

Ms. Seema and Others Vs. Surender Kumar and Another

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Court : Delhi

Decided On : Sep-06-2012

Judge : V.K. Jain

Appeal No. : CS(OS) NO. 178 OF 2008 & IA NOS. 1176, 10586, 11962 OF 2010, 6231 & 6232 OF 2011

Appellant : Ms. Seema and Others

Respondent : Surender Kumar and Another

Judgement :

V.K. JAIN, J.

1. Late Shri Chinga Ram, grandfather of the plaintiffs and defendant No.1, was the owner/allottee of property No.21, comprised in Khasra No.125, Jangpura, New Delhi measuring about 133 sq. yds. He was also in possession of property No.154/1, back portion, Masjid Lane, Jangpura, Bhogal admeasuring 85 sq. yds. belonging to DDA. Defendant No.2 is the wife of defendant No.1. Shri Chinga Ram died on May, 9, 1970 leaving behind two sons, namely, Khem Chand and Dal Chand and one daughter Smt.Lakmiri. The daughter of Shri Chinga Ram relinquished her share in his properties in favour of her brothers. Accordingly, Dal Chand and Khem Chand became owner of each of the aforesaid properties which, they mutually decided between them. In his life time, Late Shri Dal Chand had executed a registered Will in respect of the aforesaid properties bequeathing them

to his wife Smt.Kalawati. After the death of Dal Chand and Kalawati, their estate devoid upon the plaintiffs and defendant No.1 in the ratio of 1/5th each. The plaintiffs filed this suit seeking partition of the above referred two properties and also sought accounts of the movable properties which were left by their parents and were stated to be in possession of defendant No.1. They also sought an injunction restraining the defendants from creating any third party interest in the aforesaid properties and from raising any construction on it.

2. In their written statements, the defendants did not dispute the averments made in the plaint with respect to title of the aforesaid properties as also with respect to the shares of the parties in the same. They stated that defendant No.1 had no objection to the partition of the suit property in equal shares. It was further stated that defendant No.1 has no objection to the sale of the property falling to the share of the plaintiffs though he had objection to the sale of his own share.

3. In view of the admission contained in the written statement, the plaintiffs filed IA No.10586/2008 under Order XII Rule 6 of the Code of Civil Procedure for passing a decree based on the admission. Vide order dated September 2, 2008, a preliminary decree was passed declaring the plaintiffs and defendant No.1 owner of 1/5th share each in the suit properties.

Shri N.K.Kantawala was appointed as the Local Commissioner to inspect the properties, ascertaining the views of the parties and report to the Court about the best method of partition or dealing with the properties. No other relief was granted to the plaintiffs.

4. The Local Commissioner submitted a report stating therein that the suit properties cannot be physically divided and suggested appointment of a Valuer and filed the same in the Court. The plaintiff obtained report from an approved valuer and filed the same in the Court. 5. Vide order dated November 27, 2009, this court, inter alia, directed as under:-

“A Local Commissioner was appointed to explore the possibility of division of the property by metes and bounds. The Local Commissioner has given his report that the property cannot be divided by metes and bounds. The only option available is

that the property is to be sold either by *inter se* auction between the parties or by public auction.

Learned counsel for the plaintiffs state that a buyer was available for the property, who was prepared to purchase the property for Rs.95 lacs. The defendants, who are present in person, state that they do not want to sell the property and only want their 1/5th share by separation and do not want to accept the money in alternative.

I consider that this attitude and this stand both are not warranted. Once the property is a joint property and there is a definite share of one of the party, the parties are bound to abide by the law and have to either accept the share after sale of the property or purchase the property in total by paying the balance consideration. The defendants have been given option to bring a customer of higher value but they do not agree to this also. The defendants only want to create nuisance in the court by just shouting in the court.

Under these circumstances, I consider that it would be best that the property is auctioned by public auction. If the property fetches amount higher than Rs.95 lacs, it shall be auctioned in public and if it does not fetch any amount higher than Rs.95 lacs, the plaintiffs' offer of purchasing it for Rs.95 lacs shall be acceptable. The plaintiffs are prepared to pay share of the defendants at price of Rs.95 lacs."

The application of the defendants (IA No.274/2004) for staying the auction of the suit properties and IA No.273/2010 for impleadment of DDA as a party, were dismissed by this Court vide order dated January 13,2010.

6. FAO(OS) No.145/2010 was filed by the defendants challenging the order dated November 27,2009 and January 13,2010. While dismissing the appeal, a Division Bench of this Court, inter alia, observed as under:-

"The Learned Single Judge has taken note of the fact that the Plaintiff had mentioned that an offer of Rs. 95 lacs had been received for the property in question. He has noted the fact that the Appellant has only 1/5th share, which is also not disputed before us. The Appellant, however, refuses to make an offer or

accept any offer and insists that the property should be partitioned by metes and bounds. The Local Commissioner has given a Report to the effect that the property cannot be divided on metes and bounds. Counsel states that the properties are on license basis. Since the Appellant is not accepting the monetary share of 1/5th share in respect of the market value, if any loss is caused he has only himself to blame.”

7. The defendants also sought review of the judgment dated September 2, 2008 by filing Review Petition No.229/2011. The Review Petition was dismissed vide order dated April 29,2011.

8. An SLP was filed by the defendants challenging the judgment dated September 2, 2008, as well as the order dated April 29, 2011 dismissing the Review Petition. The said Special Leave Petition was dismissed by the Supreme Court on November 8, 2011 on the ground of delay as also on merits.

9. It would, thus, be seen that the judgment and preliminary decree dated September 2, 2008 became final consequent to dismissal of the Special Leave Petition filed by the plaintiffs whereas the orders dated September 27, 2009 and January 13, 2010 became final consequent to dismissal of FAO(OS) No.145/2010.

