

(2010) 11 DEL CK 0067

In the Delhi High Court

Case No : C.M. (M) No"s. 1201 of 2010 and C.M. No. 16773 of 2010

Sh. Hari Prakash Sharma (deceased), through Legal Heirs and Others APPELLANT

Vs

Smt. Lado Devi (deceased) and Others RESPONDENT

Date of Decision : 09-11-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, 151, 50
Constitution of India, 1950 — Article 227
Partition Act, 1893 — Section 4

Citation : (2010) 11 DEL CK 0067

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : Vaibhav Gaggar, for the Appellant; Nemo, for the Respondent

Judgement

V.B. Gupta, J.—This petition under Article 227 of the Constitution of India has been filed on behalf of petitioners seeking quashing of orders dated 7th August, 4th September, and 8th September, 2010, passed by Additional District Judge, Delhi.

2. Brief facts as emerges from record are that in year 1997, a suit for partition of property bearing No. 240, Hari Nagar, Ashram, Delhi was filed by respondents No. 1 to 3 against petitioner No. 1 and respondents No. 4 to 11.

3. Petitioner No. 1 (since deceased) was proceeded ex-parte in the suit. A preliminary decree was passed by Additional District Judge, Delhi on 15th January 1998 and a Local Commissioner was appointed to visit the spot and partition the suit property.

4. On 30th July, 1998, Additional District Judge passed the final decree for partition on the basis of report submitted by the Local Commissioner.

5. Since, respondents/decreed holders did not pay the fee of the Local Commissioner, therefore, Local Commissioner, could not visit the suit property as

directed. On 13th December, 2005, application of respondents/deed holders was dismissed for non prosecution.

6. During pendency of the proceedings, Smt. Lado Devi (respondent No. 1) died. However, in her life time she bequeathed her share in the property to respondent No. 2 (Smt. Kusum Lata) vide registered Will. Now, Smt. Kusum Lata holding two shares i.e. 1/6th of herself and 1/6th of Smt. Lado Devi, Smt. Shiksha Devi (respondent No. 3), Smt. Raksha Devi (respondent No. 4) holding 1/6th share each, Smt. Nirmala, Smt. Sangeeta Sharma, Smt. Sunita Sharma, Smt. Tripta Anand Sharma, Ms. Meenu Sharma, Ms. Meenakshi Sharma and Ms. Poonam Sharma (respondents No. 5 to 11 respectively) all legal heirs of Ved Prakash Sharma, jointly holding 1/6th share in the said property, have sold their undivided shares in favour of Shri Rajesh Kumar Saini (respondent No. 12) for consideration and have executed Sale Deed of their respective undivided shares in his favour.

7. During this period, petitioner No. 1 (Hari Prakash Sharma) also died, leaving behind his wife Smt. Vimla Devi Sharma (petitioner No. 5) three sons namely, Trilok Sharma, Mukesh Sharma, Yogesh Sharma (petitioners No. 2 to 4) and daughter Smt. Seema Sharma (petitioner No. 6), who are in possession of the suit property.

8. After purchasing the shares in the above mentioned property, respondent No. 12 got served a legal notice on the legal heirs of Late Hari Prakash Sharma, who are in possession of the property, calling upon them to vacate 5/6th shares of the suit property and hand over possession of the same to him being co-sharer, having purchased 5/6th share by virtue of registered Sale Deeds dated 19.5.2008 and 22.5.2008. However, said legal heirs of Late Sh. Hari Prakash Sharma, have neither vacated nor handed over 5/6th share of the suit property.

9. Respondent No. 12 also offered the legal heirs of Late Sh. Hari Parkash, to purchase their share and pay market price but they have refused to sell their 1/6th share to him. Respondent No. 12 is still ready to pay L.Rs. of Sh. Hari Parkash, market price of their share.

10. Accordingly, respondent No. 12, filed an application u/s 50 read with Section 151 of the CPC (for short as "Code") for appointment of Local Commissioner to partition the suit property in terms of order dated 30th July, 1998 and put him in possession of his share of the suit property.

11. Trial court, vide order dated 7th August, 2010, allowed the application and appointed a Local Commissioner and directed her to effect the partition of the property, as per order dated 30th July, 1998.

12. Respondent No. 12, thereafter filed an application u/s 151 of the Code, for providing Police help to execute order dated 7th August, 2010, which was allowed, vide order dated 4th September, 2010.

13. In the meanwhile, petitioners filed an application u/s 4 of the Partition Act,

1893 (for short as "Act") praying that they be given liberty to repurchase the undivided share in the suit property from purchaser Sh. Rajesh Kumar Saini (respondent No. 12) at a fair price as determined by the Court. This application had been kept pending by the trial court and was fixed for 8th September, 2010 for disposal. Meanwhile, petitioners filed this petition challenging the above three impugned orders.

14. It is contended by learned Counsel for the petitioners that impugned orders passed by the trial court are totally perverse and contrary to the facts and evidence on record. The Court below has erred in fulfilling the mandatory requirement under Order 21 Rule 22 of the Code whereby petitioners have not been made a party nor they have received any notice under the said order.

