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Court : Delhi

Decided On : Feb-28-2011

Judge : Mool Chand Garg, J.

Acts : Code of Civil Procedure (CPC) - Order 7 Rule 11

Appeal No. : Ex.F.A.No.13/2010 & C.Ms.15810 & 15812 of 2010

Appellant : Jinender Kumar and ors.

Respondent : Jaswant Singh (Decd.) Thr. Lrs.

Advocate for Def. : Mr. Subhash Garg, Adv.

Advocate for Pet/Ap. : Mr. Baban Lal, Adv.

Judgement :

1. Whether reporters of Local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

1. This appeal has been filed by the appellant aggrieved of the order dated 28.07.2010 whereby the objections filed by the appellant to the execution of the final decree passed in favour of the respondents on 09.08.1982 which decree was also confirmed by this Court vide its order dated 26.11.2009 have been rejected under Order VII Rule 11 CPC. The learned ADJ has taken note of the plea of the

parties on law as well as on facts in the impugned order.

2. Before the learned ADJ, the respondents had opposed the objections filed by the appellant both on facts as well as in law. The averments made by the respondents have been taken note of by the learned ADJ in paragraph 5 and 6 of the impugned order which are reproduced hereunder:

"5. Present objections are not maintainable on the law and facts of the case and are liable to be rejected under Order VII Rule II of CPC. Objections are totally false, frivolous, malicious and totally unfounded even to the personal knowledge of the objectors and are based on totally false and misleading information. The objections are highly belated as the preliminary decree in the matter was passed on 19.08.1971 by the Honble High Court (D.B.) in RFA No.35-D/1961 and the final decree thereafter was passed on 09.08.1982 by Shr. S.R. Goel, the then learned ADJ, Delhi which was confirmed by the judgment passed by the Honble High Court vide its order dated 26.11.2009. The Honble High Court of Delhi has upheld the judgment after hearing the objectors of all concerned. The present objections are not maintainable as these are barred by res judicata under Section 11 of CPC as all the concerned co-owners/co-sharers were impleaded in the suit for partition and possession which was filed in the year 1957, which contains 27 defendants/judgment Debtors and the issues before this Court were already adjudicated by the Honble High Court and therefore, it does not lie in the mouth of the present objectors to re-agitate the same issue by present objections. It is further submitted that the present objectors who claim to be the present co-owners of the property/land in question stands in the shoes of the original co-owners(already impleaded in the suit) and are asserting their title on the basis of agreements executed by original co-owners vide agreement dated 17.08.1973 and 08.09.1976, according to which, they have acquired the rights in the land in question subject to decision of Suit No.51/1972, titled as Jaswant Singh v. Santokh Singh which is specifically mentioned in the agreement itself & which is being relied upon by the objectors themselves. Their rights were always subject to the decision of the said matter and the same are binding upon them in all respects as per the agreement. They are filing the objections at this stage only to delay the proceedings and the objections are liable to be dismissed.

6. On merits, facts stated by the objectors are denied and it is stated that if the other defendants had lawfully purchased the property, they were supposed to put the correct facts before this Court at the relevant stage of trial, for adjudication of the real question in controversy and same issues cannot be adjudicated now again. It is further submitted that out of the total undivided land, the decree holder has claimed his legitimate share by way of filing the present suit before this Court which accordingly has been declared and duly upheld in the judgments of Ld. Trial Court/Honble High Court. It is also submitted that it was incumbent duty upon the concerned defendants to appear before this Court and place all the true facts before this Court during trial of the case, which was not done by them for their ulterior motives. These objections are not maintainable as the present suit in the Id. Trial Court was filed in the year 1957 and final order was passed on 26.11.2009 and thereafter, the execution is pending in this Court. All these facts were in the knowledge of all the concerned co-owners/defendants and therefore, they had no right or authority of justification to sell their rights to anyone by entering into the alleged agreements to sell or otherwise. Even otherwise, the alleged transfer was subject to the decision of the Court. It is also submitted that the issue pertaining to the ownership has already been adjudicated during trial and, therefore, nothing beyond the decree can legally be adjudicated upon during the objections filed in the execution proceedings. It is further submitted that the objectors cannot be allowed to create hurdles in executing the judgment and decree by putting him in his portion of the land in question. It is further submitted that grounds raised by the objectors are totally false, frivolous and legally unsustainable. It is denied that the final decree is illegal or is void ab-initio. The objections of the objectors are totally frivolous and unfounded which has no bearings in the eyes of law and deserves to be dismissed outrightly and further the decree holder be put in possession of the land allotted to him under the judgment and decree."

