Raj Kumar Arora and Anr Vs. Ajay Kumar

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Court : Delhi

Decided On : Dec-18-2014

Judge : Manmohan Singh

Appellant : Raj Kumar Arora and Anr

Respondent : Ajay Kumar

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Order delivered on:18th December, 2014 + CS(OS) 788/2010 RAJ KUMAR ARORA & ANR ..... Plaintiffs Through Mr. Sanjay Goswami, Adv. versus AJAY KUMAR Through ..... Defendant Mr. Gautam Narayan, Adv. with Ms. Asmita Singh, Adv. CORAM: HON'BLE MR.JUSTICE MANMOHAN SINGH MANMOHAN SINGH, J.

(ORAL) 1. The plaintiffs namely Mr. Raj Kumar Arora and Mr. Satish Arora have filed the suit for partition in respect of property bearing No.C135-136, New Multan Nagar, Delhi-110056 (hereinafter referred to as the "suit property"). The plaintiffs and defendant namely Ajay Kumar are real brothers. It is the case of the plaintiffs that the suit property is the joint property of the plaintiffs and the defendant.

2. The case of the defendant is that the suit property is his self- acquired property and has never been the joint property. The plaintiffs have no right, title, interest or claim in the suit property. The suit is wholly on false, misleading and baseless. The defendant is the sole owner of the suit property. The plaintiffs have not produced

any evidence to establish their claim of joint ownership of the suit property. The documents filed by the plaintiffs along with the plaint which are Ikrarnamas dated 10th January, 1981 and 21st August, 1986 are concocted have been fabricated for the purposes of present case. The defendant has never executed any document(s) acknowledging any right, title or interest of the plaintiffs. The suit property had been purchased by the defendant vide sale deed dated 7th August, 1980. The construction was commenced and completed between 1985 and 1987. The suit property stands mutated in his name. He is in sole and exclusive possession of the same till date without any protest and demur from the plaintiffs. After the lapse of 30 years from the purchase of the suit property which was in the knowledge of the plaintiffs, the plaintiffs have raised the false and frivolous claim in the present suit claiming that suit property is a joint family property. The defendant has denied any family arrangement/ decision taken by the parties.

3. It is further stated that father of the plaintiffs and defendant expired on 16th December, 2006 and their mother expired on 21st May, 2009. There is not even an iota of the truth in the contention of that the late parents of the parties had decided to treat the suit property as joint family property during their lifetime.

4. The suit was filed on 26th April, 2010. After many opportunities being granted to the plaintiffs, the replication was filed and parties were directed to appear before the Joint Registrar for filing the affidavit of admission/denial of the documents by order dated 16th September, 2011.

2011. The matter was adjourned to 19th December, On the said date, it was recorded that the affidavit of admission/denial of the documents was not filed by the plaintiffs before the Joint Registrar. Last opportunity was granted to the plaintiffs to file an affidavit of admission/denial of the documents within four weeks. By order dated 20th April, 2012 the matter was adjourned to 19th September, 2012. It appears from the record that even on the said date the affidavit was not filed despite of last opportunity. The admission/denial of the documents was accordingly concluded. The matter was listed before Court on 25th January, 2013. In the meanwhile, the application for review of the order dated 19th September, 2012 was filed by the plaintiffs which was dismissed by the Joint Registrar on 3rd

October, 2012.

5. On 28th January, 2013, the issues were framed. The plaintiffs were directed to file the affidavit within six weeks and the matter was put up before the Joint Registrar on 11th April, 2013 for crossexamination of the plaintiffs witnesses. The affidavit as evidence was not produced. Another opportunity was granted by order dated 7th October, 2013 to file the affidavit within four weeks and the matter was adjourned to 30th January, 2014 for plaintiffs evidence. However, no affidavit was filed. By order dated 30th January, 2014, one more opportunity was granted to the plaintiffs to file the chief affidavits by 21st April, 2014 and the matter was listed for plaintiffs evidence on 21st May, 2014. But no evidence was filed by the plaintiffs. When the matter was listed on 21st May, 2014 one more opportunity was granted to file the chief affidavits by 31st July, 2014 and the matter was adjourned to 20th November, 2014, subject to cost of Rs.10,000/-. When the matter was taken up by the Joint Registrar, it was noticed that the plaintiffs failed to file the affidavit. Even the cost was not paid. The matter was put up before Court and the same is listed before Court.

