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

+ RFA(OS) 124/2014 & CM Nos.13019 and 18965/2014

% Date of decision : 20th October, 2015

KUSUM KUMRIA AND ORS. Appellant
Through: Mr. Sanjeev Sindhvani, Sr.
Adv. with Mr. Mohit Paul
and Mr. Uday Joshi, Advs.

versus

PHARMA VENTURE (INDIA) PVT. LTD.
AND ANR. Respondent
Through: Ms. Anil Airi, Mr. Ravi
Krishan Chandna, Ms.
Sadhna Sharma,
Ms. Bindiya L. Airi Mr.
Aman Madan and Mr. Ishan
Khanna, Advs.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT

GITA MITTAL, J.

“For many centuries, Indian society cherished two basic values of life i.e., ‘Satya’ (truth) and ‘Ahimsa’ (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system.... In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They

shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.”

(Ref.: Dalip Singh v. State of U.P., (2010) 2 SCC 114)

1. The instant appeal challenging the order dated 15th May, 2014 of the learned Single Judge directing issuance of the sale certificate manifests the dishonest extremes to which an unscrupulous litigant can use and exploit the judicial processes in order to perpetuate the occupation of a valuable property in a posh colony. When the suit property is of the nature of the suit property being W-152, Greater Kailash-I, New Delhi (except its first floor), it is obviously difficult to let go. However, neither the methodology adopted by the appellants in the present case of filing this appeal (challenging a sale certificate confirming the sale after a public auction with the total consent and active participation of the appellants) nor the end, is either fair or justified. It is certainly completely malafide and, most importantly, contrary to law.

We propose to decide the issues pressed before us in the following manner :

I. Factual Matrix
(paras 2 to 33)

II. Plaintiff cannot be permitted to approbate and reprobate at the same time – application of the doctrine

of estoppel by election (paras 34 to 60)

- III. What is the effect of sale by a co-owner of specific portion of joint property, which the other co-owner say has not been partitioned? (paras 61 to 109)
- IV. Objections of the appellants that mandatory procedure under Sections 2 and 3 of the Partition Act has not been followed (paras 110 to 168)
- V. Submission that plaintiffs' application for amendment of plaint was pending – effect thereof (paras 169 to 180)
- VI. Appellant's submissions that jurisdiction on a court cannot be conferred by consent, acquiescence, waiver, estoppel (paras 181 to 205)
- VII. How is the court to proceed after dismissing objection to an auction (paras 206 to 217)
- VIII. The plaintiffs have failed to pay costs awarded on them (paras 218 to 221)
- IX. Costs (paras 222 to 259)
- X. Result (para 260)

We discuss the above issues in seriatum hereafter :

I. Factual Matrix

2. Before dealing with the rival contentions, we may usefully set down some essential facts. The plot of land bearing no.W-152, Greater Kailash-I, New Delhi admeasuring 500 sqr.yrds. was purchased by Shri R.R. Kumria on the 17th of November 1960. Shri R.R. Kumria expired intestate on the 22nd of May 1962 and was survived by his widow – Smt. Savitri Kumria; two sons – Shri

S.P. Kumria and Shri Sudershan Kumria and, two daughters – Urmila Kalia and Nirmala Sirba.

3. Smt. Savitri (widow of Shri R.R. Kumria) also expired on the 25th of May 1972 without leaving any will or testament.

4. On the 18th of June 1979, Smt. Urmila Kumria and Nirmala Sirba (daughters of Late Shri R.R. Kumria) executed a relinquishment deed of their share in the suit property in favour of their two brothers - Shri. S.P. Kumria and Shri Sudershan Kumria.

It is the case of the appellants that, as a result, Shri S.P. Kumria and Shri Sudershan Kumria became co-owners of half undivided share each in the property.

5. On the 24th of January 1994, Shri Sudershan Kumria died leaving behind his widow Smt. Kusum Kumria (appellant no.1 herein/plaintiff no.1 in the suit); a daughter Ratna (appellant no.2 herein/plaintiff no.2 in the suit) as well as a son Mohit (appellant no.3 herein/plaintiff no.3 in the suit). These appellants as a result jointly became entitled to half share in the property.

6. For reasons of convenience, we propose to refer to the parties by their description in the suit.

7. On the 27th of March, 1998, the first floor of the property was jointly sold by the plaintiffs and Shri S.P. Kumria by a registered sale deed to an outsider. The remaining property was in

joint possession of Shri S.P. Kumria on the one hand and the plaintiffs on the other.

8. No site plan has been filed by the plaintiffs in the suit on record. On query by the court, Shri Mohit Kumria - plaintiff no.3 prepared a rough sketch of the suit property (kept on record) which showed that it consists of the following :

(i) A basement which is a bare hall with a pantry and a bathroom.

(ii) A ground floor which consists of a drawing room, three bedrooms with attached bathrooms; a similar room next to a shaft area; lobby area and one kitchen.

(iii) Construction on the terrace above the first floor which consists of one small room above the ground floor bedroom and a bathroom as well as a kitchen. There is no other construction.

9. Shri S.P. Kumria asserted an oral partition of the property by metes and bounds and that, as a result of this partition, the entire basement; one bedroom with an attached bathroom facing east having an independent entrance on the ground floor and the complete terrace on the first floor with the partial construction and the further right to construct up to sky, with the proportionate portion of land underneath, fell to the share of Shri S.P. Kumria. This oral partition was claimed to have been reduced to writing on the 16th of October 2001. Pursuant to such partition, he claimed exclusive ownership rights over this portion of the property.

10. On 17th of October 2001, Shri S.P. Kumria sold the portion of the property which was his 50% share in the property, by a registered sale deed in favour of M/s Pharma Ventures (India) Pvt. Ltd. (respondent no.1 herein/defendant no.1 in the suit).

11. At this stage, on the 8th of November 2001, the plaintiffs filed a civil suit bearing no.CS(OS)No.2307/2001 on the original side of this court. In this plaint, the plaintiffs claimed the right of pre-emption under Section 22 of the Hindu Succession Act. On the 21st of April 2003, a preliminary issue as to "*whether the plaintiffs have locus standi to file a suit? OPP*" was framed by the court. The suit came to be dismissed by the learned Single Judge by a judgment dated 27th February, 2006 holding that the plaintiffs did not have the locus standi to file such claim. However, the plaintiffs were given liberty to file a partition suit. We shall advert to the pleadings of the plaintiffs in this plaint at a later part of this judgment.

12. On 8th of March 2006, M/s Pharma Ventures (India) Pvt. Ltd. transferred their rights in fifty per cent of the suit property, by virtue of a registered sale deed, in favour of Smt. Sarawjeet Singh - respondent no.2.

13. After the property had been sold, the plaintiffs filed the CS(OS)No.647/2006 on the 28th of March 2006 against M/s Pharma Ventures (India) Pvt. Ltd. as the sole defendant seeking partition of the property into equal proportions with the defendant asserting entitlement to "½ share" only.

14. Along with the plaint, the plaintiffs filed I.A.No.4354/2006 under Order XXXIX Rules 1 and 2 of the CPC seeking interim orders for restraining the defendant, its servants, employees or agents from interfering with the possession of the plaintiffs in the entire ground floor including one bedroom with the attached bathroom facing east together with the lawn and restraining the defendant from parking any vehicle in the lawn.

After having filed the suit, the defendant contends that the plaintiffs illegally and unauthorizedly trespassed into the ground floor room which was owned and in possession of Late Shri S.P. Kumria and had been handed over by him to the defendant.

15. On 12th January, 2007, the defendant was asked to file an affidavit giving the name of the purchaser and details of the sale deed within a week from the date of the order. Copy of the sale deed dated 8th March 2006 was handed over by the defendant no. 1 to the plaintiff in court on 6th July, 2007.

16. The plaintiffs were given directions to implead the purchaser of the property, Ms. Sarawjeet Kaur, on 23rd January, 2007. No steps were taken despite repeated reminders from the court to do so by orders dated 15th March, 2007; 6th July, 2007 and 29th October, 2007. A last opportunity was given to the plaintiffs by the order dated 29th October, 2007 to implead the purchaser.

17. It was only on 21st November, 2007 that the plaintiffs filed I.A.No.13648/2007 under Order VI Rule 17 of the CPC seeking

impleadment of Ms. Sarawjeet Singh as defendant no.2 in the suit; consequential amendments in the plaint and incorporation of the following reliefs in the prayer clause of the suit were sought :

“a) declaring that the Sale Deed dated 17.10.2001 executed by late Shri S.P. Kumria, in favour of the defendant no.1 is illegal, nonest null and void and in consequence thereof may kindly direct the Sub-Registrar of Documents Distt. South to cancel the Sale Deed bearing document no.8710 Additional Book No.1 Volume No.2556 dated 17.10.2001 at pages 22 to 41 executed by late Shri S.P. Kumria in favour of the defendant no.1 and Sale Deed dated 8.3.2006, executed by defendant no.1 in favour of defendant no.2, registered vide document no.3661 Additional Book No. one Volume No.5968 at pages 40 to 52.

*b) That a preliminary decree be passed in favour of the plaintiff and **against the defendants** declaring that the plaintiff has 1/2 share in the abovesaid property bearing No. W-152, Greater Kailash, Part-I, New Delhi.*

c) That a receiver/local Commissioner be appointed to effect the partition of the aforesaid property by metes and bounds and the share of the plaintiff be separated and possession be delivered to him;

*d) That a **final decree** be passed in favour of the plaintiff and **against the defendants** regarding the partition of the abovesaid property.”*

(Emphasis supplied)

18. By this amendment, the plaintiffs for the first time now questioned validity of the sale deeds by which the defendants derived right, title and interest in the said property.

19. Even in the amendment application as prayer 'b', the plaintiffs have maintained the prayer for declaration of their half share against the defendants, thereby clearly admitting the defendant's ownership of 50% share in the property. There is thus no dispute at all to the entitlement of the plaintiffs to only 50% of the suit property either in the original plaint or even by the proposed amendment. It was also claimed by the plaintiffs that no partition had been effected between the co-owners.

Though filed on 21st November, 2007, it is also noteworthy that the amendment application was not pressed at all.

20. So far as the main suit is concerned, it remained at the stage where it was in November, 2007 when the amendment application was filed in July, 2007. The record is replete with order sheets reflecting the effort to deliberately delay adjudication on the part of the plaintiffs. For instance, on 18th August, 2011, the learned Single Judge passed over the matter three times, yet the plaintiffs failed to appear resulting in renotification of the case to 17th November, 2011.

21. Much revolves on the proceedings held on 17th November, 2011. Consequently, we extract the order recorded on this date in extenso hereunder :

*"It has been agreed that there may be an auction of the **whole of property No.W-152 Greater Kailash, Part-I, New Delhi, except its first floor, in the Court, restricted to the parties to the suit. The party which***

offers highest price may retain the property and pay half of that amount to the other party. The parties would be entitled to bid on behalf of their nominees and in that event documents of title will be executed in favour of the nominee of the party giving the highest bid.

Hence, the parties are directed to remain present in Court on 09th January, 2012 for inter se bidding in respect of whole of property No.W-152, Greater Kailash, New Delhi, except its first floor."

(Emphasis supplied)

22. The order dated 17th November, 2011 establishes the following :

- (i) The parties to the suit being the only shareholders as well as the shareholding ("*half*").
- (ii) Consent of the parties for inter se "*auction*" which inherently contains the admission and submission that the property cannot be partitioned by metes and bounds.
- (iii) Identification of the property as the "*whole of property No.W-152, Greater Kailash, New Delhi, except its first floor*".
- (iv) Conversion of the physical shareholding of the properties into monetary terms ("*pay half of the amount to the other party*").
- (v) Agreement that parties would be entitled to bid on behalf of the third parties ("*nominees*") as well as execution of

documents of title in favour of the "*nominee*" of the party giving the highest bid. This envisages bidding by outsiders as well, though through the parties.

- (vi) Agreement of the defendants to auction the whole of the suit property, irrespective of the sale deeds dated 8th March, 2006 and 17th October, 2001.

23. The plaintiffs thereafter have wilfully acted upon the agreement contained in the order dated 17th November, 2011. All proceedings thereafter were for the purpose of sale of the property and concrete steps towards the public auction emanated with and by the consent of all parties. We extract the summation of the proceedings and actions of the plaintiff hereafter which exhibits the plaintiffs' informed and enthusiastic participation at each and every stage of the auction including its mode and manner; extent of property to be auctioned; valuation of the property :

- (a) This is manifested in the order recorded on **9th of January 2012** when Mr. P.S. Goindi, Advocate on behalf of the plaintiffs stated that Mr. Mohit Kumria - plaintiff no.3 could not make himself present in court because of his pre-occupation in seeking admission of his ward; plaintiff no.2 Ms. Ratna Kumria was abroad and plaintiff no.1 Ms. Kusum Kumria was an old lady. It was informed that plaintiff no.3 would represent the other two plaintiffs in the present case as their "*nominee*". The matter was accordingly adjourned on request of the plaintiffs.

(b) On the next date, i.e. 11th of January, 2012, Mohit Kumria plaintiff no.3 was present in court who sought more time to "comply with the order dated 17th November, 2011". The learned Single Judge has extracted the terms which were agreed by the parties on 17th November, 2011 and noted that again counsel for the plaintiffs was seeking adjournment on the ground that the "plaintiff are looking for some prospective buyer considering the price offered by the defendant".

On request of the plaintiffs, the matter was adjourned and the court made it clear to plaintiff no.3 that on the next date "they will come out with some concrete proposal so as to put an end to this litigation. The parties may interact with each other with regard to bidding price of the subject property except the first floor of the same".

(c) The matter proceeded further towards implementation of the agreement recorded in the order dated 17th November, 2011. On the next date i.e. on the 8th of February 2012 as well, plaintiff no. 3 Shri Mohit Kumria was present in court when counsel for the defendant informed the court that the defendant was prepared both ways i.e. "either to purchase the share of the plaintiffs or the plaintiffs may purchase the share of the defendant". On instructions by Shri Mohit Kumria, counsel for the plaintiffs stated that "the plaintiffs are not in a sound financial position to purchase the share of the defendant and therefore in such circumstances the plaintiffs would prefer the public auction."

Counsel, however, prays for another opportunity to find out prospective buyer". Again the court made it clear that if by the next date, no offer was made by the plaintiffs, then necessary directions for sale of the property by public auction would be made. The plaintiffs thus unequivocally accepted and admitted that defendants were co-owners; sought a public auction of the property and sought an adjournment to locate a buyer. Inherent in these submissions of the plaintiffs is their admission that the property was not conveniently and fairly partible.

(d) On the 22nd of February 2012, the court noted that the plaintiffs had not come forward with any prospective buyer. The court also noted that the "*Counsel for the plaintiffs had also agreed that if the plaintiffs failed to find any prospective buyer then the plaintiffs would agree for public auction*". Therefore, the court had no other option but to direct sale of this property through public auction. The matter was accordingly directed to be listed on 29th March, 2012 before the Registrar General for "*finalization of the sale proclamation*"

(e) On the 29th of March 2012, both parties were directed to file the valuation of the "*subject property so that before issuing the sale proclamation, reserve price of the property can be fixed.*"

(f) Despite the matter being adjourned on the 29th of March 2012 and 25th April, 2012, the plaintiffs did not care to file the valuation report.

