

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: November 17, 2009
Date of Order: November 23, 2009

+IA Nos. 14174, 13486 and 13140 of 2009 in CS(OS) 819 of 2007

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23.11.2009

Nagendra Vashisht

...Plaintiff

Through: Mr. N. Vashisht, plaintiff in person

Versus

Bhagwat Sawroop Sharma & Ors.

...Defendants

Through: Mr. Kirti Uppal and Mr. Saneet Singh, Advocates for D-1,2,3,5&7

Mr. Atul Varma, Advocate for D-4(A)-(D)

Mr. M.C. Dhingra and Mr. Abhishek Birthrey, Advocates for D-5

Mr. V.N. Sharma, Advocate for D-10.

JUSTICE SHIV NARAYAN DHINGRA

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

ORDER

IA Nos. 14174 and 13486 of 2009

1. By this order, I shall dispose of above two applications. The first application being IA No.13486 of 2009 preferred by defendant no.10 under Section 151 CPC for seeking directions from this Court against defendants no.1,2 and 3 for restraining them from making construction over the property no.316, Masjid Moth, New Delhi. In the second application being IA No.14174 of 2009 preferred by plaintiff under Order 39 Rule 1 and 2 CPC directions are sought against defendants no.1 to 3 to stop illegal and unauthorized construction being carried by these defendants at property bearing number 316 Masjid Moth, New Delhi stating that this construction was in violation of order dated 4th May 2007 passed by this Court and also in violation of Building Byelaws. Another prayer is

made that defendants no.1 to 3 should be directed not to take possession of the property.

2. Plaintiff filed the present suit for partition of the property bearing numbers 316, Masjid Moth, New Delhi; 318, Masjid Moth, New Delhi; and 333, Masjid Moth, New Delhi on the ground that they were HUF properties belonging to late Shri Yad Ram and after his death, the properties have to go as per succession as late Shri Yad Ram died intestate. At the time of filing the present suit, plaintiff had also moved an application under Order 39 Rule 1 and 2 CPC. Counsel for defendants no.1 to 3 put appearance on the very first date i.e. 4th May 2007 and accepted notice of the application and submitted that defendants no.1 to 3 shall maintain status quo with regard to title and possession of the suit properties till the next date. The application under Order 39 Rule 1 and 2 CPC was not decided on merits as the notice to other defendants was yet to be served.

3. In the application IA 14174 of 2009 it is submitted by plaintiff that defendants no.1 to 3 despite giving an undertaking by their counsel to the Court of maintaining status quo have taken possession of plot no.316, Masjid Moth, New Delhi. The property was measuring 600 sq yards and defendants no.1 to 3 divided the plot in two parts and have started raising construction on one part of the property illegally in violation of status quo order.

4. In response to this application, it is submitted by counsel for defendants no.1 to 3 that the averments made by plaintiff in the application were false. The possession of the plot was already with defendants no.1 to 3 and this fact was evident from the report of Local Commissioner filed in Probate Petition no.54 of 1989. A copy of the report has been placed on record. It is also submitted that the present partition suit filed by plaintiff

was a frivolous suit. Plaintiff had earlier filed a probate petition alleging therein that late Shri Yad Ram left behind a Will dated 7th July 1978 and all properties of his father were bequeathed to him and his brothers and the defendants were given only movable properties. This probate petition continued from 1978 onwards and the plaintiff failed to prove the Will and moved an application to withdraw the probate petition in order to initiate proper legal action against defendants. Even this application of plaintiff for withdrawal of probate petition with liberty to pursue other legal remedies was dismissed. During pendency of probate petition, a status quo order was passed which lasted for 14 years. The applicant was the son of the deceased plaintiff and had represented his father in the probate petition. He also appeared in the Writ Petition filed by defendants seeking directions to MCD for sanctioning of plan in respect of property bearing no.316, Masjid Moth, New Delhi. He was well aware of the fact that property no.316, Masjid Moth was in possession of defendants no.1 to 3 by virtue of division of properties by late Shri Yad Ram during his lifetime and this fact finds support from the report of Local Commissioner. The applicant concealed material facts from the Court and had not come to Court with clean hands.

5. I have gone through the report of Local Commissioner and the other documents. This Court while considering the suit had not granted a blanket status quo order restraining any party from raising construction on the portion in their occupation. The status quo was granted on the statement made on behalf of defendants No.3 by their counsel only in respect of title and possession. Prima facie the possession of property number 316, Masjid Moth, New Delhi seems to be with defendants no.1 to 3 as is evident from the report of the Local Commissioner appointed by the Probate Court.

6. I, therefore, consider that the plea of plaintiff that defendants no.1 to 3 had illegally taken possession is a baseless plea. The defendants had also filed a writ petition in the High Court to which plaintiff was a party where the defendants no.1 to 3 had claimed to be in possession of the property and they sought directions to MCD/ DDA for sanctioning of the site plan. Unfortunately, the stand of DDA and MCD was that they cannot sanction the site plan in respect of property at Masjid Moth because of certain administrative and technical difficulties. Defendants no.1 to 3 were given liberty to construct the property in accordance with building byelaws. Defendants no.1 to 3 had undertaken construction because of this fact. If the construction is illegal or unauthorized, that would amount to a separate cause of action and DDA/MCD would have a right to take action as per law in case of violation in building byelaws or the construction being unauthorized. This cannot be a subject matter of the present suit for partition.

7. Since defendants no.1 to 3 seem to be in possession of property and have undertaken construction, it is made clear that such construction shall be solely at the risk and costs of defendants no.1 to 3. In case ultimately it is found that this property is to be partitioned and any part of the property has to go to other successor, the defendants no.1 to 3 shall not lay any claim over the amount spent by them in raising construction and whatever is constructed by defendants no.1 to 3 shall become part of the property and shall also be subject matter of division.

8. With above observations both the above applications stands disposed of.

IA No. 13140 of 2009

1. This application under Order 39 Rule 2-A CPC has been made by plaintiff against

defendant no.1 to 3 for willful disobedience and breach of injunction of order dated 4th May 2007 passed by this Court.

2. In view of my findings in IA Nos. 14174 and 13486 of 2009, I find that no violation of order dated 4th May, 2007 is made out. This Court had not restrained defendants vide order dated 4th May, 2007 from raising any construction over the property.

3. The application is hereby dismissed.

CS(OS) 819 of 2007

1. List on 11th February 2010.

November 23, 2009
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SHIV NARAYAN DHINGRA J.