3. Appreciating the contentions raised by the appellant who relied upon an agreement dated 17.08.1973 by which Govind Ram s/o Sh. Atma Ram and Others on the one part had agreed to sell the property forming part of Khasra No.333/40 and 332/37 situated at Village Seelampur in favour of Gian Chand S/o Sh. Ugarsain Jain and others, the Court also observed as under:

"Further, the person through whom the objectors are claiming their interest, have already made clear with regard to their title in the sale agreement. Therefore, they even otherwise cannot press their claim under Section 47 of CPC. This Court is not referring any opinion as to what rights these objections might be having but as far as the provisions of Section 47 of CPC are concerned, this Court is of the considered opinion that the objections of the objectors are not maintainable under Section 47 of the CPC, Once they were party to the suit and further they have agreed themselves that they have to remain bound by the judgment of the court."

4. Moreover, in the impugned order, the learned ADJ has also taken note of the contentions of the decree holder that the objectors never challenged either passing of the preliminary decree in the partition suit or the report of the local commissioner or the order of the learned trial Court in having passed the final decree for partition as well as order of this Court confirming the final decree.

5. In their written synopsis, the appellants while admitting filing of a suit by Jaswant Singh for partition registered as Suit No.518/1957 wherein while the trial Court dismissed the petition but the RFA filed by Sh. Jaswant Singh was allowed and a preliminary decree was passed also admitted that a final decree was passed in the aforesaid matter on 09.08.1982 taking into consideration the report of the local commissioner and hearing the objections of the defendants who include the predecessor of the appellant. As per the final decree, for the purpose of possession of the property, it was demarcated as ABCD and EFGH in the site plan Ex.C-1 as well as C-1/A. The appellants also admit that thereafter two appeals which were filed against the final decree being RFA No.260/1982 and RFA No.281/1982 by the predecessor in interest of the objectors were also dismissed vide common judgment dated 26.09.2009 and it is thereafter, the execution petition was filed.

6. It is the case of the objectors that:(I) Khushi Ram and Duli Ram sold 400 sq. yds in Khasra No. 332/37 and 133/40 bounded as under to Shri Prithvi Raj and Gobind Ram in 1953, who were defendants No. 4 to 5 in the suit No. 518/1957.

North- Jheel Khurenja Road.

East- Property of Ram Rakka Mal etc. South- Passage 15 feet.

West- Passage 5 feet.

7. Shri Prithvi Raj and Gobind Ram sold the Land to five person. Shri Gian Chand Jain and Shri Roshan Lal Jain were two among the said five persons. The father of appellant, Shri Jai Chand purchased 118 sq. yds of land forming part of Khasra No. 332/37 and 133/40 from Shri Gian Chand Jain and Shri Roshan Lal Jain

8. According to the objectors, the area allotted to the respondent/D.H. does not fall in Khasra no. 133/40. The objector/ appellant are holding the possession of 118 sq. yds of land in Khasra No. 133/40 which is not a part of the land allotted to the respondent/ DH in the final decree. It is their case that the Trial Court has not considered this aspect in the execution case filed by the respondent that the part of the land occupied by the objectors are not included in the part allotted to the respondents.

9. It is also the stand of the objectors that the Trial Court in its judgment dated 28.07.2010 (impugned judgment), as per para 8, has wrongly held that the agreement dated 17.08.1973 by which Gobind Ram S/o Shri Atma Ram & Ors on the one part had agreed to sell the property forming part of khasra no. 333/40 in favour of Gian Chand, Jinender Kumar, Trilok Chand, Roshan Lal Jain and Meher Jain even though the said agreement does not include 333/40 rather it is 133/40 and this has resulted in dismissing the objection of the objector.

10. According to the appellants, they are the owner of khasra No. 333/40 which was never a subject matter of dispute in any of the proceedings in any of the court. The Khasra no. 133/40 is not mentioned in the preliminary decree or the final decree. The said khasra was never claimed or mentioned by the respondent in his suit (Suit No. 518/1957) for partition or in any proceedings. The said khasra No. 133/40, which was never claimed by the respondent and which do not find mention in the preliminary decree or final decree, is not a part of the land allotted to the respondent/DH.