(g) The plaintiffs filed I.A.No.9460/2012 dated 20th April, 2012, making a single objection made to the order dated 17th November, 2011 to the extent that the order noted auction of the property "*excluding the first floor*". In para 2, the plaintiffs averred that the plaintiffs had never understood that the property would be auctioned after excluding its first floor. No objection to any other portion of the order dated 17th November, 2011 was made. Agreement to the auction of the rest of the property was inherent and implicit. This application was dismissed by an order dated 18th May, 2012 holding that it is an absolutely false and frivolous application and costs of ₹50,000/- were imposed on the plaintiff.

(h) On 14th May, 2012, I.A.No.7512/2012 filed by the plaintiff came up for hearing wherein the court observed that it was quite apparent that the plaintiff was deliberately trying to delay this matter. The plaintiff was directed to file the valuation report within 3 days failing which reserve price as submitted by the defendant would be accepted and the Registrar General was also directed to proceed with further steps for the sale of the said property in accordance with law. This order was not challenged by the plaintiffs. This application was disposed of by the order dated 19th July, 2012.

(i) On 21st May, 2012, the plaintiffs also filed I.A.No.10059/2012 seeking extension of time to file the valuation reports.

(j) On 21st May, 2012, plaintiffs filed two valuation reports prepared by S. Sharma and Associates, one valuation report dated 19th May, 2012 showing land value and construction costs in respect of basement, ground floor, first floor and second floor. The second valuation report also dated 19th May, 2012 consisting of land value and construction costs in respect of basement, ground floor and second floor i.e. the suit property.

On 21st of May 2012, the plaintiffs also filed ***I.A.No.10059/2012*** under Sections 148 and 151 of the Code of Civil Procedure setting out their explanation for delay in filing the application seeking extension of time for filing of the valuation reports to enable fixation of the reserve price for auction of the property. The plaintiff's acceptance and admission that the defendants own and are entitled to fifty per cent share of the suit property and desire to proceed with the auction is manifested from their following averments on affidavit in this application :

“2. That the delay has been caused because of the reason that *plaintiff* is 63 years old lady and was *suffering from viral fever* and therefore she *could not obtain and file valuation report* within time.

XXX

XXX

XXX

4. That it is respectfully submitted that I.A. No. 9460/2012 was listed on 18.5.2012 ie. Friday and the applicant was suffering from viral fever and therefore was not able to obtain the valuation report. Thereafter immediately *on 19.5.2012 the applicant on getting well approached the valuer and obtained the valuation report*. That 20.5.2012 was a Sunday and the courts

were closed and thereafter immediately on 21.5.2012 the ***valuation reports have been filed***. The copy whereof is enclosed as Annexure B and C respectively.

XXX

XXX

XXX

6. That in view of the aforesaid facts and circumstances the ***applicant*** respectfully submits that the aforesaid ***delay in filing the valuation report*** is ***neither deliberate nor intentional*** and in such circumstances if the ***aforesaid valuation is not taken on record grave prejudice*** would be caused to the applicant.”

(Emphasis supplied)

(k) On 24th May, 2012, the plaintiffs sought time from the court to file draft proclamation.

(l) On 6th July, 2012, the plaintiffs withdrew the challenge to the orders dated 17th November, 2011 and 18th May, 2012 by way of FAO(OS)No.277/2012 as well as to the order dated 14th May, 2012 by FAO(OS)No.279/2012. The order clearly stated that after some arguments, on instructions from the plaintiff, the appeals are withdrawn and rightly so.

(m) On the 14th of August 2012, counsel for both the parties had stated that the "***second valuation report only has to be considered as the first floor is not to be considered as per orders of the court***". The court perused the valuation report filed by the plaintiffs which mentioned that the market value of the land was ₹8,25,000/- per sqr.mtr. as per the enquiries made by the local

estate agents in the area and market survey. The court directed both parties to file circle rates.

(n) On the 5th of September, 2012, the Registrar General noted the statement of counsel for all the parties that the "*parties would bear the **fee and costs of the auction** to be determined by the Hon'ble Court and **after successful bidding***". Thereafter, the terms and conditions governing the auction have been set out in the order. Further, in terms of the orders of the court dated 22nd February and 14th May, 2012, after discussing the aspects of the auction with the learned counsel for all the parties, the Registrar General fixed the schedule of the auction including the name of the auctioneer and the date (5th November, 2012) and time (2:00 pm); place of the auction and the description of the property. Thereafter, directions were issued for issuance of the proclamation under Order XXI Rule 66 of the CPC. Proclamation was also directed to be carried out through publication.

(o) As the advertisements were not issued, on the **statement** of counsel for "**both parties**", date of auction was re-fixed as 21st November, 2012 and issuance of the proclamation was directed afresh. The order for 1st November, 2012 reads that auction date was re-fixed as 21st November, 2012 with agreement of both parties.

(p) Similarly, on the **6th of December, 2012**, a **final schedule of the auction** was fixed on 11th January, 2013 at 2:00 pm, after **hearing the plaintiff no.3 in person** and counsel for the

defendant. The notice of auction was displayed at the site as well. Publications in the newspaper dated 20th December, 2012 in the Navbharat Times was also carried out. The order on 21st January, 2013 clearly records this fact.

(q) We may also note an application dated 7th December, 2012 filed by the plaintiffs being I.A.No.22586/2012 summarizing the order dated 6th December, 2012 whereby it is noted in para 1 that the court passed the order of ***auction*** of the property and has fixed the ***schedule*** for ***Publication*** on 20th December, 2012 and ***auctioning of the property on 11th January, 2013***. In para 2, the plaintiffs contended that “*reserve price has been fixed 15 crores is very less as the market rate in the Greater Kailash Part-I is very high and with increase of the circle rate, the property has gone up as such the application prays that the reserve prices be fixed for 25 crores*”. Prayer in these terms and directions for fixing the reserve prices at ₹25 crores was sought. We may also note that though the plaintiffs mention that the submission about the fixation of the reserve price is “*without prejudice*”, however, the plaintiff has not reserved any right to challenge the auction for any reasons. The reservation is only with regard to the quotation of the price. This application was dismissed by the order dated 17th December, 2012. It was observed that the Registrar General had considered both the valuation reports filed by the parties, the circle rates of the value of the land and also that the property in question comes within ‘B’ category and that the learned Registrar General had given sufficient

reasons before fixing reserve price of subject property to ₹15 crore. It was also noted that the order was passed by the Registrar General on 5th September, 2012 and for four months, the plaintiffs took no steps to challenge the said reserve price. The application was therefore, dismissed.

(r) Again, on the **28th of January 2013**, it was noted that **no earnest money/bid** had been received from any prospective bidder and consequently the auction could not take place. The order notes that on **request** of counsel for "*parties*", **fresh auction schedule was fixed** by the Registrar General.

(s) The proclamation was published in the Hindustan Times dated 8th February, 2013 and also affixed at the property. However, again no no bids at reserve price received, compelling a request on the 18th of March 2013 that the reserve price fixed at ₹15 crores be reduced to ₹10 crores. This was opposed by **counsel for the plaintiffs who insisted that the reserve price should be fixed at ₹25 crores**. Consequently, the matter was directed to be placed before the court on 22nd March, 2013.

(t) On 22nd March, 2013, the court noted that no bid was received with the reserve price of ₹15 crores and consequently, left it to the Registrar General to fix the reserve price. The order dated 22nd March, 2013, inter alia noted the following :

“7. Even otherwise the suggestion of the counsel for the defendant is found to be reasonable. Once no bids were received with the Reserve Price of Rs.15 crore, a

fresh attempt with the Reserve Price at Rs.26 crores would be a futility.”

(u) In the plaintiff's I.A.No.5591/2013 dated 4th April, 2013 for modification of the reserve price and the order dated 22nd March, 2013, the plaintiffs again display complete knowledge and consent with every order and proceeding. The active participation of the plaintiffs in the auctioning of the property is amply borne out from the application when they state in para 4 that *“in the present case the auction process is yet to be initiated afresh as such the reserve price need to be increased.”*

(v) On 9th April, 2013, the Registrar General directed the **parties to file the circle rates and copy of the sale deeds registered in respect of neighbouring properties to arrive at a reasonable reserve price.**

(w) On 22nd April, 2013, the plaintiffs stated that **they had “already taken steps to obtain the circle rates and copy of the Registered Sale Deed”** and sought a short adjournment.

(x) On 8th May, 2013, the court rejected the plaintiff's request that the reserve price be kept at ₹14 crores as meritless and directed the Registrar General to proceed with the reserve price at ₹10 crores. On 16th May, 2013, a fresh schedule of auction was fixed by the Registrar General.

The publications of the proclamation as well as its affixations at a conspicuous part of the suit property were duly

carried out by the Registry. The plaintiffs who reside in the suit property rightly do not deny knowledge or participation at every necessary stage.

(y) Pursuant to directions made on 16th May, 2013, Shri K.L. Choudhary, Court Auctioneer finally conducted auction sale of the property at *the suit property* on 26th July, 2013 at 2:15 pm and concluded the same at 3:00 pm. The auctioneer has filed his report dated 8th August, 2013 which mentions that apart from the three prospective bidders, *Mrs. Kusum Kumria and her family members were present at the spot*. Each of these bidders had made pre-deposits of ₹1 crore as earnest money. The spot proceedings note an **inspection of the property put to auction by the court auctioneer. This included the portion occupied by the plaintiffs as well.** The property was inspected by the three bidders as well. The plaintiffs facilitated the same and made no objection to these inspections. The bidders were permitted to call the bids above the reserve price at the spot. The court auctioneer declared that the bid of M/s DKG Buildwell Pvt. Ltd. was the highest and it was declared as the auction purchaser of the property. The court auctioneer directed the auction purchaser to deposit 15% plus remaining amounts of sale consideration to complete 25% of the total amount of auction within three working days.

(z) The plaintiffs allowed the above deposits to happen. On 14th September, 2013, the plaintiffs filed objections to the auction sale by way of I.A.No.15051/2013 under Order XXI Rule 90 CPC. In

this application, the plaintiffs have laid no dispute that the defendants were not co-sharers in the property. Only a half baked assertion (which was not pressed before the learned Single Judge) was made that no formal decree stood passed. This application was dismissed on 3rd October, 2013. The court having dismissed the plaintiff's application under Order XXI Rule 90 CPC and had no option but to confirm the sale. Additionally, the court noted that the plaintiffs as well as the defendant, "are free to get any offer higher than the highest bid of ₹10.45 crores payable on the same terms and conditions as stipulated in the auction that was held on 26th July, 2013".

The respondents however, gave first option to the plaintiffs to get a bidder willing to offer a price higher than the highest bid for which purpose the plaintiffs sought time.

(aa) On the 10th of October 2013, counsel for the plaintiffs submitted that they have "identified a bidder as permitted by the court" on 3rd October, 2013 but sought an adjournment in the following terms :

"Learned counsel for the *plaintiff submits that he has identified a bidder as permitted by this Court on the* last date of hearing i.e. *03.10.2013*. However, he has not complied with the stipulation in the said order, namely, that the bidder will only be entertained in case he carries with him a banker cheque of 10% of the bid amount. *He submits that he seeks one more opportunity to place on record the said 10% of the bid amount and to bring the bidder in Court. Subject to payment of cost of Rs.50,000/-*, on the plaintiff the

period for the plaintiff and the defendant to get a bidder with a higher offer is extended up to the next date of hearing i.e. 23.10.2013. In case the plaintiff gets a bidder on that date who is willing to deposit 10% of the bid amount by means of bankers cheque, the cost of Rs. 50,000/- will stand waived.

In view of the said request of the plaintiff for extension of time, the *directions to the successful bidder to deposit balance amount* within 15 days from 03.10.2013 *is extended* and the exact date will be decided on the next date of hearing. Learned counsel for the *successful bidder* submits that he *has already deposited the cheque in the sum of Rs. 1,61,25,000/-* vide diary No. 30315 on 03.10.2013 with the Registrar General of this Court.

I may also note that the Court Auctioneer has filed his report on 08.08.2013. The *pay order of Rs. 1 crore* in favour of the Registrar General of the High Court of Delhi which was *tendered by the successful bidder*-M/s. DKG Buildwell Pvt. Ltd. has been filed by the Court Auctioneer along with his report which is stuck at page 65 of Part I of the File. The validity of the said cheque expires on 17.10.2013. The Registrar General may send the said cheque for encashment immediately.”

(Emphasis by us)

The plaintiffs thus sought extension of time and one more opportunity to place on record 10% of the bid amount and to bring the bidder in court which was granted in terms of the order dated 10th of October 2013. However, their request on the 10th of October 2013 shows that the plaintiffs fully accepted the validity of the order dated 3rd October, 2013 dismissing the objections. It has

not been assailed any further and has attained finality. The order dated 10th October, 2013 has also attained finality.

(bb) The matter was renotified for 23rd October, 2013, when a medical certificate was produced on behalf of the plaintiff that learned counsel for the plaintiff was unwell and was not in a position to appear in court. The court observed that illness of the learned counsel for the plaintiff could not be a ground for the bidder to be not present in court along with 10% of the bid amount as directed on 3rd October, 2013 and 10th October, 2013. On this date, learned counsel appearing for the defendant stated that his client himself was ready to bid and he had brought 10% of the bid amount in court.

(cc) Thereafter, on 25th October, 2013 the defendant filed I.A.No.17200/2013 under Order XXI Rule 89 of the CPC for setting aside the auction bidding of sale and offered to purchase the property at a higher price of ₹10.65 crores which application came to be listed on 28th October, 2013.

(dd) On 28th October, 2013, the plaintiffs prayed for yet another adjournment which was rejected by the court. It was observed by the learned judge that "*in view of the nature of the order being passed and the past conduct of the plaintiff, no further, accommodation would be given to the plaintiff for today*". On the same date, the court accepted the defendant's bid of ₹10.65 crores in accordance with the directions dated 3rd October, 2013. It was

also ordered that the Registry may refund the payment deposited by the auction purchaser as expeditiously as possible.

(ee) On 8th November, 2013, in terms of the order dated 28th October, 2013, the respondent no.2 deposited the sale proceeds of ₹5,32,50,000/- (being an amount equivalent to 50% of the final sale price of ₹10.65 crores).

The amount was paid in the following manner:

- (i) ₹1,00,00,000/- vide pay order dated 09.10.2013 bearing no. 482432 drawn on Kotak Mahindra Bank, Greater Kailash – II, New Delhi;
- (ii) ₹1,66,25,000/- by way of cheque dated 28.10.2013 bearing no. 767600 drawn on United Bank of India, Greater Kailash – I, New Delhi;
- (iii) ₹2,66,25,000/- by way of cheque dated 08.11.2013 bearing no. 773085 drawn on United Bank of India, Greater Kailash – I, New Delhi.

As a result, on the 6th of December 2013, the court proceeded with the acceptance of the offer of the defendant. It was also recorded that the defendant had paid the sum of ₹13,62,500/- to the auction purchaser being the amount equivalent to 5% of the bid amount which had been deposited by it. This was in compliance with the requirement of Order XXI Rule 92(2) of the CPC. The sale was made absolute as a result.

No challenge has been laid by the plaintiffs to this order either. It has attained finality.

