

(2014) 07 DEL CK 0030

Delhi High Court

Case No: I.A. Nos. 1659-60/2004 in CS(OS) 1527/2002

Kishan Chand Dass

APPELLANT

Vs

Kuoni Travel (India) Ltd.

RESPONDENT

Date of Decision: July 9, 2014**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 151, 152, 153

Citation: (2014) 6 AD 415**Hon'ble Judges:** P.K. Bhasin, J**Bench:** Single Bench

Advocate: Arun Mohan, Sr. Advocate, Arvind Bhatt and Kuber Giri, Advocate for the Appellant; Rajiv Nayyar, Sr. Advocate, Umang Gupta and Saurabh Seth, Advocate for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

P.K. Bhasin, J.

This order shall dispose of I.A. No. 1659/2004 u/s 151 of the Code of Civil Procedure, 1973("CPC") as well as I.A. No. 1660/2004 u/s 152 read with Sections 151 and 153 CPC filed by the plaintiffs in their suit for partition which stood finally disposed of on 18th December, 2003. The facts which are relevant for the disposal of these two applications, both of which can be conveniently disposed of by a common order, are that a suit for partition in respect of property No. F-12 & 13, Connaught Place, New Delhi was filed by three persons namely, Shri Kishan Chand Dass, his wife Smt. Saroj Dass(since dead) and their son Shri Rahul Dass against M/s. Kuoni Travel (India) Ltd. These plaintiffs had claimed that they were owners of 50% undivided share in the aforesaid property and the other 50% undivided share was owned by M/s. Sita World Travels (India) Limited, which Company subsequently came to be taken over by M/s. Kuoni Travel (India) Limited, the defendant in the suit. The prayers made in

the plaint are reproduced below:-

"i) pass a preliminary decree for partition in favour of the plaintiffs against the defendant holding that the plaintiffs being 50% undivided share in the suit property bearing No. F-12 & 13, Connaught Place, New Delhi, as shown in the plan annexed; ii) appoint Local Commissioner to suggest mode of partition; iii) on the report of the Local Commissioner being received and after deciding the objections thereto, if any, pass a final decree & put the plaintiffs in possession of the portion which comes to the share of the plaintiffs;"

M/s. Kuoni Travel (India) Limited, the defendant in the suit, filed its written statement and one of the pleas taken was that the suit for partition had been filed with mala fide motives as prior to the filing of the suit the plaintiffs had not informed it of their intentions to have the suit property partitioned and if that had been done it would have agreed for partition since there was no dispute that the plaintiffs were owners of 50% undivided share in the suit property and the defendant was also owner of 50% undivided share as had been claimed by the plaintiffs in the plaint. It was also claimed in the written statement by the defendant that as far as the relief of possession being claimed by the plaintiffs in respect of the portions where the defendant was in occupation as a statutory tenant of the plaintiffs is concerned, the plaintiffs were required to get that relief in other appropriate proceedings and not in this partition suit as its tenancy was protected under the Rent Act.

2. Since there was no real dispute between the parties regarding their shares in the suit property no issues were framed on any aspect of the matter including the plea of the defendant that relief of possession could not be claimed by the plaintiffs in this suit for partition in respect of the portions which were in its occupation as statutory tenant of the plaintiffs. So, on 22nd May, 2003, a preliminary decree of partition was passed on the basis of consent of both the parties holding both of them owners of 50% undivided share in the suit property. The relevant portion of the order passed on 22nd May, 2003 by the Court is re-produced below:-

"This is a suit for partition wherein plaintiffs have claimed to be the owner of the premises bearing Nos. 12 and 13, Block "F" Connaught Place, New Delhi, to the extent of 50% undivided share. The defendants" while filing written statement have not refuted this fact. In the written statement filed by the defendants, they have claimed rest of the 50% undivided share in the properties in dispute. This fact even otherwise is admitted by the plaintiff in their plaint particularly in para 14 of the plaint.

There being no dispute in regard to the extent of undivided share of each of the parties in the properties in dispute, the plaintiff is entitled to a preliminary decree in his favour. Accordingly a preliminary decree for partition is passed in favour of the parties holding them to be the owners of the undivided share in the properties in

the suit to the extent 50% each."