6. Learned counsel for the defendant has made the statement at the bar that the affidavit is still not filed by the plaintiffs although copy of the affidavit has been received. Learned counsel for the plaintiffs on the other hand states that the affidavit has been sent from the Germany. The same is likely to be received shortly. Learned counsel for the defendant has strongly opposed the request of the learned counsel for the plaintiffs and argued that the evidence of the plaintiffs is liable to be closed mainly on the two reasons; firstly he has referred to Section 35 of the CPC that the cost has not been paid by the plaintiffs and in failure to do so, the plaintiffs are not entitled to proceed further with the matter and secondly he states that more than four adjournments have been granted and the plaintiffs right to adduce the evidence is liable to be closed. He submits that he is not ready to accept the cost. Counsel further submits that supplying the copy of the affidavit which has not been filed in Court has no consequence and his client is opposing any further request of the learned counsel for the plaintiffs. In support of his submissions, learned counsel for the defendant has referred the decision of the Supreme Court in the case of Shiv Cotex vs. Tirgun Auto Plast Private Limited and

Ors., (2011) 9 SCC678 Paras 6 to 16 of the same are reproduced as under:

6. Thereafter, the suit was fixed for the evidence of the Plaintiff on November 1, 2006. However, No.evidence was let in on that day. The matter was then adjourned for the evidence of the Plaintiff on March 2, 2007. On that day also the Plaintiff did not produce evidence and the matter was adjourned to May 10, 2007. On May 10, 2007 again Plaintiff did not produce any evidence. The trial court was, thus, constrained to proceed under Order XVII Rule 3(a) of the Code of Civil Procedure, 1908 (for short 'Code of Civil Procedure') and passed the following order:

Matter is fixed for conclusion of the Plaintiff's evidence being last opportunity. No.Plaintiff's witness is present and neither any cogent reason has been put forth for such failure fully knowing the fact that today is the third effective opportunity for conclusion of Plaintiff's evidence. Hence, matter is ordered to be proceeded under Order 17, Rule 3(a) Code of Civil Procedure and Plaintiff's evidence is deemed to be closed. Heard. To come up after lunch for orders.

7. On May 10, 2007 itself in light of the above order, the trial court dismissed the suit in its post lunch session.

8. After dismissal of the suit, the Corporation sold the mortgaged property by auction to the Appellant for Rs. 64.60 lac (Sixty four lac and sixty thousand only).

9. Against the judgment and decree of the trial court passed on May 10, 2007, the Plaintiff preferred civil appeal in the court of Additional District Judge, Chandigarh. In the appeal, the Plaintiff made an application on December 21, 2007 for impalement of the Appellant and its partners as Respondent Nos. 2 to 5. The application for impalement was granted and the Appellant and Respondent Nos. 3 to 5 herein were added as parties. The Additional District Judge, Chandigarh after hearing the parties, dismissed the civil appeal on March 20, 2008.

10. Being not satisfied with the concurrent judgment and decree of the two courts below, the Plaintiff preferred second appeal before the High Court which, as noticed above, has been allowed by the Single Judge on September 20, 2010 and

the suit has been remanded to the trial court for fresh decision in accordance with law.

11. The judgment of the High Court is gravely flawed and cannot be sustained for more than one reason. In the first place, the High Court, while deciding the second appeal, failed to adhere to the necessary requirement of Section 100 Code of Civil Procedure and interfered with the concurrent judgment and decree of the courts below without formulating any substantial question of law. The formulation of substantial question of law is a must before the second appeal is heard and finally disposed of by the High Court. This Court has reiterated and restated the legal position time out of number that formulation of substantial question of law is a condition precedent for entertaining and deciding a second appeal. Recently, in the case of Umerkhan v. Bismillabi @ Babulal Shaikh and Ors. Civil Appeal No.6034 of 2011 decided by us on July 28, 2011, it has been held that the judgment of the High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating the substantial question of law.