(ff) On 15th May, 2014, the court confirmed the sale in favour of the defendant and directed the Registry to issue a sale certificate to the defendant no.2. It may be noted that in view of the claim by the court auctioneer for his charges raised, it was directed that the issuance of the sale certificate would be subject to deposit of ₹20,00,000/- with the Registrar General of this court.

(gg) We may note that the suit record reflects that on the 20th of May, 2014, the plaintiffs filed I.A.No.11320/2014 under Section 151 CPC categorically seeking recall of only the order dated 15th May, 2014 premised on the sale deeds dated 17th October, 2001 and 8th March, 2006 contending that as per the case of the defendants, there was no joint property and therefore, the suit for partition was not maintainable. In para 4 of this application, for the first time, the plaintiffs said that the property could not have been put to public auction. For the first time, an assertion was also made in this application that the “*defendant no.2 was never its co-owner of the suit property*” and therefore, they could not have purchased the share of the plaintiffs. In para 5, the plaintiffs claimed that they were exclusive owners and the suit should have been dismissed as it was not joint property. In para 7, a prayer was made that the orders dated 28th October, 2013 and 15th May, 2014 be recalled and “*the suit being not maintainable may be ordered to be dismissed*”.

It is noteworthy that even in this application (I.A.No.11320/2014), the plaintiffs did not dispute that S.P. Kumria had half share in the suit property and that he had sold his

entire shareholding to the defendants. The plaintiffs were thus only disputing the apportionment of the super structure on the land which formed part of the suit property. The submissions in the application were actually of no legal consequence and effect, as per the well settled legal position. We note the same hereafter. The plaintiffs are well aware of the same and have accepted the same by their considered actions set out above.

(hh) We also find that the plaintiff has laid no challenge to the order dated 6th December, 2013 (whereby the offer of the higher amount by the defendant accepted) and 15th May, 2014 issuing the sale certificate which have attained finality.

The admissions of the plaintiffs aforesaid show the manner in which the plaintiffs were attempting to mislead the court by I.A.No.11320/2014; their malafide intent and the back handed manner in which they are attempting to wriggle out from their categorical admissions. This application was dismissed by the order dated 30th May, 2014.

(ii) The sale certificate in favour of the defendants stands issued on the 28th July, 2014.

(jj) Execution Petition No.298/2014 seeking execution of order dated 18th October, 2013, whereby sale in favour of the defendant no.2 has been confirmed as well as order dated 15th May, 2014 whereby sale certificate was issued in favour of the decree holder,

stands filed. The said execution petition has been adjourned because of the pendency of the present matter.

24. For the sake of convenience, we are compelled to tabulate the considered tactics adopted by the plaintiffs of filing applications and steps taken by the plaintiffs towards the finalization of the auction sale of the suit property as follows :

Sr. No.	I.A.No.	Prayer	Decision
(i)	13648/2007 dated 21st November, 2007 (under Order VI Rule 17 CPC for amendment of the plaint)	Seeking impleadment of Sarawjeet Singh as defendant no.2. Also amendment of plaint and a challenge to the sale deed dated 17th October, 2001	This application was never pressed by the plaintiffs and has to be treated as having been abandoned before the learned Single Judge. The plaintiffs accepted the validity of the sale deed in favour of the respondents and on 17th November, 2011 consented to sale of the property. On 22 nd March, 2013, the application was dismissed as infructuous. Though impleadment of Sarwjeet Singh was prayed for, however, <u>plaintiffs did not challenge registered sale deed dated 8th March, 2006 in her favour.</u>
(ii)	7512/2012 dated 20th April, 2012 (under Order XI Rule 12 CPC read with Section 151 CPC for discovery of documents)	Sought directions to defendant to produce the registration certificate, the memorandum of association and article of association of the defendant company and its annual return for last 5 years.	The application came up for arguments on 14th May, 2012 where the learned judge observed that the plaintiff had belatedly moved the application and was purposely trying to delay the matter. Plaintiff was also directed to submit the valuation report within three days, failing which the reserve price as submitted by the defendant was said that would be accepted and fixed as such by the Registrar General. Also the Registrar General was directed to proceed with further steps for the sale of the property. The appellants

			defiance in not appearing before the Registrar General and not filing valuation was noted. The application was disposed by order dated 19th July, 2012 by the court. It was clarified that error in the name will not create any problem in the auction of the subject property. It is important to note that this order was not challenged by the appellants and has attained finality.
(iii)	9460/2012 dated 20th April, 2012 (under Section 151 CPC for modification or recall of order dated 17th November, 2011) filed on 16th May, 2012	Stated that the applicant had never given consent as recorded in order dated 17th November, 2011 and that consent was given for auction of the <u>entire property including first floor</u>. Sought to include challenge to the sale deed dated 27th March, 1998 of the first floor jointly executed by plaintiffs themselves and Shri S.P. Kumria. Modification of the order 17th November, 2011 was prayed to include the first floor in the auction.	Vide order dated 18th May, 2012, the court held that <u>absolutely false and frivolous application</u> has been moved by the plaintiff. <u>Application dismissed</u> and <u>₹50,000/- costs</u> imposed on plaintiff. Held plaintiff adopting one or other means to cause delay. It was observed that many orders on record were passed in the presence of the counsel for the plaintiff and plaintiff no.3 himself clearly mentioned about the sale of the property excluding the first floor and that the court via its detailed order on 14th May, 2012 had made it explicitly clear that the technical pleas raised by the plaintiff will not come in the way of the proceedings for the sale by public auction.
(iv)	22586/2012 dated 7th December, 2012 (under Section 151 CPC)	Seeking direction to <u>fix the reserve price</u> of the property at <u>₹25 crores instead of</u>	This application was dismissed by the court on <u>17th December, 2012</u> referring to the <u>valuation reports filed by both the parties</u>; the consideration by the Registrar

		at ₹15 crores as fixed by the Registrar General by the order dated 5th December, 2012. This application reflects the active participation of the plaintiffs in the fixation of the reserve price of the property an important step in the auction process. It reiterates the consent of the appellants for the auction of the property.	General; <u>Circle rates which were prevalent as well as the fact that the property came within 'B' category.</u> It was also noted that the Registrar General had given sufficient reasons on <u>5th December, 2012</u> before fixing the <u>reserve price of the property at ₹15 crores</u> and that the plaintiffs had not taken any steps for four months to challenge the same. <u>Proclamation charges for publication of notices stood deposited.</u> The application was also belated; property was being put to <u>public auction</u> and therefore "<i>it will not restrict the bidder to offer any higher price than the reserved price fixed</i>". <u>SLP(C)No.8971/2013</u> challenging the order dated 17th December, 2012 was dismissed in limine by the <u>Supreme Court of India on 4th March, 2013.</u>
(v)	<u>10059/2012</u> on 21 st May, 2012 under Section 151 r/w Section 148 CPC	Seeking <u>extension of time for filing valuation report</u> and taking valuation on record. <u><i>Plaintiffs said there had been a delay of three days in filing valuation due to ill health of plaintiff.</i></u> Two valuation reports were filed by the plaintiff, one including first floor and one excluding, on the said date.	This application came up on 22nd May, 2012. <i>Learned counsel for both the parties took time for filing the draft proclamation.</i> The matter was renotified on 24th May, 2012
(vi)	<u>5591/2013</u> dated 4th April, 2013 (under Section 151 CPC on behalf of the plaintiff)	For modification of the order dated 22nd March, 2013 <u>fixing the reserve price of ₹10 crores.</u>	On 18th April, 2013, it was observed that no bids were received in the auction held on 11th January, 2013 when the reserve price was fixed at ₹15 crores. The court observed that "<i>if, according to the</i>

			<i>plaintiffs, the price, in excess of ₹26 crores, nothing prevents the plaintiffs/applicants from bringing a buyer for the said amount". Application was thus dismissed.</i>
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25. After the dismissal of the above applications and auction of the property on 26th July, 2013, the plaintiffs did not dispute the auction for a long period of almost two months. Thereafter a half baked action was taken to challenge the auction in the following manner :

(vii)	<u>15051/2013</u> dated 14th September 2013 (under Order XXI Rule 90 r/w Section 151 CPC)	This application was in the nature of objection filed by the plaintiffs to the auction sale of the property held on <u>26th July, 2013</u> by the court auctioneer. On 8th May, 2013, auction was directed at a reserve price of ₹10 crores. Plaintiffs prayed for declaring auction sale dated 26 th July, 2013 as null and void. Also contended that auction was conducted by playing fraud and in a malafide manner stated that despite stay on auction proceedings, auctioneer in defiance of court orders went ahead	The objections were dismissed on the <u>3rd of October 2013</u>. In <u>para 11</u> of the order. The court noted that when the reserve price had been earlier fixed at ₹15 crores, no bids were received and therefore, it had directed the Registrar General to invite fresh bids with a reserve price of ₹10 crores. In <u>para 13</u>, the court rejected the objection of the plaintiffs about commonality of the identity of the bidders holding that there was nothing also to substantiate that the three bidders were nothing but an extension of the defendants. In <u>para 15</u>, the court considered in detail the plaintiffs contention that there was some irregularity in the bidding process holding that this objection was not based on the record. A close examination was undertaken by the court observing that the <u>plaintiffs were deliberately misreading the bid sheets and further that no prejudice has resulted to the plaintiffs</u>. Categorical findings have been returned in <u>para 17</u> that there was
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		with the auction proceedings in collusion with the defendants. It is noteworthy that the plaintiffs did not raise or press any of the grounds on which the appeal has been filed.	<u>no fraud or material irregularity in the auction process so as to vitiate it.</u> <u>By this order dated 3rd October, 2013</u>, the learned Single Judge fairly gave an <u>opportunity to the plaintiffs as well as to the defendants</u> to “<u>get any offer higher than the highest bid of ₹10.45 crores payable on the same terms and conditions as stipulated in the auction that was held on 26th July, 2013</u>”. This was subject to the party bringing 10% of the bid amount in the form of a bankers cheque in favour of the Registrar General and agreement by the bidder to abide by all terms and conditions of the auction dated 26th July, 2013. <i>This order has not been challenged.</i>
(viii)	<u>11320/2014</u> dated 20th May, 2014 (under Section 151 CPC by the plaintiffs)	Seeking recall of the order dated <u>15th May, 2014</u> whereby the sale in favour of defendant no.2 was confirmed by the court and the <u>Registry was directed to issue the necessary sale certificate in his favour subject to the defendant no.2 depositing an amount of ₹20,00,000/-</u> with the Registrar General without prejudice to its rights and contentions in respect of I.A.No.6341/2014 (filed by the court auctioneer with	This application was <u>dismissed</u> by the learned Single Judge on <u>30th May, 2014</u>. <u>This order has not been challenged by the plaintiffs.</u> The amount was deposited and the sale certificate was duly issued on 28th July, 2014.

		regard to its charges)	
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26. The above tabulation clearly illustrates the manner in which the plaintiffs, having given binding consent to the sale of the suit property by the order dated 17th November, 2011 participated at every stage. Initially, on the 17th of November 2011, the plaintiffs agreed to the sale of the suit property by inter se bidding and for bidding on behalf of third party nominees. Subsequently, the plaintiffs sought sale by public auction as noted in the order dated 22nd February, 2012. The applications also establish the active participation of the plaintiffs at every stage of the auction, be it manner of sale (inter se bidding vis-a-vis public auction); fixation of reserve price (sought condonation of delay in filing valuation reports; filed reports with details of circle rates etc.; sought enhancement of reserve price); finalisation of draft proclamations; presence at the time of bidding.

27. Let us also summarize as to how some of the steps in the auction have also been the subject matter of challenge by the plaintiffs before the Division Bench of this court as well as the Supreme Court of India. The nature of the grievance expressed and outcome of the challenges also manifest the total consent of the plaintiffs to the sale by auction and their active informed participation. We are enumerating hereunder the several appeals filed by the plaintiffs carrying the matter to the Division Benches and the Supreme Court :

Sr. No.	Appeal No.	Challenge	
1.	<u>FAO(OS)No.277/2012</u> filed on 29 th May, 2012	Challenging order dated 14th May, 2012 rejecting the appellant's prayer for directions to the defendant no.1 to produce registration certificate, memorandum of articles of association and annual returns.	On 6th July, 2012 , these appeals were withdrawn in the presence of the appellants and on their instructions. The Division Bench recorded that the withdrawal was "rightly so"
2.	<u>FAO(OS)No.279/2012</u> filed on 3 rd July, 2012	Challenging the order dated 17th November, 2011 recording the consent of the parties for auction of the property and the modalities thereof as well as order dated 18th May, 2012 dismissing I.A.9640/2012 seeking modification of the order dated 17th November, 2011 to include the first floor of the properties. No further challenge to the consent order dated 17th November, 2011 of sale of suit property, determination of share holding, mode of auction.	
3.	<u>SLP(C)No.8971/2013</u> <u>The challenge to the reserve price of the property by the appellants thus stands rejected up to the Supreme Court.</u>	By this petition, the appellants challenged the order dated 17th December, 2012 whereby the learned Single Judge has rejected plaintiff's I.A.No.22586/2012 seeking direction to fix the reserve price of the property at ₹25 crores.	SLP(C)No.8971/2013 was dismissed in limine on 4th March, 2013.
4.	<u>FAO(OS)No.338/2013</u>	Challenging the order dated 8th May, 2013 rejecting the contention of the plaintiffs/appellants that the reserve price	Initially, on the <u>26th of July 2013</u> , interim stay was granted subject to depositing of ₹50,000/- in court by the

		<u>should be kept at ₹14 crores.</u> In the application, the plaintiffs prayed for issuance of directions to the Registrar General to "<u>proceed with inviting fresh bids with a reserve price of ₹15 crores</u>".	appellants. However, in the meantime, the public auction stood conducted on 26th July, 2013 fetching the highest bid of only ₹10.45 crores. On 5th August, 2013, the court called upon the respondents to file copies of the relative valuations filed by both parties and left it open for the appellants to remain present in court. On the <u>29th of August 2013</u>, the appellants instructed their counsel to <u>withdraw the appeal</u> with permission to record their objections to the auction which stood conducted pursuant to the impugned order. The court "<u>reserved such rights and contentions subject to it being available in law</u>" and the appeal was dismissed as withdrawn.
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The above tabulation establishes that the appellant never asserted that the property was partible. The appellants have never challenged that the respondents did not have right or title in the suit property.

28. Let us also examine some applications which were filed by the defendants or steps taken by defendant to which no objections were recorded by the plaintiffs. After the passing of the order

dated 5th September, 2012 appointing a court auctioneer for auction of the suit property and fixation of the terms, the defendant filed I.A.No.18661/2012 on the 4th of October 2012 under Section 151 of the CPC seeking an order for permission to participate in the auction of the suit property as a co-owner. The plaintiffs filed reply dated 5th December, 2012 wherein they proposed what they perceived as a reasonable time for vacation of the suit property before handing over the possession to the successful purchaser in the following terms :

“2.... However, as far as the prayer seeking time to vacate the property is concerned, the non-applicant submits that this Hon’ble Court may grant a period of six months for the purpose of vacating the aforesaid premises after the auction.”

29. From the assertions of the plaintiffs in para 2 of the above reply, it is evident that the plaintiffs considered a period of six months for the purposes of vacating the premises “after the auction” as reasonable. This reply also shows that the plaintiffs have once again sought implementation of the order dated 17th November, 2011 as well as the order dated 5th September, 2012 for auction of the property.

