

Babusaheb Singh and others

Vs

Parsid Narain Singh and others

Civil Appeal No. 3395 of 1990 (arising out of S.L.P. (C) No. 2946 of 1989)

(N.M. Kasliwal and S.C. Agrawal JJ)

17.07.1990

ORDER

1. Special leave granted.

2. In a suit for partition a preliminary decree was passed in which the properties standing in the name of original Defendant No. 30 Nathu Singh and those standing in the names of the wives of defendants Nos. 2 and 5 were excluded from partition as the same exclusively belonged to those persons. The preliminary decree was framed in accordance with the directions given in the judgment. In an appeal from the preliminary decree, an argument was raised before the High Court that the preliminary decree was not drawn up in consonance with the judgment. The High Court in its order dated 27th June, 1978 observed in Para 4 that there was no inconsistency between any portion of the judgment and preliminary decree in respect of such properties. The Court thus observed that the counsel for the appellants gave up this point. During the proceedings for final decree, a petition was filed on behalf of defendants Nos. 1-11 stating that the Advocate Commissioner be directed to exclude lands standing in the names of Nathu Singh and the wives of defendants Nos. 2 and 5. The Court passed an order 17-12-87 excluding the above lands and properties from partition.

3. Aggrieved against the aforesaid order, a revision was filed in the High Court. The High Court by its order dated 22-7-88 held that it appears that the High Court in its previous order had given a direction that the matter relating to the inconsistency in the judgment, vis-a-vis the preliminary decree prepared on the basis thereof, had been given up before the High Court. It was thus observed that the respondents could not reargue the said question again before the executing Court at a later stage. Aggrieved against the aforesaid order, the present appeal has been filed.

4. We have heard learned counsel for the parties and have thoroughly perused the record. We have also seen the earlier order of the High Court dated 27th June, 1978 passed in First Appeal No. 2/66. In our view, the High Court committed an error, patent on the face of the record, in holding that the respondents could not reargue the said question again before the executing Court at a later stage, as the same had been given up as mentioned in the earlier order of the High Court passed in First Appeal No. 2/66. The initial judgment and preliminary decree based on it clearly makes a mention that the properties belonging to Nathu Singh and wives of defendants Nos. 2 and 5 were excluded from partition. The High Court in its earlier order had never set aside the above direction. It is also an admitted position that the plaintiffs had never challenged the above direction given in the judgment and the preliminary decree based on it. In view of these circumstances, this appeal is

allowed. The order of the High Court dated 22-7-88 is set aside and that of the trial Court dated 17-12-87 is restored. No order as to costs.

Appeal allowed.

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