10. Pursuant to the order dated November 27, 2009, for auction of the suit properties, a public notice was published in Newspapers on February 12, 2010. When the auction was conducted on March 15, 2010, no-one came forward to purchase the suit properties. The plaintiffs participated in the auction and offered a sum of Rs.95 lakhs which was also their offer extended before the auction was held. Defendant no.1 did not bid in the auction. Share of defendant No.1 in the said consideration amounted to Rs.19 lakhs was directed to be deposited with the Registrar General of this Court and that order was duly complied with.

11. When this matter was taken up on March 25, 2011, the defendants who were present in person with their counsel stated that they were entitled to 1/5th share of the present market value of the suit property. They made an oral claim for Rs.40 lakhs for their share. The Registrar General was directed to release the amount of Rs.19 lakhs deposited by the plaintiffs to defendant No.1 within two weeks of

handing over the possession of the portion occupied by them in the suit properties. It was further directed that defendant shall not create any third party interest in respect of the portion in their possession till the handing over was complete. Defendants No.1 and 2, however, stated that they would not be in a position to vacate the portion occupied by them for six months. While listing the matter in the category of `Finals?', it was directed that the contention of defendant No.1 that he was entitled to 1/5th share of the present market value of the suit properties shall be considered on the next date of hearing.

12. When this matter was heard on 3rd July, 2012, I recorded the statements of both the defendants. In his statement, defendant No.1 stated that he wanted the suit properties to be auctioned between him and the plaintiffs and the properties to be given to the higher bidder who was to pay the share of the other parties in the bid amount to them. He also stated that both the properties should be auctioned together and not separately. This was agreed to by the learned counsel for the plaintiffs, on instructions from the plaintiffs. The plaintiffs and the defendants were directed to deposit Rs.50,000/- each in the Court within 10 days from the order i.e. July 17, 2012 by way of a Pay Order /Demand Draft in the name of the Registrar General of the Court. It was ordered that in the event of either party backing out of the statement, this amount would be forfeited and paid to the other party. The matter was adjourned to July 31, 2012. On July 31, 2012, a Pay order of Rs.50,000/- was deposited by the plaintiff and a Pay Order of the same amount was deposited by the defendants. The matter was fixed for *inter se* auction amongst the parties on September 4, 2012. The parties were directed to bring Pay Orders of Rs.2 lakhs each in the name of the Registrar General and to deposit the Pay Orders with the Court Master before the start of the bid process. It was also directed that this amount would be forfeited in case the higher bidder does not complete the transaction.

13. When the matter was taken up on September 4, 2012, the defendants stated that they had not been able to find any buyer who may be willing to come to the Court and they were not in a position to participate in the bid for purchase of the suit properties. They also stated that they were not in a position to deposit Pay Order of Rs.2 lakhs in terms of the order dated July 31, 2012. On account of

failure of the defendants to deposit Pay Order of Rs.2 lakhs and participate in the auction amongst the co-owners of the suit properties, *inter se* bidding could not take place. The matter was then heard on merits and judgment was reserved.

14. There has been no dispute between the parties with respect to their share in the suit properties. Admittedly, the plaintiffs and defendant No.1 have 1/5th share each in both the immovable properties, which are subject-matter of this suit. In any case, the preliminary decree passed by this Court on September 2, 2008 has already become final. It has already been reported by the Local Commissioner that the suit properties is not capable of division by metes and bounds. Therefore, sale of the suit properties was the only course which the Court could have adopted in the matter, particularly when no application was filed by any party to purchase the share of other parties to the suit. In any case, the order dated November 27, 2009 directing sale of the suit properties by way of auction has already become final and in view of the provisions contained in Section 8 of the Partition Act 1893, the order for sale is deemed to be a „decree?within the meaning of Section 2 of the code of Civil Procedure.

15. The auction of the suit properties has already been held and the suit properties have already been purchased by the plaintiffs in the auction, for a consideration of Rs.95 lakhs. The share of defendant No.1 in the sale consideration comes to Rs.19 lakhs. Defendant No.2 has no share in either of the two immovable properties which are subject-matter of this suit. The amount of Rs.19 lakhs has already been deposited by the plaintiffs with the Registrar General of this Court. The immovable properties subject-matter of this suit having been purchased by the plaintiffs., they are entitled to peaceful and vacant possession of the portions which are in possession of the defendants. The defendants are granted time till September 30, 2012 to vacate the portions occupied by them in the immovable properties which are subject-matter of this suit. If the defendants fail to do so, the Registry will issue warrant for possession of the aforesaid portions in favour of the plaintiffs, who shall be entitled to execute the same through the process of the Court. On the plaintiffs receiving the possession of the portions occupied by the defendants in the immovable properties subject-matter of this suit, the amount of Rs.19 lakhs, which the plaintiffs have deposited with the Registrar General of this

Court, shall be released to defendant No.1 along with interest which accrues on that amount.

Though in terms of the consent order dated July 17, 2012, the plaintiffs have become entitled to Rs.50,000/- which the defendants had deposited by way of Pay Order in the name of Registrar General of this court, considering the facts and circumstances of the case, it is directed that the aforesaid Pay Order would be returned to the defendants on their handing over peaceful and vacant possession of the portion occupied by them in the immovable properties which are subject-matter this suit to the plaintiffs. It is reiterated that the defendants shall not sell, assign, transfer or otherwise part with possession of the portions occupied by them in the immovable properties subject-matter of this suit nor shall they induct any other person therein or part with its possession, till the plaintiffs get possession of the portions occupied by the defendants.

The suit and all pending applications stand disposed of, in terms of this order.

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