

(2021) 12 DEL CK 0167

In the Delhi High Court

Case No : Civil Revision Petition No. 101 Of 2021

Ramesh Arya

APPELLANT

Vs

Pavan Arya

RESPONDENT

Date of Decision : 21-12-2021

Acts Referred:

Code Of Civil Procedure, 1908 — Order 7 Rule 11

Citation : (2021) 12 DEL CK 0167

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Final Decision : Disposed Of

Judgement

Prathiba M. Singh, J

1. This hearing has been done in physical Court. Hybrid mode is permitted in cases where permission is being sought from the Court.

CM APPL. 46581/2021 (for exemption)

2. Allowed, subject to all just exceptions. Application is disposed of.

CRP 101/2021 & CM APPLs. 46582/2021 & 46583/2021

3. The present petition challenges the impugned order dated 30th November, 2021 in CS No.807/17 titled Pavan Arya v. Ramesh Arya. Vide said order, the application under Order VII Rule 11 CPC, filed by the Defendant/Petitioner (hereinafter "Petitioner"), was dismissed. This litigation is between two brothers, Pavan Arya and Ramesh Arya, and the suit herein was instituted by the Plaintiff/Respondent (hereinafter "Respondent") in 2017 concerning the same property bearing No.A-135, Priyadarshini Vihar, New Delhi (hereinafter "suit property").

4. Between the members of the Arya family, there was another suit for partition filed in 2018, by the Petitioner. This partition suit which was filed before the Delhi High Court was decreed vide order dated 5th September, 2019 in CS(OS)

520/2018 titled Ramesh Arya v. Pawan Arya & Ors., in the following terms:

"Thus, a preliminary decree for partition of property No.A-135, Priyadarshini Vihar, New Delhi is passed, declaring the plaintiff Ramesh Arya, defendant no.1 Pavan Arya, defendant no.2 Satish Arya and defendant no.7. Anju Nijhawan to be having 1/5th undivided share each therein and the defendants no.3 Raj Kumari Arya, defendant no.4 Sunil Arya, defendant no.5 Saurabh Arya and defendant no.6 Sonali Arora together having remaining 1/5th undivided share in the property.

38. Preliminary decree for partition be drawn up.

39. While the counsel for the plaintiff and the counsel for the defendants no.1,2,6 and 7 on enquiry state that the property is not partible by metes and bounds, the counsel for the defendants no.3 to 5 states that he will have to study the plan to answer the question.

40. Considering the size and construction of the property and the number of shareholders in the property, the property is not found to be partible by metes and bounds and it is not deemed necessary to issue a commission or to await the response of the defendants no. 3 to 5 to the query made.

41. The counsel, when appears in the Court, ought to have been ready with the said aspect in view of the admitted position as emerged.

42. Thus, a final decree for partition of property No.A-135, Priyadarshini Vihar, New Delhi is also passed, of sale thereof and of distribution of sale proceeds amongst the parties as per their shares in the preliminary decree for partition.

43. It is however made clear that the parties shall be entitled to make inter se bids, with the party/s bidding the highest, acquiring the share/s of other/s against payment of consideration, execution of requisite documents and delivery of possession.

44. If any of the party/s fails to deliver possession of the portion of the property in his/her possession/occupation to the purchaser or to the highest bidder, such party/s shall be liable to be dispossessed from the property as if in pursuance to a decree for recovery of possession of immovable property.

45. Till the execution of the decree, all the parties are restrained from alienating, encumbering or parting with possession of and/or creating any third party right in and/or from making any additions, alterations, constructions, demolitions in the property.

46. The parties to bear their own costs.

47. Final decree for partition be drawn up."

5. The suit out of which the present petition arises, is a suit for permanent and mandatory injunction, filed in 2017, prior to the suit seeking a decree for partition. In the present suit, only the two brothers, Pavan Arya and Ramesh

Arya, are parties. The prayers in the suit are as under:

"It is, therefore, most respectfully prayed that this Hon'ble court may kindly be pleased to pass a decree of permanent injunction in favour of Plaintiff and against the Defendant thereby restraining the Defendant their agents, servants, legal heirs, attorneys, representative, employee, friends associates etc. from causing any kind of hindrance in the peaceful enjoyment of the common passage at 2nd floor shown in red colour by the plaintiff to the suit property and further restrain the defendant from illegal encroachment, hindrance over the suit property and common passage. Further also restraining the defendant from creating any third party interest into the suit property i.e. 2nd Floor (Back Side portion), A-135, Priyadarshini Vihar, Delhi-110092 including common passage. It is also prayed before honourable court to pass an order of mandatory injunction, to give the access to this common passage to the plaintiff to enter into his Bedroom at the back side of the 2nd Floor portion for the peaceful enjoyment of the same. The suit property is more specifically shown in GREEN colour in the site plan annexed herewith.

