

(2010) 10 DEL CK 0092

In the Delhi High Court

Case No : C.M. (M) No. 1275 of 2010 and C.M. No. 18189 of 2010

Sh. Surender Kumar Gupta, (through Dr. Manju Gupta)
Daughter and Attorney of Petitioner

APPELLANT

Vs

Sh. Mahender Kumar Gupta

RESPONDENT

Date of Decision : 26-10-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Constitution of India, 1950 — Article 227
Partition Act, 1893 — Section 2, 3

Citation : (2010) 10 DEL CK 0092

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : Manju Gupta, Attorney of Petitioner, for the Appellant; Nemo, for the Respondent

Final Decision : Dismissed

Judgement

V.B. Gupta, J.—By way of present petition under Article 227 of the constitution of India filed by the petitioner, there is challenge to order dated 21st August, 2010 passed by Civil Judge, vide which application u/s 3 of Indian Partition Act, 1893 (for short as "Act") for grant of pre-emptive right to petitioner to buy the share of the respondent, was dismissed.

2. Brief facts as emerges from the record are that, petitioner filed a suit for partition in the year 1982. That suit was decreed and a preliminary decree was passed on 22nd December, 2003, whereas final decree was passed on 17th May, 2004.

3. Petitioner filed appeal against the final judgment and decree, wherein non-disposal of the objections filed by him to the report of Local Commissioner was taken. First Appellate Court, vide its judgment dated 13th December, 2006 observed as under:

From the said statements, it is clear that neither of the parties ever requested to sell the property. They merely stated that the matter could not be settled amicably, hence requested to pass the final decree. As both the parties had allegedly filed the objection to the report of Local Commissioner, hence Id. Trial Court should decide the objections at least at the time of passing of final decree. In this case there was two contrary reports as one architect opined that property cannot be partitioned while another opined that it can be partitioned by the simply raising the wall.

4. Accordingly, final decree was set aside and matter was remanded back to the trial Court with directions to decide the objections filed by the parties to the report of Local Commissioner.

5. Trial court, after hearing arguments on the objections of the Local Commissioner's report, ordered for the appointment of a new Local Commissioner. Petitioner thereafter, filed an application u/s 151 of the CPC (for short as "Code") objecting to the suggestion for appointment of another Local Commissioner. Petitioner also filed an application u/s 3 of the Act, for grant of pre-emptive right to buy the share of respondent. Vide impugned order, application of petitioner u/s 3 of the Act, was dismissed.

6. It is contended by the attorney of the petitioner that trial court has not analyzed the contentions made by the parties in application u/s 3 of the Act. The trial court, allowed the respondent to resile from his earlier stand that suit property is not partition able as evident from respondent's reply to the objections to the Local Commissioner's report, dated 26th August, 2004 wherein respondent has supported all the findings of the Local Commissioner.

7. It is further contended that as per the Act, if a shareholder in a suit for partition has invoked the power of the Court to order sale, instead of division, in a partition suit u/s 2 of the Act and other share-holder undertakes to buy at a valuation the share of the party asking for sale, then the court has no option or choice or discretion left to it and it is bound to order a valuation of the share in question and order to sell the same to the share holder undertaking or applying to buy it at a valuation. In the present suit, respondent has prayed for public auction whereas, petitioner vide present application is praying for grant of pre-emptive right to buy the share of the respondent, u/s 3 of the Act. Thus, as per law it was obligatory on the trial court, to order to sell the share of respondent to the petitioner at the valuation fix by the Court.

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

9. 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.

10. 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.

11. Trial court, in its impugned order held:

It is pertinent to mention that in the appeal filed by the appellant/plaintiff, contention of non disposal of objections that the property is divisible against the report of Local Commissioner that the same is not divisible was raised. Section 2 of the Indian Partition Act and consequently Section 3 Clause (1) of the Indian Partition Act, 1893 come into picture only when the court is of the opinion that the property is indivisible. In view of remanding back of the case on the appeal of the plaintiff on the ground that the objections that the property is divisible was not disposed of, it is obligatory for the court to first dispose of those objections. It is important to note that the contention of plaintiff that the property is divisible runs counter to the merits of the application u/s 3 Clause (1) of Indian Partition Act, 1893 filed by the plaintiff which can be filed only when there is finding/opinion that the property is not capable of being partitioned. In view of remanding back of the case for disposal of the objections and continuation of the objections, Section 2 and therefore Section 3 Clause (1) of the Indian Partition Act do not come into play. It is important to note that plaintiff was very specifically asked to clarify about this aspect on 01.07.2009 and even time was granted to the plaintiff for the same but even after giving time to the plaintiff to appreciate this aspect, AR of plaintiff on 22.07.2009 submitted that plaintiff was still standing by the objections filed and the stand that the property is divisible and can be divided properly. It being so and in view of observation of the Ld. Appellate Court on page-6 of the judgment dated 13.12.2006 that from the said statement it was clear that neither of the parties ever requested to sell the property, I do not find any merit in the application u/s 3 Clause (1) of the Indian Partition Act, 1893 for granting pre-emptive right to the plaintiff to buy share of defendant. Application is accordingly allowed.