12. The legal position with regard to second appellate jurisdiction of the High Court was stated by us thus:

11. In our view, the very jurisdiction of the High Court in hearing a second appeal is founded on the formulation of a substantial question of law. The judgment of the High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating a substantial question of law. The second appellate jurisdiction of the High Court under Section 100 is not akin to the appellate jurisdiction under Section 96 of the Code; it is restricted to such substantial question or questions of law that may arise from the judgment and decree appealed against. As a matter of law, a second appeal is entertain able by the High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of the Code provides that the second appeal shall be heard on the question so formulated. It is, however, open to the High Court to reframe substantial question of law or frame substantial question of law afresh or hold that No.substantial

question of law is involved at the time of hearing the second appeal but reversal of the judgment and decree passed in appeal by a court subordinate to it in exercise of jurisdiction under Section 100 of the Code is impermissible without formulating substantial question of law and a decision on such question.

12. This Court has been bringing to the notice of the High Courts the constraints of Section 100 of the Code and the mandate of the law contained in Section 101 that No.second appeal shall lie except on the ground mentioned in Section 100, yet it appears that the fundamental legal position concerning jurisdiction of the High Court in second appeal is ignored and overlooked time and again. The present appeal is unfortunately one of such matters where High Court interfered with the judgment and decree of the first appellate court in total disregard of the above legal position.

13. Unfortunately, the High Court failed to keep in view the constraints of second appeal and overlooked the requirement of the second appellate jurisdiction as provided in Section 100 Code of Civil Procedure and that vitiates its decision.

14. Second, and equally important, the High Court upset the concurrent judgment and decree of the two courts on misplaced sympathy and non - existent justification. The High Court observed that the stakes in the suit being very high, the Plaintiff should not be non-suited on the basis of No.evidence. But, who is to be blamed for this lapse?. It is the Plaintiff alone. As a matter of fact, the trial court had given more than sufficient opportunity to the Plaintiff to produce evidence in support of its case. As noticed above, after the issues were framed on July 19, 2006, on three occasions, the trial court fixed the matter for the Plaintiff's evidence but on none of these dates any evidence was let in by it. What should the court do in such circumstances?. Is the court obliged to give adjournment after adjournment merely because the stakes are high in the dispute?. Should the court be a silent spectator and leave control of the case to a party to the case who has decided not to take the case forward?.

15. It is sad, but true, that the litigants seek - and the courts grant - adjournments at the drop of the hat. In the cases where the judges are little pro-active and refuse to accede to the requests of unnecessary adjournments, the litigants deploy all

sorts of methods in protracting the litigation. It is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further. The case in hand is a case of such misplaced sympathy. It is high time that courts become sensitive to delays in justice delivery system and realize that adjournments do dent the efficacy of judicial process and if this menace is not controlled adequately, the litigant public may lose faith in the system sooner than later. The courts, particularly trial courts, must ensure that on every date of hearing, effective progress takes place in the suit.

16. No.litigant has a right to abuse the procedure provided in the Code of Civil Procedure. Adjournments have grown like cancer corroding the entire body of justice delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided in proviso to Order XVII Rule 1 Code of Civil Procedure is not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII Rule 1 Code of Civil Procedure should be maintained. When we say 'justifiable cause' what we mean to say is, a cause which is not only 'sufficient cause' as contemplated in Sub-rule (1) of Order XVII Code of Civil Procedure but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity like sudden illness of the litigant or the witness or the lawyer; death in the family of any one of them; natural calamity like floods, earthquake, etc. in the area where any of these persons reside; an accident involving the litigant or the witness or the lawyer on way to the court and such like cause. The list is only illustrative and not exhaustive.

7. From the above said judgment and conduct of the plaintiffs in the present case, I am of the considered view that the evidence of the plaintiffs is liable to be closed. Even otherwise, this Court is doubtful if the plaintiffs have any case on merit against the defendant in view of the pleadings of the parties and documents produced. However, without deciding the present case on merit, I am of considered view that it is a fit case for closing the evidence of the plaintiffs. Ordered accordingly.

8. Since the evidence of the plaintiffs is closed, the plaintiffs have failed to discharge the burden of the issues framed. Accordingly, the suit of the plaintiffs is dismissed. The pending application also stands disposed of. (MANMOHAN SINGH) JUDGE DECEMBER18 2014