30. The defendants filed I.A.No.20595/2012 on 5th December, 2012 under Section 151 CPC requesting for fixation of a new schedule for auction process be fixed. It was clearly stated therein that the plaintiff and defendant no.2 each have 50% ownership rights in the property comprised in basement, ground floor and

second floor in the properties. This was not refuted by the plaintiffs.

31. The plaintiffs lay no dispute to the ownership or entitlement of the defendants to fifty per cent of the property in I.A.No.5591/2013 (dated 4th April, 2013) seeking increase in the reserve price. In I.A.No.15051/2013 (filed on 14th September, 2013), the plaintiffs do not dispute that the defendants are co-owners.

32. The plaintiffs also filed a reply dated 5th December, 2012 to I.A.No.20595/2012 wherein they took a preliminary objection stating that “*the **reserve price** if it is to be fixed, it should be **fixed at the market rate** in view of the hike in circle rate as well as increased in the market rate of the property of Greater Kailash being the posh area.*”

33. The above statements of the plaintiffs unequivocally establish their commitment to the sale of the property. The plaintiffs had even anticipated the position that they would have to vacate the property after the sale and projected their need of six months time to vacate the suit premises after the auction. The plaintiffs were aware of and accepted the legality and validity of the sale of the property. Where remains any question of challenging the same thereafter?

II. Plaintiff cannot be permitted to approbate and reprobate at the same time – application of the doctrine of estoppel by election

34. It has been contended at some length before us that the plaintiffs made several conscious choices in the matter and enthusiastically participated in every stage of the auction process. The plaintiffs have all along admitted and accepted the shareholding of the parties. Fully aware of the rights of the parties and the impartibility of the property, the plaintiffs agreed before the court on 17th November, 2011 to sell the property by bidding inter se the parties themselves or on behalf of their nominees. This was the first choice exercised by the plaintiff. On 8th February, 2012, the plaintiffs expressed their inability to do so on account of their not being in a sound financial position to purchase the share of the defendant and sought sale of the property by a public auction. This was the second choice. The plaintiffs thereafter actively engaged in the exercise undertaken by the court for valuing the property. They not only filed multiple valuation reports on record but once a considered order thereon came to be made, unsuccessfully challenged the same up to the Supreme Court of India. Proclamation notices were finalized and auction schedules appointed with the participation of the plaintiffs as noted in the earlier sections of the judgment.

35. In these facts, the respondents contend that the plaintiffs are thereby stopped from challenging the auction by application of the doctrine of estoppels by election.

36. We have examined in detail in the earlier part of this judgment the conscious steps from the first stage of the auction to vacation of the property after sale were taken in the matter by plaintiffs.

37. In support of this submission, Mr. Anil Airi has placed the pronouncement of the Supreme Court reported at **(2011) 10 SCC 420, Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Ltd.** In this case, the court held that where a final settlement upon re-negotiation is reached amicably between the parties by making price adjustments without misrepresentation, fraud or coercion on the part of the respondents and money is accepted towards full and final settlement, it is not open to either of the parties to make any claim/demand against other parties. The transaction in this case stood concluded between the parties, not on account of any unintentional error but after extensive and exhaustive bilateral deliberations with clear intention to bring about quietus to the said dispute. A settlement was reached by the parties with eyes open and they instructed their banker to accept the money as proposed by the respondent. The Supreme Court held that the applicants were estopped from making the claim made by them since they had chosen to receive the adjusted price rather than to get the shipment rejected and they could not retract from their actions. In this regard, we extract paras 32, 34 and 35 of the judgment which read as follows :

“32. The transaction stood concluded between the parties, not on account of any unintentional error, but after extensive and exhaustive bilateral deliberations with a clear intention to bring about a quietus to the dispute. These negotiations, therefore, are self-explanatory steps of the intent and conduct of the parties to end the dispute and not to carry it further.

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34. A party cannot be permitted to “blow hot and cold”, “fast and loose” or “approve and reprobate”. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide *Nagubai Ammal v. B. Shama Rao* [AIR 1956 SC 593], *CIT v. V.M.R.P. Firm Muar* [AIR 1965 SC 1216], *Maharashtra SRTC v. Balwant Regular Motor Service* [AIR 1969 SC 329] , *P.R. Deshpande v. Maruti Balaram Haibatti* [(1998) 6 SCC 507 : AIR 1998 SC 2979] , *Babu Ram v. Indra Pal Singh* [(1998) 6 SCC 358 : AIR 1998 SC 3021] , *NTPC Ltd. v. Reshmi Constructions, Builders & Contractors* [(2004) 2 SCC 663 : AIR 2004 SC 1330] , *Ramesh Chandra Sankla v. Vikram Cement* [(2008) 14 SCC 58 : (2009) 1 SCC (L&S) 706 : AIR 2009 SC 713] and *Pradeep Oil Corpn. v. MCD* [(2011) 5 SCC 270 : (2011) 2 SCC (Civ) 712] .)

35. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approve and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his

actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.”

(Underlining by us)

38. On the same aspect, we may usefully refer to the pronouncement of the Supreme Court reported at **(1992) 4 SCC 683, *R.N. Gosain v. Yashpal Dhir***. In this case, time for vacating the premises was allowed by the High Court on condition of the tenant filing an undertaking of vacation within one month. The petitioner paid rent arrears but sought extension for time for vacation of the premises before the High Court without furnishing the undertaking. This application was dismissed. The petitioner thereafter submitted an undertaking dated 20th March, 1992 before the rent controller that he would vacate the premises and shall hand over the vacant possession of the premises on the expiry of one month from 6th March, 1992 as per the order of the High Court subject to his right to file special leave petition before the Supreme Court. The Supreme Court rejected this application holding thus :

“9. ... In order to avail the protection from eviction from the premises for a period of one month he filed the requisite undertaking in the court of the Rent Controller within the period of 15 days prescribed under the directions of the High Court. The statement in the undertaking that it was subject to the rights of the petitioner to file special leave petition in this Court against the order of eviction, does not, in our view, have any effect on the legal consequences flowing as a result of the filing of the undertaking by the petitioner. By furnishing the said undertaking the petitioner elected to

avail the protection from eviction from the premises and he enjoyed the said protection till the passing of the order by this Court on March 26, 1992, staying dispossession of the petitioner. *Having elected to avail the protection from eviction under the order dated March 6, 1992 passed by the High Court, by filing the requisite undertaking, the petitioner cannot be permitted to assail the said order.*

10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that “a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage”. [See : Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd. [(1921) 2 KB 608, 612 (CA)] , Scrutton, L.J.] According to Halsbury's Laws of England, 4th Edn., Vol. 16, “after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside”. (para 1508)”

The special leave petition was consequently rejected.

39. In the pronouncement reported at *(1998) 6 SCC 507 P.R. Deshpande v. Maruti Balaram Haibatti*, the Supreme Court has usefully adverted to the Black's Law Dictionary and derived the doctrine of election from the rule of estoppel. On the effect thereof, the court observed thus :

“8. xxx xxx xxx By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he

otherwise would have had. (vide Black's Law Dictionary, 5th Edn.)”

(Emphasis by us)

40. Estoppel by judgment means that when a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as judgment or decree stands unreversed. (vide **Black’s Law Dictionary, 6th Edn.**).

41. This principle was reiterated by the Supreme Court in the judicial pronouncement reported at *(2011) 5 SCC 435, Joint Action Committee of Air Line Pilots' Assn. of India v. DG of Civil Aviation* and it went further to say that taking inconsistent pleas by a party makes its conduct far from satisfactory.

42. In a landmark judgment of the Supreme Court reported at *(2010) 10 SCC 422, Mumbai International Airport (P) Ltd. v. Golden Chariot Airport* the court has extensively discussed the doctrine of election & estoppels which we reproduce hereunder in extenso:

“42. It may be noted that when the City Civil Court returned the plaint filed by the contesting respondent it came up in appeal against the said order before the Bombay High Court, *it expressly gave up its claim of irrevocable licence in order to revive the suit.* On such stand being taken, the High Court remanded the suit for trial before the City Civil Court. It is therefore clear that the contesting respondent has taken a stand before a court of law and also got the benefit as a result of taking such stand inasmuch as it got the suit revived and tried

and got the benefit of an interim order in the said proceedings. As a ***result of the aforesaid stand being taken, the suit of the contesting respondent went on*** before the Bombay City Civil Court from 2001 to 2004 and in view of the interim protection, the ***contesting respondent ran the restaurant during that period.***

43. Now the question is whether the contesting respondent on a complete volte face of its previous stand can urge its case of irrevocable licence before the Estate Officer and now before this Court? The answer has to be firmly in the negative.

44. ***Is an action at law a game of chess? Can a litigant change and choose its stand to suit its convenience and prolong a civil litigation on such prevaricated pleas?***

45. The common law doctrine prohibiting approbation and reprobation is a facet of the law of estoppel and well established in our jurisprudence also. The doctrine of election was discussed by Lord Blackburn in the decision of the House of Lords in ***Scarf v. Jardine*** [(1882) 7 AC 345 : (1881-85) All ER Rep 651 (HL)] wherein the learned Lord formulated: (AC p. 361)

“... a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act ... the fact of his having done that

unequivocal act to the knowledge of the persons concerned is an election.”

46. In *Tinkler v. Hilder* [(1849) 4 Exch 187] Parke, B. stated that where a party had received a benefit under an order, it could not claim that it was valid for one purpose and invalid for another. (See p. 190.)

47. In *Clough v. London and North Western Railway Co.* [(1861-73) All ER Rep 646] the Court referred at All ER p. 651 F to *Comyn's Digest*, wherein it has been stated:

“If a man once determines his election, it shall be determined forever.”

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49. In *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* [1964 AC 993 : (1964) 2 WLR 150 : (1964) 1 All ER 300 (PC)] the Privy Council held that: (AC p. 1018)

“... a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned.”

50. Ashutosh Mookerjee, J. speaking for the Division Bench of the Calcutta High Court in *Dwijendra Narain Roy v. Joges Chandra De* [AIR 1924 Cal 600] , held that it is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. This wholesome doctrine, the learned Judge held, applies not only to successive stages of the same suit, but also to

another suit than the one in which the position was taken up, provided the second suit grows out of the judgment in the first.

51. It may be mentioned in this connection that all the proceedings pursued by the contesting respondent in which it took the plea of irrevocable licence were virtually in clear contradiction of its stand which it took before the Bombay High Court on 12-7-2001 where it had given up the plea of “irrevocable licence”. It is on this plea that its suit again became triable by the Bombay City Civil Court and all subsequent proceedings pursued by the contesting respondent followed thereafter.

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53. This Court in *C. Beepathuma case* [AIR 1965 SC 241 : (1964) 5 SCR 836] at AIR p. 246, para 17 also took note of the principle stated in *White & Tudor's Leading Case in Equity*, Vol. 18th Edn. at p. 444, wherein it is stated:

“Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both ... That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument.”

54. In *New Bihar Biri Leaves Co. v. State of Bihar* [(1981) 1 SCC 537] this Court observed that it is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which

might be disadvantageous to him. The maxim, *qui approbat non reprobatur* (one who approves cannot reprobate), applies in our laws too.”

(Emphasis by us)

43. In the judgment reported at *AIR 2013 SC 1241 Rajasthan State Industrial Development and Investment Corporation v. Diamond and Gem Development Corporation Ltd.*, the Supreme Court reiterated the position that where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner so as to violate the principles of right and good conscience.

44. In a recent pronouncement reported at *2014 SCC OnLine SC 232 State of Punjab and Ors. v. Dhanjit Singh Sandhu*, the Supreme Court further stated that:

“...It is *settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground.* (Vide Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati, AIR 1969 SC 329)...”

(Emphasis by us)

45. In the judgment of the Supreme Court reported at *(1986) 4 SCC 505, Dr. Kishore Chand Kapoor & Ors. v. Dharam Pal Kapoor & Ors.* a challenge was laid to the method of valuation. In a partition suit between the parties, a preliminary decree was

passed by a Single Judge of this court in terms of a compromise between the party declaring the share of each party as one-sixth in the suit property. The appellant nos. 1 and 4 (plaintiffs in the suit) applied for a final decree under Order XX Rule 18 of the CPC whereupon, a commissioner for partition was appointed by the court who submitted a report that the building was incapable of being divided by metes and bounds. All parties to the suit accepted this finding. The plaintiff/appellant filed an application for sale of the property by public auction under Section 2 of the Partition Act. Respondent no. 2 herein also made a similar action. Thus three of the parties (having an aggregate of half share in the property) sought sale of the property by public auction under Section 2 of the statute. On the other hand, respondent no.1 and appellant no. 2 (defendant nos. 1 and 3 respectively), made two separate applications praying for purchase of the shares of other parties at a valuation. On this application, the Single Judge directed the property be sold by public auction and the highest bid would determine the true market value of the property. On appeal, the Division Bench set aside the order and directed shares of the plaintiffs and respondent to be sold to the other applicants.

Before the Supreme Court, the appellant no. 3 who made the application under Section 3(1) was no longer willing to purchase the property herself. Only the respondent no. 1 was willing to purchase the share of the other parties so that the entire property may be allotted to him. The court noted the conduct of the

respondent no.1 to the effect that he had not taken any objection with regard to the valuation before the valuer as well as his participation in the proceedings in the following terms.

“8. It is next contended on behalf of Respondent 1, that, as prayed *by the plaintiff-appellant and Respondent 2, the property should be put up for auction-sale so that the highest bid in the auction may determine the market value of the property. This was exactly the order that was passed by the learned Single Judge of the High Court, but Respondent 1 felt aggrieved by the said order and preferred an appeal to the Division Bench of the High Court. Such a contention is not only devoid of any merit, but also is not maintainable at the instance of Respondent 1, who has expressed his willingness by an application under Section 3(1) of the Partition Act to buy up the shares of the other parties at a valuation. Respondent 1, therefore, cannot be allowed to blow hot and cold. The contention is, therefore, rejected.*

9. There is also no merit in the contention of Respondent 1 that the plaintiff-appellants having prayed for the sale of the property by public auction under Section 2 of the Partition Act, *cannot oppose the prayer of Respondent 1 for such sale. It appears to us that Respondent 1 being in possession of the property wants to prolong the proceedings as much as possible.*”

(Emphasis by us)

46. The plaintiffs before us after having consented to and participated in all stages towards the auction have the temerity to raise a similar malicious and malafide challenge in the present appeal against the order issuing a sale certificate, as the respondent no.1 before the Supreme Court in *Dr. Kishore Chand Kapoor*.

47. Lord Coke stated, *"It is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth"*. (Coke, *A Commentary on Littleton*, 11th Edn., 352a)

48. In this case, the plaintiffs have never disputed the shareholding of Shri S.P. Kumria or his right to sell the property. The plaintiffs have, in the plaint itself, also admitted and accepted the defendant to be equal co-sharers in the suit property. They have accepted the sale of his share to the defendants as narrated above.

In their request for sale of the property as recorded in the order dated 17th November, 2011, the plaintiffs have admitted impartibility of the suit property; enthusiastic participation in every facet of the auction from fixation of the reserve price to finalization of the draft proclamations. The auction schedules were fixed with the consent and to the convenience of the plaintiffs as well as defendant.