12. First Appellate's Court judgment dated 13th December, 2006, was never challenged by the petitioner and as such the same has become final.

13. In R. Ramamurthi Iyer Vs. Raja V. Rajeswara Rao, Apex Court observed;

The scheme of Sections 2 and 3 apparently is that if the nature of the property is such or the number of shareholder is so many or if there is any other special circumstances and a division of the property cannot reasonably or conveniently be made the court can in its discretion on the request of any of the shareholders interested individually or collectively to the extent of one moiety or upwards direct a sale of the property and distribute the proceeds among the shareholders. Now when a court has been requested u/s 2 to direct a sale any other shareholder can apply for leave to buy at a valuation the share and shares of the

party or parties asking for sale. In such a situation it has been made obligatory that the court shall order a valuation of the share or shares and offer to sell the same to the shareholder who has applied for leave to buy the share at a price ascertained by the court. In other words if a plaintiff in a suit for partition has invoked the power of the court to order sale instead of division in a partition suit u/s 2 and the other shareholder undertakes to buy at a valuation the share of the party asking for sale the court has no option or choice or discretion left to it any it is bound to order a valuation of the share in question and offer to sell the same to the shareholder undertaking or applying to buy it at a valuation. The purpose underlying the section undoubtedly appears to be to prevent the property falling into the hands of third parties if that can be done in a reasonable manner. It would appear from the objects and reasons for the enactment of the Partition Act that as the law stood the court was bound to give a share to each of the parties and could not direct a sale or division of the proceeds. There could be, instances where there were insuperable practical difficulties in the way of making an equal division and the court was either powerless to give effect to its decree or was driven to all kinds of shifts and expedients in order to do so. The court was, therefore, given a discretionary authority to direct a sale where a partition could not reasonably be made and the sale would, in the opinion of the court, be more beneficial to the parties. But having regard to the strong attachment of the people in this country to their landed possessions the consent of the parties interested at least to the extent of a moiety in the property was made a condition precedent to the exercise by the court of the new power. At the same time in order to prevent any oppressive exercise of this privilege those shareholders who did not desire a sale were given a right to buy the others out at a valuation to be determined by the court.

It further observed;

The language of Section 3 of the Partition Act does not appear to make it obligatory on the court to give a positive findings that the property is incapable of division by metes and bounds. It should only "appear" that is not so capable of division. It has further been contended that the respondent had maintained throughout that the property was capable of division. He could not, therefore, take advantage of the provision of the Partition Act.

14. In Palanikumar Pillai Vs. Palani Kumar Pillai and Others, court observed;

Section 3 of the Partition Act would normally come into play when the entire suit property cannot reasonably or conveniently be divided and a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders. Section 2 does not contemplate a case where some of the suit properties are not divisible by nature. If there are several items of suit properties such item which is not divisible could be allotted to one sharer exclusively and the value thereof could be taken into account as against the allotment of the other properties to the other sharers and the values of the respective shares could be equalized by owlet. There is however, no bar to the parties against

invoking the provision of S.2 of the Partition Act, with reference to one or more of the suit properties which are bound to be not divisible while accepting the division of the properties which could be divided.

15. In the present case, as per order dated 13th December, 2006 of the first appellate court, it is clear that neither of the parties ever requested to sell the property. Moreover, the matter is already listed before the trial court for arguments on the objections to the report of Local Commissioner and trial court in impugned order has also stated that respondent has filed an application during the pendency of the suit u/s 151 of the Code, accepting the mode of partition suggested in Annexure-V by the petitioner in March, 2004 dividing it into two equal portions; portion-A & portion-B to 2744 sq. ft. each by raising a dividing vertical wall, of suitable thickness and of height of that of momty (staircase room on the first floor) to be constructed in the portion of petitioner in his own share of land at his own costs.

16. Trial court has listed the matter for disposal of respondent's application and also for the proposal of division of property by the petitioner.

17. Under these circumstances, the present petition filed under Article 227 of the Constitution of India is pre-mature and as such no ambiguity or illegality can be found in the impugned order.

18. Present petition is thus dismissed being pre-mature.

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19. Dismissed.