhi High Court Advocates Welfare Trust, as a pre-condition for seeking mesne profits.