49. The record shows that the auction was fixed five times. The auction was first fixed on 5th November, 2012 at 2:00 pm. Due to the reason that no advertisement could be published in time and the date of depositing 10% of the reserve price expired, thus the time needed to be extended and thus auction was re-fixed for 21st November, 2012 at 2:00 pm. However, again an application was filed by the defendant for fixing a new schedule for the auction process and thus the date for auction was re-fixed for 11th January,

2013 at 2:00 pm. On the date of 11th January, 2013, no earnest money/bid from any prospective bidder would be recorded and thus auction could not take place. It was again re-fixed for 9th March, 2013. On 9th March, 2013, again no bids were received and so the bid price was reduced to 10 crores and the auction was again re-fixed for 26th July, 2013. Finally, on 26th July, 2013, the auction was held and a bid of ₹10.45 crores was the highest bid.

50. At each instance, the proclamation notice of the auction was finalized with the participation of the plaintiffs which clearly describes that the property was being auctioned. The auctions were held at the suit premises in their presence; they sought time to get a higher bidder and even suggested appropriate time for vacating the suit premises after the sale. They cannot be permitted to now turn around and say that the defendants had no right at all in the suit premises.

51. So far as the valuation is concerned, the plaintiffs carried the matter up to the Supreme Court by way of Civil Appeal No. 2508/1997 which was rejected.

52. The orders on 3rd October, 2013 to 6th December, 2013 have not been assailed or impugned in any proceedings. Other than the order dated 15th May, 2014, impugned herein, the plaintiff has accepted validity and all orders which have attained finality.

53. After the order dated 3rd October, 2013, the plaintiffs requested and were given three dates and opportunities to bring a

higher bid. The plaintiffs thereby perpetuated their occupancy of the suit property.

54. It is noteworthy that as per Order XXI Rule 89 CPC requires that when an immovable property is sold in execution of a decree, any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of such person, may apply to have the sale set aside on his depositing in court, for payment to the purchaser, a sum equal to 5% of the purchase money, and for payment to the decree holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. Thus the defendant no.2 was required to pay an amount equivalent to 5% of the amount deposited by the auction purchaser in court.

55. The court accepted the improved bid of the defendant no.2 on 28th October, 2013. On 8th November, 2013, the entire sale consideration of ₹10.65 crores had been deposited. Additionally the defendant no.2 has paid the auction purchaser an amount of ₹13,62,500/-.

56. The well settled principle of estoppel provides to interdict/bar a person from making a statement discrepant with statements, earlier made. Lest a person is estopped in such circumstances, the opposite party may suffer material prejudice.

57. Adams, J., said: "*Equitable estoppel in pais owes its origin and development to the notion of justice promulgated by courts of*

chancery. It embraces estoppel by conduct which rests upon the necessity of compelling the observance of good faith.” (Thomas v. Conyers, 198 N.C. 229, 151 S.E. 270, 273.)

58. Courts of equity, thus to prevent injustice to one who relies on the spoken word or act of another, fashioned a rule of conduct called estoppel in pais. The rule prohibits or estops the speaker or actor from controverting what he had previously asserted.

59. Once a pleading has been made, a course of action opted for, the plaintiff cannot in law, from the admission, resale. In the interest of justice & equity, to circumvent such malafide behavior, the courts must enforce the principles of estoppel assertively. Allowing a litigant to take two inconsistent stands in any litigation would amount to nothing short of travesty of justice. In the present case, the stand has been reiterated repeatedly by the plaintiffs, however, they now seek to plead a completely inconsistent stand after direction of issuance of the sale certificate have been made. The plaintiff shall therefore, be estopped from contradicting a previous stand with a different newer stand.

60. We may note that in the present case as well, the plaintiffs have fully understood the impact of the order dated 17th November, 2011. They have not only permitted the public auction to be conducted but have actively participated in every stage thereof as detailed above.

As such, the plaintiff cannot be now permitted to approbate and reprobate at the same time. The plaintiffs would stand estopped by application of the doctrine of estoppels from laying the challenge to the auction of the property or to issuance of the sale certificate in the present case.

III. What is the effect of sale by a co-owner of specific portion of joint property, which the other co-owner say has not been partitioned?

61. In the present appeal, the entire challenge by the plaintiffs lies on what they assert is the case of the respondents that the suit property stood partitioned by metes and bounds and upon such division/partition, the predecessors-in-interest of M/s Pharma Ventures (India) Pvt. Ltd. acquired a separate interest therein and possession of a determined portion of the suit property under the registered sale deed. The entire case rests on the submission that in view of the case of the defendants, there did not remain any estate which could be partitioned.

62. Mr. Sanjeev Sindhvani, learned Senior Counsel for the plaintiffs would contend that the defendants cannot be permitted to turn around and take a stand that the property may be treated as undivided and that this tantamounts to playing fraud upon the court. The plaintiffs have levelled allegations that the respondents have misled the court, manipulated the proceedings and violated the duty upon them to speak. In support, reliance is placed on the judicial pronouncements reported at ***AIR 1959 SC 689 Waman***

Shriniwas Kini v. Ratilal Bhagwandas and Co; AIR 1968 SC 1165 Nair Service Society Ltd. v. Rev. Father K.C. Alexander & Ors.; AIR 1968 SC 534 Sita Ram v. Radhabai & Ors; AIR 1960 SC 213 Kedar Nath Motani & Ors. v Prahlad Rai & Ors.

63. In view of the primary contention of the plaintiffs that there was no partition of the suit property and Shri S.P. Kumria could not have sold a specified area of the property, let us first and foremost examine what is the impact of sale of the specific share by Shri S.P. Kumria defining it as specific portions of the suit property.

64. The question which must be answered is whether such a sale deed becomes illegal and void if the plea of the other side that the property had not been so partitioned is accepted? Or would the sale deed be treated as transfer of only the share of the co-owners without determination of the exact portions?

65. So far as the statutory regime governing transfers of shares by a co-owner is concerned, our attention has been drawn to Section 44 of the Transfer of Property Act which reads as follows :

“44. Transfer by one co-owner.— Where one of two or more *co-owners of immovable property legally competent* in that behalf *transfers his share* of such property *or any interest therein*, the *transferee acquires, as to such share or interest*, and so far as is necessary to give effect to the transfer, the *transferor's right to joint possession* or other common or part enjoyment of the property, *and to enforce a partition* of the same, but subject to the conditions and liabilities

affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him of joint possession or other common or part enjoyment of the house.”

(Emphasis by us)

66. The scope and object of this statutory provision stands considered in prior judicial precedents. Mr. Anil Airi, learned counsel for the respondents has placed the judgment of the Supreme Court reported at **(2009) 15 SCC 747, *Jai Singh & Ors. v. Gurmej Singh***. In this case, challenge was laid to an order passed by the learned Single Judge of the Punjab and Haryana High Court dismissing the appellant’s second appeal. The question before the High Court was whether sale by a co-owner out of joint khewat of the specific portion of a land described by particular khasra numbers, would be a sale of his share out of the joint land or whether the vendees become co-owners or co-sharers in the joint land. The vender Bhartu sold land measuring 20 kanals being 400/3723 share out of the total land measuring 186 kanals 3 marlas vide a registered sale deed dated 11th April, 1990 to the appellants for consideration of ₹1,80,000/-

The respondent Gurmej Singh filed a suit for possession by way of pre-emption pleading that the vendor had sold the land out of joint khewat and being a co-sharer, he has a right to pre-empt the sale under Section 15(1)(b) of the Punjab Pre-emption Act,

1913. The vendees contested this suit inter alia on the plea that the khewat containing the suit land had been partitioned between the various co-sharers much prior to the sale through an oral partition and secondly the sale was out of the defined share of the vendor.

67. The only two issues (in ***Jai Singh***) contested before the trial court were as follows :

“(1) Whether plaintiff has superior right to pre-empt the land in dispute being co-sharer?

(2) Whether plaintiff is stopped from filing present suit?”

68. The trial court returned the findings in favour of the pre-emptor. The appeal was also rejected before the District Judge. Before the High Court, the appellants argued that “*where a co-sharer sells his share as a specified part of joint land the vendees do not become co-sharers the sale being not a share out of the joint land*”. It was submitted that “*the plaintiff respondent does not become a co-sharer in the property in dispute and as such has no preferential right of pre-emption with regard to sale of specific part of the vendor’s share*”. The second appeal was also dismissed resulting in the challenge before the Supreme Court. The Supreme Court laid down principles relating to inter se rights and liabilities of co-sharers. The principles relevant for the present purposes stand set out in paras 8 and 9 of the judgment which read thus :

“8. It is thus evident that ***when a co-sharer is in exclusive possession of some portion of the joint holding he is in possession thereof as a co-sharer*** and

is entitled to continue in its possession if it is not more than his share till the joint holding is partitioned. *Vendor cannot sell any property with better rights than himself. As a necessary corollary when a co-sharer sells his share in the joint holding or any portion thereof and puts the vendee into possession of the land in his possession what he transfers is his right as a co-sharer in the said land and the right to remain in its exclusive possession till the joint holding is partitioned amongst all co-sharers.*

9. *Sale of subsequent portion of the land out of the joint holding by one of the co-owners is nothing but a sale of a share out of the joint holding* and is pre-emptible under [Section 15\(1\)\(b\)](#) of the Act. It is to be noted that the judgment in Bhartu's case (supra) had the seal of approval of this Court in Pokhar (dead) by Lrs. and [Ors. v. Ram Singh \(Civil Appeal No. 4418 of 1986\)](#) disposed of on August 14, 2001)."

(Emphasis by us)

69. On the same aspect we may refer to the judgment of the Punjab and Haryana High Court reported at *AIR 2004 P&H 353, Hazara Singh & Anr. v. Faqiria (Deceased) Thr. L.Rs.* In this case, two brothers Biru and Ganga Ram gifted 14 Bighas 9 Biswas of land in specific khasra numbers in the village Kaimbwala to Nanak and Nathu, sons of their sister Nimmo. The plaintiffs (Hazara Singh etc.) urged that the said gift transaction was a paper transaction which was not implemented and that in the Revenue record, the defendant nos.1 and 2 or their predecessors-in-interest have been shown as co-owners in land being donees while the plaintiffs have been shown as donors. The argument was that merely because the plaintiffs have been shown in the column of

owner as co-sharer and the defendants or their predecessors-in-interest in the column of cultivation, did not mean that the defendants or their predecessors-in-interest were not co-owners in the joint khewat. We extract hereunder the findings of the Division Bench on the question of the rights of the plaintiffs with regard to the specific khasra numbers which had been gifted to them, which read thus :

“14. ...Undisputedly, *two of the co-owners*, namely Biru and Ganga Ram *gifted* 14 bigas 9 biswas of land from the joint khewat comprising in *specific khasra numbers*. *By virtue of the said alienation which fall under the definition of ‘Transfer of Property’, the donees became co-sharers in the joint khewat*. The *rights of a transferee from a co-owner* are regulated by *Section 44 of the Transfer of Property Act* which provides that where one or two more co-owners of the immovable property legally competent in that behalf *transfer his share of such property or any interest therein*, the *transferee acquires such share or interest and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property and to enforce a partition of the same* but subject to the conditions and liabilities affecting at the date of transfer, the share or interest so transferred. According to this statutory provision also what transferee gets is the right of the transferor to joint possession and to enforce a partition of the same irrespective of the fact whether the property sold is fractional share of specified portion, exclusively in possession of the transferor. *Even though the gift was made of a specific Khasra number, the donees became owners of the same and by virtue of the same they became co-owners in the joint khewat. Transfer of a specific portion of the land out of the*

joint holding by one of the co-owners is nothing but transfer of a share out of the joint holding, as held by the *Full Bench* of this Court in *Bhartu v. Ram Sarup*, 1981 P.L.J. 204. 15. In my opinion, the *gift of a specific portion in the joint holding or the sale of a specific portion in a joint holdings does not stand on different footing*. By virtue of the *gift of a Specific portion*, the *predecessors-in-interest of the defendant became co-sharers in the khewat*. They cannot be denied the status of the co-owners in the joint Khewat merely because in the revenue record, they have been shown as co-owners being donees in the column of cultivation. A *transferee under Section 44* of the Transfer of Property Act *gets right of the transferor to joint possession and to enforce a partition of the same whether the property sold is fractional share or specified portion*. The first Appellate Court has totally ignored this aspect of the matter and drawn a wrong conclusion that the defendants or their predecessors-in-interest were not the co-owners in the joint khewat, merely because they have been shown in the column of cultivation and not in the column of ownership.”

(Emphasis by us)

70. On this aspect, we may also usefully advert to a pronouncement of the Full Bench of the Punjab & Haryana High Court reported at *2008 SCC OnLine P&H 754, Ram Chander v. Bhim Singh*, which reads thus:

“15. In *Lachhman Singh's case* (supra), Rajinder Singh and Harindar Singh, real brothers, were owners in possession of half share, whereas the other half share was owned by Ajmer Singh. The land was described as bearing in Khewat No. 171, rectangle Nos. 6, 12, 13 and 16, and Khewat No. 172, bearing rectangle Nos, 13 and

16. On 20.8.1960, Harinder Singh, co-sharer sold, by a registered sale deed, 48 kanals and 2 marlas of land to the plaintiff, comprising of rectangle No. 6, killa Nos. 16 and 25, rectangle No. 13, Killa Nos. 1 to 19 and 22 to 26, $\frac{1}{4}$ th share, and 1 kanal 10 marlas, out of 7 kanals and 10 marlas, comprising of rectangle No. 13, killa No. 20, $\frac{1}{5}$ th share. On 2.2.1965, another co-sharer Ajmer Singh, vide registered sale deed, sold 103 kanals and 8 marlas of land to Lachhman Singh out of rectangle No. 16, Khewat Nos. 171 and 172, Killa Nos. 6, 7, 8, 13, 14, 15, 17/2, 16, 17/1, 18, 19, 23, 24 and 25. Killa Nos. 6, 7, 8, 13, 14, 15 and 17/2 are in Khatauni No. 251 of Khewat No. 171, and killa Nos. 16, 17/1, 18, 19, 23, 24 and 25 are in Khatauni No. 258 of Khewat No. 172. Pritam Chand and another (plaintiffs), sought to preempt the sale deeds in favour of the defendant by asserting their rights as a co-sharer, under Section 15(1)(b), Fourthly, of the Punjab Preemption Act, 1913 (Punjab Act 1 of 1913), as by an earlier sale in their favour, by Harinder Singh co-sharer, they had become co-sharers in the land sold by Ajmer Singh to Lachhman Singh. The suit was dismissed by the trial Court by holding that the plaintiffs were not co-sharers of the joint land with Ajmer Singh-vendor, as they had purchased a specific share out of specific killa numbers, being specific rectangles and, therefore, did not become co-sharers in the **entire** Khewat Nos. 171 and 172. The appellate Court, however, reversed the said judgment and held that the sale in favour of the appellants was of land from the joint khewat and, therefore, as they had become co-sharers in the entire Khewat, they were entitled to the relief of pre-emption.