11. The respondents have also filed written submissions. According to them, firstly, the appellants being successor in interest of defendants No.4 and 5 parties to the Suit are not entitled to claim any better right than what was available to defendants No.4 and 5 and thus, they are bound by the decree passed against those respondents after a preliminary decree was passed and a report of local commissioner was filed and which was accepted by the Court concerned while passing the final decree.

12. Second submission made by the respondents is that even otherwise, the property in question being subject matter of the suit and having been sold to the appellants subsequently cannot be the subject matter of the objections after a final decree was passed by virtue of Section 52 of the Transfer of Property Act which reads as under: "52. Transfer of property pending suit relating thereto.- During the pendency in any Court having authority [within the limits of India excluding the State of Jammu and Kashmir] or established beyond such limits] by the Central Government, of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

[Explanation.-- For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.]"

13. It has also been submitted by the respondents that after the preliminary decree for partition of land comprised of khasra No. 333/40/2 and Khasra No. 332/37, Khata No. 256 & 257, wherein the respondent was held to be entitled to 36 shares

out of 124 shares, the file was thereafter returned to the Trial Court for passing the Final Decree and for separation of the respondents share.

14. The local commissioner Sh. K. K. Buchar after taking about 3 years to conduct the proceedings held deep inquiry and recorded evidence. He filed his report dated 25.02.1976 along with site plan Ex.C-1 whereby he suggested that the land marked as ABCD and EFGH in the site plan Ex.C-1 could be allotted to the respondents towards his 36th share out of 124 share. He also assessed mesne profits etc. The said report is available on record.

15. It is also submitted that after objection was filed by the other defendants, the local commissioner was directed to prepare a fresh site plan which was prepared by him with the help of a retired Tehsildar and the additional report was submitted along with another site plan Ex.C-1/A. After this report was filed a final decree was passed. Two appeals filed against the final decree were also dismissed.

16. Referring to the objections filed by the appellants, it has been submitted by the respondents that according to the present objectors, they claimed that they are the successors in interest of defendant No.4 & 5 as their deceased father/predecessor in interest, namely, Shri Jai Chand Jain had purchased plot total measuring 118 sq.yds. vide two un-registered agreements dated 28.04.1975 and 08.09.1976. Except these two agreements, there exist no other title deeds in favour of the objectors. At the time of alleged transfer by the defendant No.4 & 5 the preliminary decree dt. 19.08.1971 was already passed and further the respondents share was already demarcated by the Ld. Local Commissioner in his report dt. 25.06.1976. Hence, the defendants No. 4 & 5 were well aware about the preliminary Decree and pendency of proceedings of the Final Decree before Ld. Trial Court. In Agreement, it is mentioned that "THE SAID SALE WAS SUBJECT TO THE RIGHTS AND LIABILITIES OF THE SUIT NO. 51/72 AND THE RESULTS THEREOF WOULD BE BINDING UPON THE SECOND PARTY/TRANSFeree".

17. In these circumstances, it is submitted that the objections filed by them are not sustainable inasmuch as their predecessors in interest, i.e., defendants No.4 and 5, namely, Sh. Govind Ram and Sh. Prithvi Raj were well aware of passing of the preliminary decree by the Division Bench at the report filed by the local

commissioner but never challenged any of those proceedings inasmuch as they:

i) Never challenged/ file any appeal against the Preliminary Decree passed in RFA No. 35-D/1961.

ii) Never filed any objections to the appointment of Local Commissioner or to his Reports dt. 25.02.1976 & 12.02.1982, demarcating the respondents 36 share out of the total land.

iii) Did not file any appeal against the Final Decree dt. 09.08.1982.

iv) This obviously means that the defendants No.4 & 5, Predecessor in interest of the present objectors as well as their father, accepted the preliminary decree, final decree and the Local Commissioners Reports, in its true letter & spirit.

v) This also mean that the present objectors have no independent rights qua the disputed land, who themselves claims through defendants No. 4 & 5 and thus are bound by the effect/outcome of preliminary and final decree and cannot sustain any objection against execution and accordingly their objections were rightly dismissed by the learned Executing Court.

