

(2011) 08 DEL CK 0464

In the Delhi High Court

Case No : Regular First Appeal No. 391 of 2011

Vijay Gupta

APPELLANT

Vs

Mohd. Arifeen and Others

RESPONDENT

Date of Decision : 03-08-2011

Acts Referred:

Stamp Act, 1899 — Section 15(2)

Citation : (2011) 08 DEL CK 0464

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : N.N. Aggarwal and Rohit Gandhi, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—At the outset, counsel for the Appellant states that though the appeal challenges various orders and also the final judgment/final decree dated 30.4.2011, he confines the present appeal as a challenge only to the final judgment dated 30.4.2011 which draws out the final decree in the partition suit because one appeal otherwise would not have been maintainable.

2. The facts of the case are that a suit for partition was filed with respect to the property bearing No. 3741 to 3745, Sarak Churiwala, Chawri Bazar, Delhi. In this suit, a preliminary decree of partition was passed on 14.12.2009. The preliminary decree not only decided shares of the parties but decided the issue as to whether Defendant No. 1, one of the co-owners, who was running a guest house namely "Seema Lodge" was also, in fact, a tenant of the property. It was held in this preliminary decree that the Defendant No. 1 thus in fact was also a tenant in the property. Admittedly, this preliminary decree became final and was not challenged by any of the parties. Once the preliminary decree becomes final and is not challenged by any of the parties, the conclusions/findings therein operate as res judicata between the parties vide Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and Another,

3. After the preliminary decree was passed, it was found that the property is not capable of partition by metes and bounds. Counsel for the Appellant/Plaintiff also admits that this is an undisputed position that the property cannot be partitioned by metes and bounds. Proceedings therefore took place in the Trial Court, post the preliminary decree, with respect to valuation of the property and the possibility of inter se purchase by the parties. Ultimately, an order was passed on 9.11.2010 which records the submission of the Appellant/Plaintiff that the property in suit be auctioned. The order dated 9.11.2010 reads as under:

Present: Sh. Vijay Gupta, Attorney of the Plaintiff with counsel Sh.M.P. Choudhary,

Mohd. Irfan, Legal Representative of Defendant No. 1.

Today the envelopes submitted by both the sides have been opened in their presence. Out of envelope submitted by attorney of the Plaintiff, his proposal has been taken out. The Plaintiff has shown his willingness and readiness to purchase the half share of the Defendants for a sum of Rs. 70 lacs. He has also shown his readiness and willingness to sell his half share for the said amount. However, Mohd. Irfan has not put forth his proposal specifying as to for which consideration he will purchase the share of the Plaintiff. Even when the proposal put forth by the Plaintiff has been conveyed to Mohd. Irfan, he has not put forth his willingness and readiness to purchase the share of the Plaintiff or sell his share and that of co-Defendants.

In the given circumstances, as rightly submitted by counsel for Plaintiff, this Court finds that the property is required to be auctioned when Local Commissioner has already observed that suit property cannot be partitioned by metes and bounds.

Reader to collect the latest list of the Court Auctioner from Judicial Branch, Office of Learned District & Sessions Judge, Delhi.

Be put up on 20.11.2010.

(Narinder Kumar)

ADJ-01(West)/DELHI

09.11.2010

(Underlining added)

A reference to this order shows that the Appellant/Plaintiff himself said that the property is required to be auctioned as the same cannot be partitioned by metes and bounds. Clearly therefore the right to inter se purchase the property was given up by the Appellant/Plaintiff himself and so recorded in the order dated 9.11.2010. The Trial Court thereafter passed the impugned judgment being the final decree dated 30.4.2011 directing sale of the property and also the division of the rents from the tenants in the property as per the shares fixed in the

preliminary decree.

4. Learned Counsel for the Appellant has sought to argue before this Court the following points:

i) The Trial Court has wrongly directed auction of the property by the impugned final decree and the court should have considered the inter se bidding for purchase of the property. It is argued that even if there has to be auction of the property, Plaintiff cannot be prevented from participating in the auction.

ii) M/s. Seema Lodge/Defendant No. 1 is not a tenant in the property and therefore the valuation report of the property is not correct and therefore needs to be set aside.

iii) Final decree cannot be a valid final decree inasmuch as it has not been directed to be drawn up on the necessary stamp paper because the partition decree is an instrument of partition u/s 2 Sub-Section 15 of the Stamp Act.

