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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA(OS) 88/2019

MOHINDER SINGH

.....Appellant

Through: Mr N.S. Dalal, Ms Nidhi Dalal, Mr
Alok Kumar, Ms Rachana Dalal and Mr Kunal
Narwal and Mr. Karan Mann, Adv.

versus

OM PRAKASH GAHLOT (DECEASED) THR LRS & ORS

.....Respondent

Through: Mr. Anil Gahlot, Adv. for R-1
Mr. Kapil Gahaloth, Adv. for LR No. (iii) of R-2
Mr. Anil Gahlot, LRs-II and Attorney of LRs I &
II of Respondent No. 2.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

HON'BLE MR. JUSTICE SAURABH BANERJEE

ORDER

20.11.2024

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1. The present appeal under Section 10 of the Delhi High Court Act, 1966 read with Section 96 of the Code of Civil Procedure, 1908 seeks to assail the judgment dated 19.09.2019 passed by the learned Single Judge in CS(OS) No. 564/2016. Vide the impugned judgment, the learned Single Judge has after taking into account the preliminary decree of partition passed on 22.04.2019 qua land situated in the Revenue Estate of Village Kakrola, New Delhi as described in the plaint, directed that the same be sold and the sale proceeds be distributed amongst the parties as per their respective shares declared under the preliminary decree. The learned Single Judge further



directed that, before the property be sold to any outsider, an opportunity will be given to the parties to make inter se bids, for purchase of the property.

2. Learned counsel for the appellant submits that the only reason why the learned Single Judge directed that the suit property should be sold instead of being divided by metes and bounds, is only because the parties were not able to arrive at a consensus regarding the manner in which the property could be divided by metes and bounds. He contends that while passing a final decree for partition, the Court can direct sale of the suit property only when it comes to a conclusion that the said property cannot be reasonably and conveniently divided and, therefore, sale of the same and distribution of the sale proceeds thereof would be more beneficial to all the shareholders of the suit property. This direction, he submits can be made only when a request for sale of the property is made by any of the shareholders and that too when the Court finds justifiable ground to direct the sale and not merely because the parties are not able to amicably agree regarding the manner in which the suit property should be divided by way of metes and bounds.
3. Learned counsel for respondent no. 1 as also learned counsel for legal representative No. III of the respondent no. 2 support this plea of the appellant and submit that the suit property could be easily divided by metes and bounds. They, however, contend that it was the proposal for physical division of suit property as suggested by them to the Local Commissioner, which ought to have been accepted and not the manner of division suggested by the appellant.



4. We may, at this stage note, that despite service being complete on all the respondents on 07.08.2023, except for the aforesaid two respondents, the other respondents are unrepresented. The same has been the position for the last many dates. In these circumstances and having considered the submissions of learned counsel for the parties, we are taking up the appeal for disposal today itself without granting any further time to the respondents who have chosen to remain unrepresented despite service.
5. Now coming to the merits of the appeal, before we deal with the submissions of learned counsel for the parties, we may note that it is the common case of the parties that as per the Local Commissioner appointed by the learned Single Judge, in pursuance to the preliminary decree of partition, the suit property could be divided by metes and bounds. The suit property was, however, not directed to be divided by metes and bounds only because it was found that both sides were suggesting different methods for physical division of the suit property by metes and bounds. It is upon consideration of this report of the learned Local Commissioner that the learned Single Judge proceeded to direct sale of the suit property instead of directing that the same be divided by metes and bounds.
6. It would, therefore, be apposite to note the relevant extracts of the impugned judgment, which read as under:-

“3. The counsel for the plaintiff states that the Commissioner has found the property, with respect to which preliminary decree for partition has been passed, to be divisible by metes and bounds and has, after considering the proposals received from the parties found



the proposal of division of the property of the plaintiff to be equitable and suggested division of the property by metes and bounds as per the said proposal.

4. Mr. Anil Gahlot, LR 2 of defendant no.1 is agreeable but the counsel for LR No.3 of defendant no.2 is not agreeable.

5. The counsel for LR No.3 of defendant no.2 proposes partition by metes and bound as per his own site plan. Though the counsel for the plaintiff is agreeable thereto but the counsel for LR No.3 of defendant No. 2 wants only one specific portion and to which plaintiff is not agreeable.

6. In the aforesaid circumstances, partition by metes and bounds does not appear to be feasible and will only lead to further litigation.

7. On enquiry, while the counsel for the plaintiff states that only the parties are in possession, the counsel for the LR No.3 of defendant no.2 states that outsiders also are in possession of the property.

8. When there is no consensus, it is appropriate to pass a final decree for partition of the property as described in the preliminary decree for partition, of sale thereof and of distribution of sale proceeds amongst the parties as per share declared in the preliminary decree for partition.”

7. From the aforesaid, what clearly emerges is that the directions for sale of the suit property were issued by the learned Single Judge not because the property was found to be indivisible but because it was found that the parties were insisting on retaining certain specific portions of the suit land. Consequently, the learned Single Judge after noticing that there was no consensus amongst the parties regarding the manner in which the suit property could be physically divided, opined that partition by metes and bounds did not appear to be feasible. We are, however, unable to agree with this conclusion arrived at by the learned Single Judge. In our considered view,



merely because the parties are not able to mutually agree regarding the manner in which the property can be physically divided, cannot be a ground to hold that the suit property cannot be physically divided amongst all the co-owners.

8. No doubt, the Court while dealing with a suit for partition is empowered to order sale of a property instead of opting for its physical division among co-owners in appropriate cases, this discretion, however, has to be exercised only in a case where the property itself is found to be indivisible. In the present case, no such finding has been recorded by the learned Single Judge that the suit property was indivisible. On the other hand, we find that all the parties were *ad idem* that the property could be divided by metes and bounds, which was also the report of the learned Local Commissioner and, therefore, it was not open for the learned Single Judge to issue directions for the sale of the same and that too without any request from any of the parties for sale thereof.
9. We may also note at this stage that as per the preliminary decree for partition dated 22.04.2019, it was declared that the share in the suit property of the plaintiff(appellant), defendant no.3(respondent no.3) and defendant no.4(respondent no.4) taken together was 50%, while that of the defendant nos.1(respondent no.1) and 2(respondent no.2) was 25% each. In this factual situation, when three of the co-owners taken together were held entitled to 50% of the share in the suit property, with the other two co-owners having 25% share each, there was no reason as to why the suit property, which is a land measuring 22 bighas 5 ½ biswas could not be divided by metes and bounds.



10. In the light of the aforesaid, we are of the view that the learned Single Judge has erred in directing the sale of the suit property without exploring the manner in which the property could be divided amongst the co-owners.
11. The appeal is, accordingly, allowed by setting aside the impugned judgment and remanding the matter back to the learned Single Judge for passing a final decree of partition after considering as to whether the suit property can be divided by metes and bounds. We, however, make it clear that this order will not come in the way of the learned Single Judge directing sale of the property, in case, it holds that the property cannot be divided by metes and bounds.
12. List the suit before the learned Single Judge on 02.12.2024 as per Roster.

REKHA PALLI, J

SAURABH BANERJEE, J

NOVEMBER 20, 2024/acm