18. As regards confusion created by the objectors regarding khasra number, it has been submitted that their allegations that the plot allegedly purchased by the father was out of different khasra numbers not subject matter of the suit. The respondents have averred that the said issue has already stood resolved by a Division Bench of this Court while passing the preliminary decree by observing that "The effect of competent officer separating the evacuee share was that the appellant- Jaswant Singh became a co-sharer in both Khasra No.333/40/02 and 332/37. Reference in this regard can be made to the order passed in RFA 35-D/1961 by the Division Bench of this Court on 19.08.1971, the relevant portion of whereof reads as under:

"The trial Court appears to have accepted the transfer in favour of the appellant by Ram Lal and Kachheroo by the sale deed, Ex.P-3. It was, however, of the opinion that the transfer in favour of the appellant did not create such unity of title and possession as was necessary before a suit for partition could be held to be

maintainable. In this conclusion, the trial Court was, in our opinion, clearly wrong. Section 44 of the Transfer of Property Act provides that where one of the two or more co-owners of immovable property transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferors right to joint possession or other common or part enjoyment of the property, as also the right to enforce a partition of the same. This Section makes it clear that a transferee of a co-sharer steps into the shoes of such co- sharer and can even enforce a partition of that share. Although, the vendors of the appellant had sold land only in Khasra No.333/40 being co-sharers in the land comprised not only in this Khasra Number but also in Khasra No.332/37, the effect of the order of the competent officer separating the evacuee share was that the appellant became a co-sharer not only in the remaining Khasra No.333/40/2 but also in Khasra No.332/37 and was, therefore, entitled to claim separation in respect of the land comprised in both these khasra numbers. The Competent Officer was under the separation of Evacuee Interest Act competent to separate the share of one evacuee and in doing so, he gave Khasra No.333/40/1 to the land comprising 12 biswas which was separated by him from out of the old Khasra No.333/40 and he further gave Khasra No.333/40/2 to the remaining land in this Khasra which remained joint. Not only that, the order of the competent officer was agreed by all the parties and was reflected in the revenue records. The result was that the appellant became a co-sharer in the lands comprised in both Khasra No.332/37 and 333/40/2 An another objection considered by the trial Court was as to the relief claimed by the appellant and it was of the view that the proper relief which the appellant ought to have asked for partition of his share out of the remaining property, that is, property comprised in Khatauni A, we do not understand this view of the trial Court because the plaint clearly prays for partition of the lands comprised in Khatauni A which consisted of the lands comprised in Khasra No.332/37 and the new Khasra No.333/40/2. The prayer in the plaint further asked for separate possession of the appellants share. In view of the provisions of Section 44 of the Transfer of Property Act, referred to earlier, we have not been able to find anything objectionable in the prayer in the plaint. We, therefore, allow this appeal and set aside the judgment under appeal. We further pass a preliminary decree in favour

of the appellant for partition of the lands comprised in Khasra No.333/40/2 and Khasra No.332/37, Khata Nos. 256,257 and Khewat No.78 in the Village Seelampur, Abadi Gandhi Nagar, Shahdara, Delhi wherein the appellant is entitled to 36 shares of 124 shares and we further order separation of the appellants share as aforesaid as prayed by him. The file shall be returned to the trial Court for taking further steps for separating the Appellants share in the aforesaid land and for passing of final decree. In view of the fact that the respondents have not appeared, there will be no order as to costs."

19. It is submitted that there is no ambiguity or confusion about the respondents 36 share, which is duly marked as ABCD & EFGH in both the site plans Exhibit C-1 & C-1A, area measuring 248+581 sq.yds and mentioned in the Local Commissioners Report and the final decree dt. 09.08.1982. This area is also specifically mentioned in the latest judgment dated 27.11.2009.

20. In view of the aforesaid, it is apparent that the efforts of the appellant to raise an issue with respect to the suit property by stating that it forms part of a separate khasra number not subject matter of the suit is without any substance. Admittedly, they have purchased the suit property from the defendants No.4 and 5 who have lost the battle even with respect to the khasra number as observed by the Division Bench of this Court in the judgment referred by me in para-18 of the judgment (supra). Moreover, the transfer of the property subject matter of the objections being that of the suit property was even otherwise not legal being violative of Section 52 of the Transfer of Property Act. The appellants could not have raised the same issue on which their predecessor has lost their battle. Even though, the appellants knowing full well about the proceedings have not taken any steps to challenge any of the judgments delivered by the trial Court, appellate Court or by this Court. They have neither challenged the preliminary decree nor the final decree. As such they have no legs to stand for the purpose of filing objections or filing this appeal. Consequently, the appeal is dismissed with no order as to costs.

21. TCR be sent back along with a copy of this order. C.M.15812/2010(permission to file EFA)

Since the appeal lies against an order dismissing the objections, no specific order is required to be passed by this Court. The application is, accordingly, dismissed as infructuous. C.M.15810/2010(stay)

Interim order is vacated.

The application is disposed of.

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