16. The dispute eventually came to be referred to a Full Bench of this Court. The Full Bench, in *Lachhman Singh's case* (supra), after a considered appraisal of various judgments, held that as Pritam Chand and another had not purchased a share from the entire joint land of the three co-sharers and having purchased a

share of defined killa numbers from defined rectangles, in terms of sale deed, they did not have any rights beyond the land of which share had been sold to them. It was held that Pritam Chand and another would become joint owners or co-sharers of the land bearing rectangle Nos. 6 and 13 with the original co-owners but would not become co-sharers with them in the other or remaining joint land of the three original co-sharers. It was held that where a vendee purchases specific killa/khasra numbers from a specific rectangle, he does not become a co-sharer in the entire khewat and his rights, if any, as a co-sharer would be confined to the rectangle/killa numbers, reflected in his sale deed and as a necessary corollary would not confer any right as a co-sharer with respect to the entire joint khewat.

17. On the other hand in *Bhartu v. Ram Sarup's case* (supra), Ram Chander son of Ram Singh sold land measuring 21 square yards out of 4 kanals and 2 marlas bearing Khasra No. 99/4/2, Khatauni No. 204 and Khewat No. 100 through a **registered sale deed**, dated 19.5.1966 to Bhartu. Ram Sarup, claiming to be a co-sharer, in the said Khewat, filed a suit for possession of the said land by way of pre-emption. Both the trial as well as the appellate Courts upheld the claim of Ram Sarup and decreed the suit. In Regular Second Appeal, the matter was referred to a Full Bench. The dispute before the Full Bench was ***whether purchase of land by reference to specific khasra numbers would confer the right of a co-sharer upon the vendee in the entire joint khewat.*** After considering the Full Bench judgment in *Lachhman Singh's case* (supra) and other judgments, it was held that the question, whether the sale of specific khasra numbers, out of a khewat, would be a sale of share out of joint land or not, would depend on the *inter se* rights of co-sharers in the joint khewat and their nature. Primary reliance was placed upon a Division Bench judgment in *Sant Ram Nagina Ram v. Daya Ram Nagina Ram*, AIR 1961 PB 528, which succinctly sets

out the *inter se* rights and liabilities of co-sharers. It was thereafter held that *when a co-sharer sells his share or any portion thereof in the joint holding and puts the vendee into possession of the portion in his possession what he transfers is his right as a co-sharer in the land and the right to remain in its exclusive possession till the joint holding is partitioned amongst all co-sharers by referring to Section 44 of the Transfer of Property Act, 1882* which provides that where one or two or more co-owners of immovable property legally competent in that behalf transfer their share of such property or any interest therein, the transferee acquires as to such share or interest and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred. The question, therefore, posed before the Full Bench *was answered in the affirmative and it was held that sale, by a co-owner, of specific portion of joint land, described by particular khasra numbers, out of a joint khewat, would be the sale of a share out of joint land and pre-emptable, under Section 15(1)(b) of the Punjab Preemption Act.*

18. It would also be necessary to mention here that while recording the above opinion, judgments in *Mst. Gurnam Kaur v. Ralla Ram*, 1970 PLJ 687, and *Bakhshish Singh v. Gurcharan Singh*, 1972 PLJ 672, which had followed the ratio of the Full Bench judgment in *Lachhman Singh's case* (supra), were overruled by holding that these judgments were no longer good law. It, therefore, appears that though in *Bhartu v. Ram Sam Sarup's case* (supra), a clear departure was made from the opinion recorded in *Lachhman Singh's case* (supra), their Lordships chose to merely hold that the judgment in *Lachhman Singh's*

case (supra) had no direct bearing on the question, posed before them.

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20. Property held in common, by two or more persons, whatever be its nature or origin, is said to be joint property and the owners thereof joint owners. Joint property, envisages a community of interest (ownership) and a commonality of possession vested in the entire body of owners called co-sharers/joint owners. This body of owners is joint, both in possession and in ownership of the property and every co-sharer shall be owner in possession of every inch of the joint estate. Inherent in his status as a co-sharer/joint owner and flowing from his status as a joint owner or a co-sharer of the joint property is the right to assert ownership with respect to every part and parcel of the joint property. The status as a co-sharer would be preceded by a tangible act of conferring proprietary status, whether by way of membership of a co-parcenary or by devolution of interest, pursuant to inheritance or by assignment of property by sale etc. A co-sharer asserts joint title and possession even, where other co-sharers/joint owners are in separate possession of different parcels of land and as a natural consequence, a co-sharer in possession of a specific area of joint property possesses the property for and on behalf of all other co-sharers/joint owners. Co-sharers may and often do for the purpose of better management of the joint estate hold separate possession of parcels of joint land. This separation of possession, without a corresponding intent, to sever the joint status of the community of joint owners does not confer a right upon a co-sharer in separate possession to assert his separate ownership. A joint owner, therefore, would be owner of a specified share in the entire joint property but would not be entitled to claim separate ownership of any specified and particular portion of the joint property till such time, as the property remains joint.

21. A joint owner/co-owner, just as an individual owner, has an inherent right to alienate the joint property, limited to the extent and the nature of his share holding. Upon transfer of his share or a part thereof, a co-sharer transfers only such rights as vest in him as a joint owner, namely, his specified share or a part thereof in the community of joint owners with commonality of possession. A vendee from such a joint owner or a co-sharer would, therefore, receive the property so transferred, with all the rights and liabilities that vested in his vendor, namely, a right to assert a community of interest (ownership) and a commonality of possession in the entire joint estate and along with the entire body of joint/co-owners. Our above conclusion draws sustenance from Section 44 of the Transfer of Property Act and a reproduction thereof would place our conclusions in perspective, as under:—

“44. Transfer by one co-owner.—Where one or two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.”

22. In order to lend weight to our conclusions, we draw upon the observations of a Division Bench judgment of this Court, relied upon and referred to in both the Full Bench Judgments, that we are called upon to interpret. While considering the nature of joint property and the *inter se* rights and liabilities of co-sharers, a Division Bench in Sant Ram Nagina Ram v. Daya Ram Nagina Ram, AIR 1961 Punjab 528 set out in detail the *inter-se*

rights and liabilities of co-sharers in the following terms:—

“(1) A co-owner has an interest in the whole property and also in every parcel of it.

(2) Possession of joint property by one co-owner, is in the eye of law, possession of all even if all but one are actually out of possession.

(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to

disturb the arrangement without the consent of others except by filing a suit for partition.”

23. It is, therefore, apparent that a co-owner has an interest in the entire property and also in every parcel of the joint land. When a co-sharer alienates his share or a part thereof in the joint holding what he brings forth for sale is what he owns i.e. a joint undivided interest in the joint property. A sale, therefore, of land from a specific khasra/killla number, forming part of a specific rectangle number, but being a part of a joint khewat, would, in view of the nature of the rights conferred upon a co-sharer, be deemed to be the sale of a share from the joint khewat and such a vendee would be deemed to be a co-owner/co-sharer in the entire joint khewat, irrespective of the artificial divisions of the joint land into different rectangles, khasra and killa numbers.

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26. As a result of the above discussion, we express our complete agreement with the opinion, recorded in the Full Bench in *Bhartu v. Ram Sarup's case* (supra) and are sanguine in our understanding of the law...”

(Underlining by us)

71. In the judgment of the learned Single Judge of this court reported at **2012 SCC OnLine Del 5408 *Sarla Aggarwal v. Sh. Ashwani Kumar Aggarwal*** decided on 15th October, 2012, in a similar situation, the court noted Section 44 of the Transfer of Property Act which deals with transfer by one of the co-owners of an immovable property and Section 4 of the Partition Act in the context of partition at the instance of a transferee of share in a dwelling house belonging to an HUF. Placing reliance on these

provisions, the court reiterated the principles that there is *no legal bar* on one of the *co-owners* of an immovable property *transferring his share* in the property *to an* outsider even if the property belongs to an HUF and the transferee is not a member of the HUF.

72. This view was upheld in appeal by the division bench of this court in the judgment reported at *2013 SCC OnLine Del 3832 Sarla Aggarwal v. Sh. Ashwani Kumar Aggarwal*. The court noted the pronouncement of the Supreme Court in *AIR 2001 SC 61, Gautam Paul v. Debi Rani Paul & Ors.* wherein the view in the prior case reported at *AIR (2000) 5 SCC 662, Babu Lal v. Habinoor Khan* was reiterated in the following terms :

“23. ... There is no law which provides that co-sharer must only sell his/her share to another co-sharer. Thus strangers/outsideers can purchase shares even in a dwelling house. ...”

73. In *Sarla Aggarwal*, the learned Single Judge noted that it was not the case of the plaintiff Sarla Aggarwal that Ashwani Kumar did not own the 350 sqr.yrds. of the property which he had sold and that he had full authority to sell his undivided share to the defendant no.2. It was held that on application of the above statutory provisions and principles, the transfer of 350 sqr.yrds. of the suit property by the defendant no.1 Ashwani Kumar Aggarwal to the defendant no.2 was perfectly legal in the eyes of law.

74. It is therefore, well settled that sale of his share by a co-owner, even if identified as a specific portion of the joint property, is actually merely a sale of the share of the vendor in the joint land. As a result, the vendee becomes a co-owner of the joint property with the other co-sharers therein.

There is therefore, no merit also in the submission on behalf of the plaintiffs that Sections 91 and 92 of the Evidence Act preclude such examination.

75. It is clear from the sale documents that the rights in favour of the defendants to the share of S.P. Kumaria have been created. The transfer by the transferor is therefore, of his rights as co-sharer in the joint holding. By virtue thereof, the transferee becomes a co-owner in the joint holding entitled to enforce a partition.

76. The plaintiffs have unequivocally admitted the shareholding of Shri S.P. Kumria as also his right to sell such share in the suit property. They have also admitted and accepted that Shri S.P. Kumria had validly sold his rights in such share to the defendant. We find that in the case in hand also the plaintiffs have treated the sale deed dated 17th October, 2011 executed by Shri S.P. Kumria in favour of the defendant as transfer of his share in the suit property. This has been admitted in the plaintiffs' pleadings in the plaint as well as several applications filed by them which we note hereafter.

Plaintiff's admissions that Shri S.P. Kumria had transferred his rights in the fifty percent share in the suit property to the defendant by the sale deed dated 17th October, 2011 - effect thereof

77. We note that on request, the record of CS(OS)No.2307/2001, filed by the plaintiffs against Late Shri S.P. Kumria and the defendant no.1, was called for. Our attention was drawn thereto by Mr. Sanjeev Sindhvani, learned Senior Counsel for the plaintiffs. We may also note the submissions made by the parties with regard to CS(OS)No.2307/2001 We are merely noting the proceedings therein, without being persuaded by the contentions of the parties or influenced by the pleadings or proceedings thereon, for the purposes of the present judgment.

78. On 8th November, 2011, these appellants had firstly filed CS(OS) No.2307/2001 against Shri S.P. Kumria as defendant no. 1 and M/s Pharma Venture India Pvt. Ltd. as defendant no. 2 on the averments that they along with Sh.S.P. Kumria were joint owners of the property no. W-152, Greater Kailash, Part-I, Delhi (*para 1*); that the first floor in the property was jointly sold by the plaintiffs and defendant no. 1 by registered sale deed on 27th March, 1998 and therefore, they became entitled to the one-half undivided share in the remaining portion (*para 8*); that these parties have unspecified undivided one-half share in the property (*para 9*); in *para 10*, it was averred that Sh.S.P. Kumria had never expressed intention to sell his share in the property to an outsider and had never offered it to the plaintiffs. So far as the sale of his half share by Sh.S.P. Kumria is concerned, it was claimed as follows :-

“11. That the *plaintiffs have now come to know that the defendant no.1 has executed a sale deed* in favour of *M/s Pharma Ventures (India) Pvt. Ltd. in respect of his one half undivided share* in the property in question *with proportionate right in the land underneath* without offering the plaintiffs to purchase his *one half undivided share in the property* for which the plaintiffs have preferential right to purchase in exclusion of the stranger by virtue of section 22 of the Hindu Succession Act, 1956. The *defendant no.1 has executed a sale deed in favour of defendant no.2 dated 17th October, 2001, registered as document No.8710 in Additional Book No.I, Volume 2556 on pages 22 to 41 on 17th October in the office of the Sub-Registrar, New Delhi for a total consideration of Rs.30,00,000/- = (Rs. Thirty lacs)*

12. That the sale in favour of *M/s Pharma Ventures (India) Pvt. Ltd. being stranger and plaintiffs having preferential right over the one half undivided share* of the defendant no.1 in the property in question is invalid and void.

13. That in view of the plaintiff's having a preferential right to purchase the undivided share of the defendant no.1 in the property in question, the *plaintiffs have a right to pre-empt the sale made by defendant no.1 in favour of defendant no.2 for the same consideration for which the said sale has been made. The plaintiffs have always been ready and willing to pay the said amount.*”

(Emphasis by us)

79. On this basis, the appellants sought the following prayers :-

“a) *That the plaintiffs have right of pre-emption in respect of property in question mentioned in para no.1 of the plaint in W-152, Greater Kailash, Part-I, New Delhi and after paying the amount in this Hon'ble*

Court, the plaintiff be declared to be in sole and exclusive possession of the property in question.

b) That the sale deed dt. 17.10.2001 executed by defendant no.1 in favour of defendant no.2 be declared as invalid and void and be set aside.

c) That the defendants be further directed to execute a conveyance deed in respect of the property in question in favour of the plaintiffs on the same terms and conditions as the said sale deed dt. 17.10.2001 executed by defendant no.1 in favour of defendant no.2.

80. No interim order was granted on the plaintiff's application being I.A.No. 10571/2001 under Order XXXIX Rules 1 and 2 of the Act which was restricted to only one room in the ground floor.

81. The plaintiffs thereafter filed I.A.No.10702/2001 alleging that the defendant no.1 had removed their locks from the basement; are constructing on the second floor and have placed goods in the drive way to take illegal possession of the property. On this application, an order of status quo was passed.

82. On 27th November, 2001 apprehending dispossession, the present defendant filed an application being I.A.No.15002/2001 under Order XXVI Rule 9 of the CPC praying for appointment of a local commissioner for the reason that false claims of possession had been made by the plaintiff and asserted its possession in the suit property.

83. In the plaint in CS(OS)No.647/2006, it was the case of the plaintiffs that the defendant was entitled to half undivided share in

the property which had earlier belonged to Shri S.P. Kumria. The admissions to this effect are made at the following places in the plaint dated 28th March, 2006 signed and verified by all the plaintiffs and supported with their affidavits.

"6.therefore Sh. S.P. Kumria and Sh. Sudershan Kumria became entitled for equal undivided share in the property i.e. one half each.

7. That Sh. Sudershan Kumria also died interstate on 24th January 1994 leaving behind his wife Smt. Kusum Kumria, son Sh. Mohit Kumria and daughter Miss. Ratna Kumria, (the plaintiffs herein). Therefore, the plaintiffs become entitled for one half undivided equal share in the property in question.

8. That the first floor in the property in question was sold by late Sh. S.P. Kumria and the plaintiffs, owners of the property in question, by registered sale deed dated 27.3.1998 therefore the late Sh. S.P. Kumria became entitled for one half undivided share and the plaintiffs jointly entitled for one half undivided share in the property in question.

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11. That since the one half undivided and unspecified share of Sh. S.P. Kumria was stated to have been sold to the defendant by late Sh.S.P. Kumria, the plaintiffs had filed a suit for pre-emption against late Sh. S.P. Kumria who was alive at the time of filing the said suit and against the defendant claiming preferential right to purchase his one half undivided share in the property in exclusion of the stranger by virtue of section 22 of the Hindu Succession Act, 1956.