3. By the same order a local commissioner was appointed to suggest the modes of partition of the suit property. After the local commissioner gave a report indicating the specific portions which were to be given to both the sides final order was passed by the Court on 18th December, 2003 decreeing the suit. That order is re-produced below:-

"A preliminary decree for partition was passed in favour of the parties holding them to be the owners of the undivided share in the property Nos. 12 and 13, Block F, Connaught Place, New Delhi to the extent of 50% each. A Local Commissioner was appointed to inspect the premises and suggest modalities of partition by metes and bounds. The Local Commissioner filed his report and stated that there was no problem regarding the division of the main property. However, there is a problem with regard to partition of the garage area. The Architect who also visited the property was of the opinion that if the garage block was constructed with due sanction from NDMC and the covered area fell within the permissible limit of prevailing FAR, at the time of approval from NDMC then the covered area may be relocated so that both the parties get covered area facing the inner circle.

The plaintiffs made a suggestion that if the defendant is prepared to demolish 50% of the garage area, then the plaintiffs would have a right to construct on the open land which would be the proposed share of the plaintiffs in the garage. The defendant did not oppose the proposal. Consequently, the parties applied to the NDMC for sanction of the said proposal.

Learned counsel for the NDMC states that the proposal for demolition and construction of the garage block has been rejected by the NDMC. Therefore, counsel for the parties agree that the garage portion be split into two equal portions and the portion that is contiguous to the portion of the defendant shall fall to the share of the defendant and the remaining half portion shall go to the share of the plaintiffs. Likewise, the open space of 2381 sq. ft. shall also be split into two equal portions and the area contiguous to the portion of the defendant shall fall to the share of the defendant and the remaining portion shall fall to the share of the plaintiffs. Counsel for the parties also agree that both the parties shall have free ingress and egress to the porch area.

Accordingly, the suit is decreed in terms of the report of the Local Commissioner with modifications made hereinabove. All other pending applications also stand disposed of. All the interim orders stand vacated.

Registry is directed to prepare the decree sheet expeditiously. Both the parties shall pay the stamp duty to be affixed on the decree in equal proportion and a site plan shall also be filed duly signed by the parties."

4. After some months of the passing of the judgment/order dated 18th December, 2003 the plaintiffs moved the present two applications. I.A. No. 1659/2004 was filed by the plaintiffs claiming that the defendant was avoiding to sign the plans which the plaintiffs had sent to it for signing as per the directions given by the Court in the order dated 18th December, 2003 and was also not paying its share of the stamp duty. The following prayers were made in the said application:-

"a) Directing the defendant to comply with the order dated 18th December, 2003 and sign the plans of the suit property handed over to them by the plaintiffs and also direct the defendant to pay/deposit their share of the stamp duty.

b) Direct the defendant to hand over possession to the plaintiffs of the portion that has fallen to the share of the plaintiffs as per judgment and order dated 18th December, 2003.

c) An ad-interim temporary injunction to restrain the defendant and/or its assigns from alienating, transferring or otherwise parting with possession of any portion of the suit property bearing No. F-12 & 13, Connaught Place, New Delhi, which has not fallen to the share of the defendant in terms of judgment/order dated 18th December, 2003, till the defendant hands over possession to the plaintiffs in terms of the said order.

d) Any other order(s) that this Hon"ble Court may be pleased to pass in the facts and circumstances of this case."

5. In I.A. No. 1660/2004 it was pleaded by the plaintiffs that defendant was not handing over the possession of those portions of the suit property in its occupation which had been allotted to them as per the local commissioner's report, about which no dispute had been raised by any of the parties, on the plea that this Court had not passed a decree of possession in favour of the plaintiffs and so for that relief the plaintiffs should initiate appropriate proceedings before the Rent Controller as the defendant was a statutory tenant of the plaintiffs in respect of some portions falling to the share of the plaintiffs. The plaintiffs claimed that due to inadvertent error this court had omitted the direction for delivery of actual possession also by the defendant to the plaintiffs of the portions in occupation of the defendant which fell to the shares of the plaintiffs in the final order dated 18th December, 2003 and so that error required to be rectified by the Court by including a direction in the judgment and order for the plaintiffs being put in possession of the portions falling to their share and which were in occupation of the defendant so that the plaintiffs could get the possession of the entire 50% of its share in the suit property without resorting to fresh round of litigation. The following prayer was made in this application:-

"(a). direct appropriate correction(s) in the judgment and order dated 18th December, 2003 passed by this Hon"ble Court by inserting therein appropriate words indicating that the parties and particularly the plaintiffs/decreed holders would

be entitled to be put in actual physical possession of the portions that had fallen to their respective share in terms of the decree of this Hon"ble Court. (b). pass such other or further orders as this Hon"ble Court may deem fit, appropriate and/or expedient."