15. Other contention is that, vide order dated 7th August, 2010, trial court appointed a Local Commissioner to partition the suit property as per order dated 20th July, 1998 and also recorded that the respondent No. 1 had executed a Sale Deed in respect of her share in the suit property in favour of respondent No. 12, however, no Sale Deed till date exists between respondents No. 1 and 12.

16. Another contention is that application moved on behalf of petitioners u/s 4 of the Act has not been considered by the trial court, since they are willing to purchase the undivided share in the suit property.

17. In support of its contention, learned Counsel cited following judgments;

(i) S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others,

(ii) V. Uthirapathi Vs. Ashrab Ali and Others,

(iii) Hurmat Bibi and Ors. v. Prodosh Kumar Bajpayee and Anr. 1988 (Supp) SCC 507;

(iv) Kalipatnapu Atchutamma v. Kommana Sambamurthy (Died) PER LRs. 2003-ALT-3-82 and

(v) S.K.R.A.K.N. Athappa Chettiar and Others Vs. S.K.A.R.K. Somasundaram Chettiar and Others,

18. At the outset, it is pertinent to point out that till date, petitioners have not challenged the order dated 15th January, 1998 of the Additional District Judge, passed against their predecessor-in-interest, vide which preliminary decree of partition was passed, as well as Local Commissioner was appointed to visit the spot and partition the property in suit.

19. On 30th July, 1998, Additional District Judge passed the final decree for partition on the basis of report submitted by the Local Commissioner, which read as under;

As per the report, the property consists of six portions as detailed in para 9 (a to f). In this regard, site plan has also been filed by the Ld. Local Commissioner. I

have given a considerable thought to the report of L.C. and agree that the division as such is best possible and all the co-sharer can get their due share by way of this partition. I, therefore, pass a final decree thereby partitioning the suit property as per the report of the L.C. given in para (a to f). The division as such be made by the L.C. appointed in this case by again visiting the spot, as per the choice of the parties and if it is not possible and anybody raises objection as regards the particular portion, then the division be made by lottery system and/or by holding draw of lots and this exercise be also done by the L. C. in presence of all the parties after giving them notice of her visit at the spot.

20. Judgment dated 30th July, 1998 was also never challenged by the petitioners. Accordingly, order dated 15th January, 1998 and judgment dated 30th July, 1998 have become final.

21. Trial court, vide impugned order dated 7th August, 2010 allowed respondent's No. 12 application u/s 50 read with Section 151 of the Code. Accordingly, it appointed a Local Commissioner and directed her to effect the partition of the property in terms of order dated 30th July, 1998. In its impugned order trial court observed;

It appears that non-applicant (petitioner) have taken such plea only to delay the disposal of the application or execution of the partition decree.

22. Trial court also relied upon the decision of Supreme Court in Kartar Singh Vs. Harjinder Singh and others, wherein the court observed;

Whenever a share in the property is sold the vendee has a right to apply for the partition of the property and get the share demarcated.

23. Trial court also observed that at this stage the objections are not being adjudicated but only a Local Commissioner is being appointed in terms of order dated 30th July, 1998. Hence, it appointed a Local Commissioner and adjourned the matter for 4th September, 2010.

24. On application of respondent No. 12, seeking Police aid for executing order dated 7th August, 2010, trial court vide its order dated 8th September, 2010, directed the Police to provide adequate security to the Local Commissioner.

25. Present petition has been filed under Article 227 of the Constitution of India. It is well settled that jurisdiction of this Court under this Article is limited.

26. In Waryam Singh and Another Vs. Amarnath and Another, the court observed;

This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in - Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee, to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.

27. In light of principles laid down in the above decision, it is to be seen as to

whether present petition under Article 227 of the Constitution of India against impugned order is maintainable or not.

28. After going through the record it is apparent that there is no ambiguity or illegality in the impugned order dated 7th August, 2010, appointing a Local Commissioner and order dated 8th September, 2010 for providing necessary Police aid to Local Commissioner.

29. As far as application u/s 4 of the Act, filed on behalf of present petitioners is concerned, part arguments on this application was heard and in its order dated 4th September, 2010 trial court made the following observations;

During the course of arguments, Id. counsel for DH submits that let JD make offer for the price to buy the share of the DH. If DH is able to make offer of high value then DH is ready to purchase share of the JD.

Ld. Counsel for JD is not able to make any offer for the price and in these circumstances when JD is not able to make offer, let JD file reply to the application u/s 151 of CPC and application u/s 4 of the Partition shall remain kept pending. JD shall file reply on the next date and shall supply advance copy of reply to DH within three days. Failing which JD shall be burdened with a cost of Rs. 1000/-.

Relist this case on 08.09.2010 for disposal of application.

30. Thus, as apparent from the record, application u/s 4 of the -Act filed by petitioners, has not yet been disposed of.

31. Under these circumstances, it is ordered that the trial court shall dispose of application u/s 4 of the Act filed on behalf of petitioners, within two weeks from receipt of the present order.

32. Parties shall be at liberty to challenge the same in accordance with the provisions of law.

33. With these observations, present petition stands disposed of.

34. Copy of this order be sent to the trial court forthwith.

35. Both the parties are directed to appear before the trial court on 15th November, 2010.