Cost of the suit proceedings is also awarded in favour of the Plaintiff and against the Defendant.

Any other relief which this Hon'ble Court deems fit and proper, in the facts and circumstances of the present case may also be granted in favour of plaintiff and against the defendant."

6. In light of the above prayers, the question that the Petitioner's counsel seeks to raise is that the injunction as sought cannot be granted by the Trial Court in view of the judgment on partition already passed by the High Court dated 5th September, 2019.

7. Notably, issues were framed in this suit, as recorded in order of the Trial Court dated 21st March, 2018 and thereafter, the application was moved by the Petitioner for rejection of the plaint. The said application has been rejected by the Trial Court vide the impugned order, on the ground that the judgment in the partition suit dated 5th September, 2019 only established the shares of all the parties i.e., it determined the rights of all co-owners in the suit property, however the cause of action in the present suit is different, as here the Respondent is seeking an injunction order to gain access to his lawful share in the suit property.

8. Ld. counsel for the Petitioner submits that if the Trial Court proceeds further, it may result in contradicting the decree which has been passed by the High Court.

9. Therefore, the narrow issue in this petition is whether the plaint is liable to be rejected under Order VII Rule 11 CPC. As per the Trial Court, the application under Order VII Rule 11 CPC has been rejected on the ground that the judgment dated 5th September, 2019 in fact, only, recognized the shares of all the parties.

10. The first and foremost feature that this Court wishes to note is that the final

decree for partition was passed on 5th September, 2019. However, the admitted position is that none of the decree holders/siblings have taken any steps to give effect to the said final decree of partition. No steps for sale of the property have been taken nor have any remedies been invoked to execute the said decree. In the meantime, the suit filed by the Respondent is proceeding further and the Petitioner has now been unsuccessful in getting the said plaint rejected. As per Id. counsel for the Petitioner, he is in exclusive possession of second floor of the property and the remaining portions are stated to be in possession of the other siblings.

11. The prayers in the suit before the Trial Court are in respect of injunction, peaceful enjoyment as also for the entry to the second-floor portion. The Trial Court is fully seized of the matter. It is unclear to this Court as to why none of the parties are taking any steps to give effect to the decree for partition dated 5th September, 2019.

12. Whatever may be the reasons between the parties to not effectuate the decree dated 5th September, 2019, this Court does not believe that the suit for permanent and mandatory injunction is liable to be rejected in view of the partition decree. Though there is no doubt that the share of the various parties had been determined by the said partition decree, if there are any intervening prayers for injunction which any of the parties wishes to seek, they cannot be stopped from availing of their legal remedies. The injunction as sought relates to the enjoyment and peaceful possession of the property and shall not in any way impinge upon the judgment passed by the Court.

13. Accordingly, interference is not warranted against the impugned order. However, the Trial Court would definitely bear in mind the following facts, before adjudicating the suit herein:

(i) Before deciding the suit for injunction, it shall note that the other three legal heirs are not impleaded in the suit.

(ii) If the Court deems it appropriate to implead the other parties to the partition suit in the present suit, i.e., the siblings, it may implead them and proceed further in accordance with law.

(iii) Since the settlement being relied upon by the Respondent has already been opined upon in the judgment dated 5th September, 2019, nothing contradictory shall be considered by the Trial Court. No order would be passed in this suit, which would be contradictory to the final decree of partition dated 5th September, 2019.

14. With these observations, the present revision petition is disposed of. All pending applications are also disposed of.

15. Let a copy of this order be sent to the Court of the Id. ACJ cum CCJ cum ARC, Karkardooma Courts, Delhi, in CS No.807/17 titled Pavan Arya v. Ramesh Arya.