6. Both these applications were opposed by the defendant on various grounds.

7. At the time of arguments no submissions were made by Shri Arun Mohan, learned senior counsel for the applicants-plaintiffs in respect of I.A. No. 1659/2004 and in my view rightly so because the Court having already directed the parties to place on record a signed site plan so that it could form a part of the final decree of partition and also to pay their respective shares of the requisite stamp duty for drawing up of the formal decree no fresh direction was required to be given by the Court. The plaintiffs could and even now can initiate proceedings for ensuring that the defendant complies with the said directions given to it in the judgment and order dated 18th December, 2003. I.A. No. 1659/2004 is, therefore, dismissed.

8. As far as I.A. No. 1660/2004 is concerned, Mr. Arun Mohan had submitted that filing of this application became necessary for the reason that even though the plaintiffs had claimed the relief of possession also of the portions of the suit property which would be coming to their share this Court while disposing of the suit finally on receipt of local commissioner"s report and the plan attached therewith wherein the local commissioner had shown specific portions going to the share of the parties on different floors of the suit property, did not pass any specific order directing the defendant to hand over the physical possession of those portions of the suit property which were in its occupation and which had fallen to the share of the plaintiffs as per the local commissioner"s report and taking advantage of that inadvertent error on the part of the Court the defendant was avoiding to hand over the possession of those portions on the flimsy ground that it was a statutory tenant therein of the plaintiffs and possession could be claimed by the plaintiffs only by approaching the Rent Controller under the provisions of the Delhi Rent Control Act. Mr. Arun Mohan cited a large number of judgments of the Supreme Court in which scope of Section 152 C.P.C. was discussed. Learned senior counsel submitted that it was held in those judgments that the situation in which the present plaintiffs stood placed because of their being unable to get the possession of their property on account of the inadvertent error committed by this court the only remedy available to them was to file an application u/s 152 C.P.C. and not to file an appeal etc. as was the plea being taken by the defendant.

9. Opposing this application Mr. Rajiv Nayyar, learned senior counsel for the defendant had submitted that this Court having not specifically granted the relief of possession to the plaintiffs the same was deemed to have been rejected and, therefore, the plaintiffs" remedy was to challenge the order dated 18th December, 2003. According to Mr. Nayyar there was no error committed by the Court in not including the direction of delivery of possession by the defendant of those portions

in its occupation since it was always the case of the defendant and the plaintiffs were also not disputing the fact that some portions of the suit property were in its occupation as a statutory tenant of the plaintiffs and the decree for partition could not be used as a decree of possession in respect of those portions wherein the defendant was a tenant and which tenancy was protected under the Delhi Rent Control Act. In support of this argument Mr. Nayyar also cited some judgments of the supreme Court wherein it was held that a decree of partition will not determine the tenancy of the tenants in occupation of the suit property and they can be dispossessed by the party becoming owner of the same by virtue of the partition decree by approaching the Rent Controller in case the provisions of Rent Control Act apply to the tenants. After giving my due consideration to the entire aspects of the matter, the submissions made by the senior advocates from both sides and the judgments cited by them I have come to the conclusion that the application u/s 152 C.P.C. filed by the plaintiffs is totally misconceived and had been filed unnecessarily without carefully reading and understanding the final order dated 18th December, 2003. No error requiring rectification by the Court was committed while disposing of the suit. The prayers made by the plaintiffs in their suit for partition and possession have already been extracted by me in the earlier part of this order. The plaintiffs had prayed for a decree of partition of the suit property in equal shares with the sole defendant and they had also sought the relief of their being put into possession of the portions of the suit property which would be allotted to them after passing of the preliminary decree of partition by the local commissioner. The parties had consented to the passing of the preliminary decree straightaway without asking for trial on any aspect. Preliminary decree was accordingly passed by the Court and upon receipt of the report of the local commissioner wherein specific portions were proposed to be allotted to the parties. No objections were raised to that report from either side in respect of the different portions on different floors of the suit property. Therefore, the Court had decreed the suit without specifying that any part of the suit claim was not being decreed. So, it cannot be said that the Court had inadvertently omitted to include the relief of possession to the plaintiffs in the final judgment/order dated 18th December, 2003 and that mistake/error required to be rectified by the Court in exercise of the powers vested in it u/s 152 C.P.C. Nor was there any necessity of filing any appeal by the plaintiffs since the suit had been ordered to be decreed and once the Court says that suit is decreed it means that the suit is decreed in entirety. By filing this kind of application the defendant stood benefited since the plaintiffs chose not to execute the decree passed in their favour all these years and it also got the chance to take an unjustified stand that the relief of possession stood rejected. Therefore, I.A. No. 1660/2004 is also dismissed.