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15. That since the property in question has not been divided between the co-owner by metes and bounds and since the one half undivided share of Late Sh. S.P. Kumria has stated to have been sold to the defendant and preferential right of the plaintiffs has been rejected on account of the plaintiffs not being class-1 heir of Sh.R.R. Kumria, the property in question is required to be partition/divided by metes and bounds.

84. The plaintiffs laid the following prayer in the plaint :

***“a) A preliminary decree for partition of the said ½ share in equal proportion in the property in question i.e. W-152 Greater Kailash, Part-I, New Delhi by metes and bounds be passed in favour of the plaintiffs and after separating the shares/portions allotted and the plaintiffs a final decree for partition be passed.*”**

85. Our attention has been drawn by Mr. Anil Airi, learned counsel for the defendants to the several admissions made by the plaintiffs in writing on court record in the applications filed by them.

86. On 21st November, 2007, the plaintiffs filed I.A.No.13648/2007 on seeking amendment of plaint. In this application, the plaintiffs asserted entitlement to only 50% of the property and in para 2 stated that “***the plaintiffs along with defendants were joint owners of the property comprising basement, ground floor along with lawn and constructed garage, terrace above the first floor with partial construction consisting of one room, kitchen and bathroom, forming part of property bearing No.W-152, Greater Kailash, Part-I, New Delhi.*”**

In para 6 of this application, the plaintiffs stated as follows :

"6. That it had been further pointed out in the suit instituted by the plaintiff that the aforesaid Shri S.P. Kumria had sold his undivided half share in the left over property, xxx xxx xxx to the defendant, M/s Pharma Venture (India) Pvt. Ltd., which had been so disclosed to the plaintiffs, as such, the defendant had stepped in the shoes of Shri S.P. Kumria, as such, plaintiffs had instituted the instant suit against the defendant seeking partition of the property by metes and bounds."

(Emphasis supplied)

87. On 7th November, 2012, the defendant filed I.A.No.20597/2012 praying for fixation of a fresh schedule for auction as the proclamation had not been issued. In para 2 of this application, the defendant asserted as follows :

*"2. That the **plaintiffs and Defendant no.2 each have 50% ownership rights in the property** comprised in Basement, Ground Floor and Second Floor in the property W-152, Greater Kailash, Part-I, New Delhi."*

88. The plaintiffs filed a reply dated 5th December, 2012 in reply to the above (I.A.No.20597/2012) stating that "**para 2 is a matter of record**". This is yet another unequivocal admission of the rights of the defendants.

89. I.A.No.7620/2013 was filed by the defendant stating in para 3 that "*admittedly the plaintiffs and the defendant no.2 are the*

owners in possession of 50% share in the basement, ground floor and second floor of the property”

The defendant no.2 filed I.A.No.17200/2013 under Order XXI Rule 89 of the CPC praying for setting aside the sale/bid of DKG Buildwell (Pvt.) Ltd. and accepting the bid of the defendant. It was stated in para 6 of this application that "*the applicant/defendant no.2 has a right, title and interest in the property in question (50%) and is entitled to maintain the above application*".

No repudiation to these assertions has been pointed out.

90. The plaintiffs themselves had required the present respondent to be directed to execute the conveyance of the half share of Sh.S.P. Kumria on the "*same terms and conditions as the sale deed dated 17th October, 2001*" premised on their claim to their perceived pre-emption rights under Section 22 of the Hindu Succession Act. These averments support the terms and conditions of the auction sale.

91. The above assertions, therefore, are unequivocal admissions, firstly, of the defendants having purchased Sh.S.P. Kumria's half share in the property.

Secondly, the plaintiffs thereby also admitted the correctness of the valuation of Shri S.P. Kumria's portion as they sought its transfer to them on the same rate. Thirdly, the plaintiffs admitted

that this defendant was put in possession thereof as well. These are three very important admissions.

92. In this regard, we may usefully advert to the judicial precedent reported at *AIR 1973 MP 222, Ramdayal v. Manaklal*. In this case, the defendant had purchased a house from the plaintiff's father and was put in possession thereof. The plaintiff filed a suit urging that the property was coparcenery and challenged the validity of the sale in the absence of a legal necessity. The court directed that if the purchaser files a suit for partition within a period of six months, he can be in possession till the pendency of the suit. He can be legally handed over the property if it is not in excess of the share of the coparcener. The court has observed the fact that the purchaser acquires interest immediately on the purchase effected by him and the possession of the property purchased by him, if it is not in excess of the share of the transferor in the coparcenery property, cannot be said to be unjust or inequitable. However, if the **coparcener transfers more than his share, then in such a situation, the purchaser can acquire only what belongs to the coparcener i.e. only his share.** The court examined the material on record and found that the properties purchased was less than the share of the vendor. The defendant was therefore, given possession of the property which he had purchased.

The court declared the principle that even if the coparcener had transferred more than his share, a purchaser could validly acquire only the share of the coparcener.

93. This principle was also held good by the Supreme Court in a pronouncement reported at *(1996) 11 SCC 164 Anand Dev Puri & Ors. v. Guriqbal Singh & Ors.* The relevant extract is being reproduced hereunder:

“7. ... We find considerable force in the submissions advanced by the learned counsel for the appellants. It can hardly be disputed that Ishar Mal after his death left behind him his widow, three sons and four daughters whose names have been stated in the earlier part of this judgment. There is overwhelming oral and documentary evidence to establish that the house in dispute belonged to Ishar Mal and that being so after the death of Dhan Devi the widow of Ishar Mal, the property in suit would devolve to the three sons and four daughters, each having 1/7th share in the same. The learned first appellate court patently committed a serious error in holding that the three sons of deceased Ishar Mal were the owners of the house in suit only on the basis of some municipal entry ignoring all other material facts and evidence, documentary and oral on record. Rajinder Pal Puri one of the sons of Ishar Mal had only 1/7th share. He, therefore, could not have sold out 1/3rd specified portion of the house in suit in the absence of any partition amongst the shareholders. At best, Rajinder Pal Puri could have sold out his 1/7th share in the house which was the joint property of all the sons and daughters. Respondent 1 Guriqbal Singh, therefore, would be entitled only to the extent of 1/7th share in the house by partition. In these facts and circumstances the trial court was fully justified in passing the preliminary

decree for possession by partition of the house granting 1/7th share to each of the sharers (except Rajinder Pal Puri) including the defendant Guriqbal Singh, who would be entitled to 1/7th share of Rajinder Pal Puri.”

94. We have extracted above from the pleadings of the present plaintiffs wherein they have claimed entitlement to only fifty per cent of the suit property. By way of prayer (b), the plaintiffs seek a decree to the extent of fifty per cent of the property alone. This prayer is maintained even in the amendment application which had been filed by the plaintiffs. The shareholding between the parties is clearly an admitted factor. In this background, the plaintiffs cannot dispute the rights of the defendants to fifty per cent of the property.

95. We find that pursuant to the sale deed, Shri S.P. Kumria put the defendant no.1 in possession of the property sold to them. Of course, there is a dispute about the possession of the room on the ground floor and the date of the claimed dispossession by the defendants. Be that as it may, the sale deed cannot be construed as anything else other than transfer of the rights and the fifty per cent share of Shri S.P. Kumria in the suit property. It has been so understood by the plaintiffs as well.

96. The order dated 8th February, 2012 in the second suit notes the statement of defendant that it was prepared both ways, either to purchase shares of the plaintiffs or that the plaintiffs may purchase share of the defendant. The order dated 20th October, 2013 records

97. In the grounds of appeal before us, the plaintiffs have stated thus :

ix. That Shri S.P. Kumria has never expressed his intention to sell his one-half undivided share in the property in question to any outsider. He *clandestinely sold one-half share in the said property to Respondent/Defendant No.1 M/s Pharma Venture (India) Pvt. Ltd.* through its Managing Director Shri M. Jha. xxx xxx xxx

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98. So far as the judicial pronouncements relied upon by the plaintiffs are concerned, in para 13 of ***AIR 1959 SC 689, Waman Shrinivas Kini v. Rati Lal Bhagwandas & Co.***, the Supreme Court refused to enforce an agreement of sub-tenancy holding that the enforcement thereof tantamounted to an "*illegality and infraction of a statutory provision which cannot be condoned by any conduct or agreement of the parties*". In the instant case, the effect of the proceedings and orders of the court, all of which had attained finality, is that the court has accepted the case of the plaintiffs and implemented the statutory provisions.

99. In ***AIR 1968 SC 534, Sita Ram v. Radha Bai***, the court reiterated the well settled principle as contained in the maxim in *pari delicto potior est conditio defendentis* holding that the court would refuse to enforce an illegal agreement at the instance of a person who was himself a party to an illegality of fraud.

100. Similarly in ***AIR 1965 SC 1364, Smt. Surasaibalini Devi v. Phanindra Mohan***, the Supreme Court refused to assist the litigant seeking assistance of the court to effectuate an illegal transaction.

101. In ***AIR 1968 SC 1165, Nair Service Ltd. v. Rev. Father K.C. Alexander***, it was held that the court would refuse assistance to a litigant who was relying upon his own illegality.

Before us, the plaintiffs have failed to point out any such illegality on the record of the instant case. These judicial precedents have thus no application at all.

102. Again in *AIR 1960 SC 213, Kedar Nath v. Prahlad Rai*, it was held that public policy demands that a party resting its case upon an illegality should not be allowed to take advantage of the position. There can be no dispute with this well settled principle. But it does not apply to the present case.

103. We have noted the case of the plaintiffs in the plaint which was filed by the appellants. The defendants have claimed transfer of the share of Late Shri S.P. Kumria by virtue of the sale deed dated 17th October, 2001 in favour of defendant no.1 who in turn transferred the same under the sale deed dated 8th March, 2006 to the respondent no.2. The plea that a partition had been effected inter se the plaintiffs on the one side and Shri S.P. Kumria on the other is disputed by the plaintiffs but they do not dispute the factum of transfer of his share to the defendant no.1. If it were not so, there would be no occasion for the plaintiffs to seek the prayers in the suits against the defendants.

104. So far as the sale deed of 2001 is concerned, the plaintiffs were aware of them right from the time of its execution. This is manifested from the stand of the plaintiffs in CS(OS)No.2307/2001.

105. This matter may be examined from one more angle. In the plaint in CS(OS)No. 647/2006, the plaintiffs state that the defendants had acquired 50% share of the property which was owned by Late Shri S.P. Kumria which has been transferred by him to the defendants. The advocates for the defendants entered

appearance in the suit on 21st August, 2006. Therefore, in accordance with the provisions of Order VIII Rule I of the CPC, the defendant was required to file written statement within 30 days or as legally extended by the court. No written statement was filed by the defendant. There was no challenge to the case of the plaintiffs or the prayers made therein. In the present case, no adjudication regarding the shareholding of the parties was necessary for this reason as well.

106. The plaintiffs cannot challenge the correctness of the assertions in the plaint. Contradictorily, they are challenging the order of the learned Single Judge contending that the learned Single Judge has ignored a case of the defendants which was not even pleaded by it! This is completely impermissible.

107. The legal effect of the sale deeds has been discussed at length above. The plaintiff's plea that the learned Single Judge had no jurisdiction to direct partition in view of the plea of the defendants as the property already stood partitioned, is again devoid of legal merit.

108. The proceedings before the court would show that it has accepted the case of the plaintiffs with regard to the shareholdings in the property; the admission and acceptance of the plaintiffs that the defendants were co-sharers in equal shares and the joint prayer by the plaintiffs and defendant was made for sale of the property, firstly, by inter se bidding and subsequently by a public auction. A challenge to the orders passed by the court on the above

submissions, if at all, could have been asserted by the respondents. Such a challenge is certainly not available to the plaintiffs, it is completely misconceived and legally untenable.

109. The court has accepted the claim of the plaintiffs in the plaint, acting on the admissions of the parties including those in court.

There is nothing on record to establish that the defendants either misled the court or played fraud upon the court.

IV. *Objections of the appellants that mandatory procedure under Sections 2 and 3 of the Partition Act has not been followed*

110. It has been urged at length by Mr. Sanjeev Sindhvani, learned Senior Counsel for the appellants that the orders passed by the learned Single Judge are in gross violation of the mandatory provisions of the Partition Act. It is contended that under Section 2 of the Partition Act, passing of a preliminary decree was imperative; that thereafter a final decree was essential. Putting the property to auction sale is contested by the appellants as illegal for the reason that formal final decree was not passed.

111. It is the further submission of Mr. Sanjeev Sindhvani, learned Senior Counsel for the appellants that a court trying a partition suit has no jurisdiction to pass any decree or order without first determining the shares (if any) of the parties. In case the property, which is the subject matter of the suit for partition stands

already partitioned, no jurisdiction is left in the court to effect its partition or pass any order to either divide by metes or bounds or order sale by public auction or otherwise. The submission is that dehors the determination/adjudication of these aspects, the orders for division/sale would be without jurisdiction, even if the same are based on consent of the parties.

112. In the instant case, the orders for sale of the property have been made in a suit for partition and hence exercise of powers under the Partition Act. We would have to advert also to the provisions of the Code of Civil Procedure which would apply to such proceedings.

113. The statutory provision relating to partition of property are found in the Partition Act, 1893. For convenience, we extract hereunder the relevant provisions contained in Sections 2, 3, 4, 6, 7 and 8 :

“2. Power to Court to order sale instead of division in partition suits.— Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one

moiety or upwards, direct a sale of the property and a distribution of the proceeds.

3. Procedure when sharer undertakes to buy.—(1) If, in any case in which the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for sale, the Court *shall* order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf.

(2) If two or more shareholders severally apply for leave to buy as provided in sub-section (1), the Court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the Court.

(3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications.

4. Partition suit by transferee of share in dwelling house.—(1) Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

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6. Reserved bidding and bidding by shareholders.—(1) Every *sale* under section 2 shall be subject to a *reserved bidding*, and the amount of such bidding shall

be fixed by the Court in such manner as it may think fit and may be varied from time to time.

(2) *On any such sale any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same as to the Court may seem reasonable.*

(3) If two or more persons, of whom one is a shareholder in the property, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the shareholder.

7. Procedure to be followed in case of sales.—Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely:—

(a) if the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay in the exercise of its original jurisdiction,¹ [* * *] the procedure of such Court in its original civil jurisdiction for the sale of property by the Registrar;

(b) if the property be sold under a decree or order of any other Court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such rules are made, the procedure prescribed in the Code of Civil Procedure (14 of 1882) in respect of sales in execution of decrees.

8. Orders for sale to be deemed decrees.— Any order for sale made by the Court under sections 2, 3 or 4 shall be deemed to be as a decree within the meaning of section 2 of the Code of Civil Procedure (14 of 1882).”

114. Thus by virtue of Section 2, if in a suit for partition, it appears to the court that, by reason of the nature of the property or

of the number of shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

115. In the instant case, the order dated 17th November, 2011 would show the agreement with regard to the shareholdings of the parties. The parties jointly requested the court for sale of the property inter se the parties. After the court directed issuance of the sale certificates, the plaintiffs have set up a plea based on their perceived defence of the defendants that the orders for sale could not have been passed in the suit. We therefore, propose to examine the requirements of law and the propriety of the steps taken in the present case.