5. So far as the first argument of the Appellant/Plaintiff is concerned that the impugned judgment has wrongly directed auction of the property and the Court ought to have directed inter se bidding for purchase of the property and that the Plaintiff had an entitlement to purchase the property from other co-owners, is an argument which goes against the admission of the Appellant/Plaintiff recorded in the order dated 9.11.2010 of the Trial Court and which has been reproduced above. This order of the Trial Court dated 9.11.2010, and which is an order which is preceded by earlier orders wherein efforts were made for inter se purchase by the co-owners, records that the Appellant/Plaintiff agreed that the property should be auctioned. The earlier part of the order dated 9.11.2010 records the lack of agreement as to the price at which one co-owner will purchase from the other co-owner. A party is not allowed to challenge the factual statement as recorded in the order by stating that the order does not correctly record the fact. Right from the decision in the case of the State of Maharashtra v. Ramdas Shrinivas Nayak and Anr. AIR 1982 SC 483, it has been a consistent view of the Supreme Court that it is not open to a party to pray before an Appellate Court that the Trial Court in an order has wrongly mentioned a factual aspect. The only way in which a factual aspect which is recorded in the order that something has happened or not happened before the Court below, can be corrected, is by approaching the same Court which records the factual aspect and that too immediately after the order has been passed, when the matter is fresh in the mind of the judge who has passed the order. If that is not done the matter must necessarily rest there. Therefore, I reject the argument raised on behalf of the Appellant that the Trial Court has wrongly directed sale of the property and should have, in fact, directed inter se purchase by the different shareholders. I also reject the weak attempt on behalf of the counsel for the Appellant to state that the order dated 9.11.2010 wrongly records the stand of the Appellant/Plaintiff that when it was said that the property should be auctioned. On this aspect I may however finally note that if the Appellant is entitled to participate in

the auction as per law, then he can participate on such terms as the trial court finds appropriate.

6. So far as the second argument that the Defendant No. 1 is not a tenant in the property, I must state that if any judgment or decree wrongly decides an aspect, then the aggrieved party is bound to file an appeal against the said judgment and decree. Even, if this Court disagrees with the earlier view of a judgment and decree, the same is not good enough to set aside the earlier judgment and decree which, if not challenged, becomes final. The view of this Court therefore as to whether M/s. Seema Lodge/Defendant No. 1 should not be held to be a tenant in the property, cannot be as expressed inasmuch as the preliminary decree dated 14.12.2009 specifically recorded a conclusion to this effect after recording the respective contentions of the parties, and dismissing the argument/stand/contention of the Appellant/Plaintiff when it was argued that M/s Seema Lodge/Defendant No. 1 is not a tenant. This argument on behalf of the Appellant, that M/s. Seema Lodge/Defendant No. 1 is wrongly held to be tenant in the property and therefore the valuation report is fraud, has no merit because the earlier preliminary decree dated 14.12.2009, and which is final, holds that M/s. Seema Lodge/Defendant No. 1 is a tenant in the property. In view of the aforesaid, I also reject the argument of the learned Counsel for the Appellant that it is only a legal issue that whether or not M/s. Seema lodge/Defendant No. 1 is a tenant in the property and therefore this issue can again be raised in challenge to the final decree which has been passed, although the said aspect has achieved finality as per the preliminary decree which has become final.

7. So far as the third argument is concerned, an instrument of partition includes a final order effecting partition passed by a Civil Court by virtue of Section 2 Sub-Section 15 of the Indian Stamp Act, 1989. The Trial Court therefore will before proceeding to direct execution or implementation of the impugned final judgment and decree dated 30.4.2011 will ensure that the requirements of the Stamp Act, 1899 are complied with. I may, however, as a matter of caution, state that possibly the provision of Sub-Section 2 of Section 15 of the Stamp Act, 1899 will apply when the value of the property is deposited pursuant to the auction sale proceedings and whereafter it is held that there is a final decree prescribing the different shares in terms of the monetary value of each of the co-sharer in the suit property out of the deposited sale value.

8. In view of the above, I do not find any merit in the appeal, which is accordingly dismissed, leaving the parties to bear their own costs.