116. Under Section 3 of the Partition Act, if the court directs a sale and any other shareholder applies for leave to buy at a valuation the share/shares of the party asking for sale, it is mandatory for the court to order valuation of the share/shares as it may deem fit and proper and offer to sell the same to the shareholder at the price so ascertained. Section 4 of the statute is concerned with transfer of share in the dwelling house belonging to an undivided family to a person who is not a member of such

family. If such transferee sues for partition and any member of the family being a shareholder undertakes to buy such share of such transferee, the court shall make a valuation of such share in such manner as deemed proper and direct the sale of such share to the shareholder. So far as the sale of the property under Section 2 is concerned, Section 6 of the statute renders it mandatory for the court to have reserve bidding, the amount whereof is required to be fixed by the court with jurisdiction to vary the same from time to time. By virtue of sub-section 2 of Section 6, any of the shareholders are enabled to bid at the sale on such terms as non-payment of deposit or as to setting off the same, as may seem reasonable to the court.

117. Section 7 directs that where a property is to be sold under the provisions of the Partition Act, as far as practicable, the procedure which is applicable to sale of a property under a decree or order of the court as may be prescribed by the high courts under the Rules, failing which procedure prescribed under the Code of Civil Procedure in respect of sales in execution of decrees has to be adopted.

118. By virtue of Section 8, an order for sale made by the court in exercise of jurisdiction under Sections 2, 3 or 4 of the Partition Act shall be deemed to be a decree within the meaning of the expression in Section 2 of the Code of Civil Procedure. Section 9 enables partition of part of the property as well.

119. So far as the judgment and decree in a suit for partition of property or separate possession of a share therein is concerned, Section 2(2) defining a decree and Order XX Rule 18(2) are relevant and read thus :

“2. Definitions.

In this Act, unless there is anything repugnant in the subject or context,-

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(2) “decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation – A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit, it may be partly preliminary and partly final.”

“18. Decree in Suit for partition of property or separate possession of a share therein.- Where the court passes a decree for the partition of property or for the separate possession of a share therein, then,—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.”

120. It is apparent from the above that a preliminary decree is required to be passed if partition or separation cannot be conveniently made without further inquiry.

121. How is the court to proceed for passing a preliminary decree? Assistance in this regard is sought by the court under Order XXVI of the CPC which relates to issuance of commissions. Order XXVI Rules 13 and 14(1) is relevant for conducting an inquiry for division of the property and reads thus :

“13. Commission to make partition of immovable property.- Where a preliminary decree for partition has been passed, the court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

14. Procedure of Commissioner.- (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

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122. There is therefore, no difficulty at all where division of the property into shares is possible. The court in such circumstances would first pass a preliminary decree and thereafter, proceed to appoint a commissioner for suggesting a division by metes and bounds. If the report is confirmed or varied, the court would proceed to confirm the report or direct variation in terms of sub-rule 3 of Rule 14 which is treated as a final decree.

123. So far as the grievance of the plaintiffs that the orders passed by the court are violative of the provisions of the Partition Act are concerned, it is necessary to first examine the manner and scope in which the court would proceed with matters of sale of property under Sections 2 and 3 of the Partition Act. The manner in which these provisions have to be worked have arisen for consideration in several binding judicial precedents.

124. Let us examine the legal position with regard to determination of shares i.e. passing of the decree under Section 2 of the Partition Act and its disposition under Section 3 thereof. Can consent of parties have any role to play in the matter? In this

regard, the pronouncement reported at **(2009) 9 SCC 689, *Shub Karan Bubna @ Shub Karan Prasad Bubna v. Sita Saran Bubna*** is topical. In this case, in the year 1960 the first respondent and his mother filed a suit for partition against the petitioner and two others for partition and separate possession of their one-third share in the plaint scheduled properties and for rendition of accounts. Three non-agricultural plots and some movables were involved. After contest, the suit was decreed on 25th February, 1964 directing a preliminary decree for partition to be drawn up with regard to the plaintiff's one-third share in the plots and a final decree to be drawn up through appointment of a commissioner for actual division of the plots by metes and bounds. The petitioner/defendant's appeal was dismissed by the Patna High Court on 29th March, 1974. The first respondent/plaintiff filed an application long thereafter on 1st May, 1987 for drawing up the final decree. The petitioner/defendant filed an application on 15th April, 1991 to drop the final decree proceedings as appeared barred by limitation which application was dismissed by the trial court holding that once the shares stood determined by the preliminary decree, there was no limitation for the application for effecting actual partition/division in accordance therewith and it should be considered to be an application made in a pending suit. The petitioner's challenge in the revision petition was dismissed by the High Court resulting in the Special Leave Petition.

125. We may extract hereunder the binding enunciation of law by the Supreme Court in paras 5 to 10 of **Bubna** on the issue as to what is a partition :

“5. “Partition” is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty.

6. A partition of a property can be only among those having a share or interest in it. ***A person who does not have a share in such property cannot obviously be a party to a partition.*** xxx xxx xxx

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7. In a suit for partition or separation of a share, the ***prayer*** is not only for ***declaration of the plaintiff's share*** in the suit properties, but also ***division of his share by metes and bounds***. This involves ***three issues***:

- (i) whether the person seeking division has a share or interest in the suit property/properties;
- (ii) whether he is entitled to the relief of division and separate possession; and
- (iii) how and in what manner, the property/properties should be divided by metes and bounds?

In a suit *for partition or separation of a share*, the court at the first stage decides ***whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession***. The decision on these two issues is exercise of a ***judicial*** function and results *in first stage decision termed as “decree”* under Order 20

Rule 18(1) and termed as “*preliminary decree*” under Order 20 Rule 18(2) of the Code. The *consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements*, calculations and considering various permutations/combinations/alternatives of division is referred to the Collector under Rule 18(1) and is the subject-matter of the final decree under Rule 18(2).

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9. *Rule 18 of Order 20 of the Code of Civil Procedure* (“the Code”, for short) deals with decrees in suits for partition or separate possession of a share therein which is extracted below:

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10. The terms “*preliminary decree*” and “*final decree*” used in the said Rule are defined in the Explanation to Section 2(2) of the Code ...”

(Emphasis supplied)

The Supreme Court has thus referred to the provisions of the Code of Civil Procedure in Order XX Rule 18 (1) and (2); as well as Section 2(2).

126. So far as the manner in which the court would proceed after the passing of the preliminary decree, in para 17 (of *Bubna*), the court held thus :-

“17. Once a court passes a preliminary decree, it is the duty of the court to ensure that the matter is referred to the Collector or a Commissioner for division unless the parties themselves agree as to the manner of division. This duty in the normal course has to be performed by

the court itself *as a continuation of the preliminary decree*. Sometimes either on account of the pendency of an appeal or other circumstances, the court passes the decree under Rule 18(1) or a preliminary decree under Rule 18(2) and the matter goes into storage to be revived only when an application is made by any of the parties, drawing its attention to the pending issue and the need for referring the matter either to the Collector or a Commissioner for actual division of the property. Be that as it may.”

(Emphasis by us)

127. Finally, in para 18.2 of *Bubna*, the court summed up the principles applicable to partition suits with regard to immovable properties in the nature of buildings, plots etc.:

“**18.2.** In regard to *immovable properties* (other than agricultural lands paying land revenue), that is, *buildings*, plots, etc. or movable properties:

(i) where the *court can conveniently and without further enquiry make the division* without the assistance of any Commissioner, *or where parties agree upon the manner of division, the court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds*.

(ii) *where the division by metes and bounds cannot be made without further inquiry*, the court will pass a preliminary decree declaring the rights of the parties interested in the property *and give further directions* as may be required to effect the division. In such cases, normally a Commissioner is appointed (usually an engineer, draughtsman, architect, or lawyer) to physically examine the property to be divided and suggest the manner of

division. The court then hears the parties on the report, and passes a final decree for division by metes and bounds.

The function of making a partition or separation according to the rights declared by the preliminary decree (in regard to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it ***involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions***. When the Commissioner gives his ***report*** as to the ***manner of division***, the proposals contained in the report are ***considered by the court***; and after hearing objections to the report, if any, the ***court passes a final decree*** whereby the relief sought in the suit is granted by separating the property by metes and bounds. ***It is also possible that if the property is incapable of proper division, the court may direct sale thereof and distribution of the proceeds as per the shares declared.***

(Emphasis by us)

128. This judgment is important for the purposes of the present case, for the reason that it has anticipated three situations – first whence, instead of two stages of a preliminary decree and a final decree, there may be a single decree declaring the rights of several parties as well as dividing the suit property by metes and bounds. The second situation, where division by metes and bounds is not possible without further inquiry. Here the court will first pass a preliminary decree declaring the rights of the parties interested and give further directions as may be required to give effect to the division. The third is where the preliminary decree decides only a part of the suit. In this regard, we reproduce hereunder para 20 of the judgment which reads as follows :

“20. On the other hand, in a *partition suit* the *preliminary decrees only decide a part of the suit* and therefore an application for passing a final decree is only an application in a pending suit, seeking further progress. *In partition suits, there can be a preliminary decree followed by a final decree, or there can be a decree which is a combination of preliminary decree and final decree or there can be merely a single decree with certain further steps to be taken by the court.* In fact, several applications for final decree are permissible in a partition suit. *A decree in a partition suit enures to the benefit of all the co-owners and therefore, it is sometimes said that there is really no judgment-debtor in a partition decree.*”

(Emphasis by us)

129. In paras 24 to 27 of the pronouncement, the court noted the extreme necessity of focussing on the early disposal of such cases as well as the early and easy securement of reliefs for which the party had approached the court. The court referred to the “*artificial division of suits into preliminary decree proceedings, final decree proceedings and execution proceedings*”. In para 26, the court noted that “*many a time, a party exhausted its energy and finances by the time he secures a preliminary decree and has neither the capacity nor the energy to pursue the matter to get the final relief*”. The Supreme Court deprecated the separation of proceedings for declaration of the right, then a separate proceeding for quantification or ascertainment of relief and another separate proceeding for enforcement of the decree as outmoded and unsuited. In para 31 it was held that the Code of Civil Procedure does not contemplate filing an application for final decree and that

after passing a preliminary decree, proceedings should be continued till final decree is passed. The Supreme Court has thus unequivocally declared the position that if the parties have no dispute on shareholdings and also agree that the property is not partible or to sell the property, then the court can straightaway direct a sale thereof without anything more. This is legally permissible.

130. On the same proposition, Mr. Anil Airi has placed reliance on yet another pronouncement of the Supreme Court reported at ***AIR 2012 SC 1586, Bimal Kumar & Anr. v. Shakuntala Debi & Ors.*** In this case, a *decree* stood passed *in terms of a compromise* which clearly showed that the parties had obtained separate and exclusive possession of properties allotted to their respective shares. The compromise thus left nothing to be done for the future. A question was raised as to whether this partition decree was the preliminary decree or a final decree? Reference was again made to Order XX Rule 18 of the CPC. The court held that the decree which stood passed *embodying such a compromise* is a *final decree*. In para 24, reliance was placed on the precedent reported at ***AIR 2003 SC 1608 Renu Devi v. Mahendra Singh & Ors.*** We extract hereunder the observations of the court in paras 25 to 28 of ***Bimal Kumar*** which are to the following effect :

“**25.** In the said case, after referring to *Civil Procedure Code* by Mulla, this Court in *Renu Devi case [(2003) 10 SCC 200 : AIR 2003 SC 1608]* , while drawing a distinction between the preliminary and the final decree,

has stated that xxx xxx xxx Thus, fundamentally, the distinction between preliminary and final decree is that: a preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in the preliminary decree which inquiry having been conducted and the rights of the parties finally determined a decree incorporating such determination needs to be drawn up which is the final decree.

26. Applying the principles laid down in the aforesaid authorities, it is graphically clear that in the case at hand, the parties entered into a compromise and clearly admitted that they were in separate and exclusive possession of the properties and the same had already been allotted to them. It was also admitted that they were in possession of their respective shares and, therefore, no final decree or execution was required to be filed. It is demonstrable that the compromise application does not contain any clause regarding the future course of action. The parties were absolutely conscious and rightly so, that their rights had been fructified and their possession had been exclusively determined. They were well aware that the decree was final in nature as their shares were allotted and nothing remained to be done by metes and bounds. Their rights had attained finality and no further enquiry from any spectrum was required to be carried out. The whole thing had been embodied in the decree passed on the foundation of compromise.

27. It is to be borne in mind that the term “compromise” essentially means settlement of differences by mutual consent. In such process, the adversarial claims come to rest. xxx xxx xxx.

28. In the present case, as the factual matrix would reveal, a decree came to be passed on the bedrock of a compromise in entirety from all angles leaving nothing to be done in the future. The curtains were really drawn

and the court gave the stamp of approval to the same. Thus, the inescapable conclusion is that the compromise decree dated 3-4-1964 was a final decree.”

(Emphasis by us)

131. Learned counsel for the respondents have also placed a pronouncement in *Renu Devi v. Mahendra Singh & Ors.* (2003) 10 SCC 200 wherein in para 9, the court observed thus :-

“9. In the case at hand, a *perusal of the decree dated 13-2-1978* and the contents of the *compromise application* with the three schedules of properties annexed thereto shows that the property was partitioned by metes and bounds; *not only the shares but the property actually falling to the share of each of the three groups were actually defined and given to the party entitled thereto.* The decree dated 13-2-1978 demarcates the properties forming the subject-matter of partition by metes and bounds. *For all practical purposes the decree dated 13-2-1978 was a final decree. Under Order 20 Rule 18 CPC it is not necessary to pass a preliminary decree; the court may pass a preliminary decree if it is required. If the rights of the parties are finally determined and no further inquiry remains to be held for the purposes of completing the proceedings in partition then there is nothing in law which prevents the court from passing a final decree in the very first instance. Often such are the cases which are based on compromise.* The present one is such a case. However, still one of the parties sought for a final decree being drawn up. The Court and the parties acted under the misapprehension that the decree dated 13-2-1978 was a preliminary decree and therefore a final decree was needed to be drawn up. As we have already stated, the final decree dated 24-5-1979 is nothing but a reproduction of the schedules contained in the preliminary decree dated 13-2-1978. The only difference is that the decree dated 24-5-1979 is engrossed

on stamp papers while the decree dated 13-2-1978 was not.”

(Emphasis by us)

This precedent reiterates the principle laid down in ***Bubna*** that, if at the first stage itself, rights of the parties are finally determined and no further enquiry remains to be held for the purposes of completing the partition, there is no prohibition to the court passing the final decree in the first instance itself. The Supreme Court has noted that this is often in cases of compromise.

132. This principle was reiterated by the Supreme Court in the judgment reported at (2003) 7 SCC 452, ***Rachakonda Venkat Rao & Ors. v. R. Satya Bai (Dead) by LR. & Anr.*** In this case, the parties were members of a family of four brothers. The widow of the eldest brother as plaintiff no.1 filed a suit for partition on 14th May, 1975 of joint family immoveable properties in the court of the District Judge. Her daughter was the plaintiff no.2. Defendants were younger brothers of plaintiff no. 1’s husband as well as members of their families. Parties arrived at a compromise during the pendency of the suit resulting in a decree dated 13th July, 1978 under Order XXIII Rule 3 on the basis of the compromise. On 20th September, 1991, the plaintiff no. 2 moved an application under Order XXVI Rules 13 and 14 praying for appointment of a commissioner to divide the properties by metes and bounds as per the said decree. The application was opposed by defendant no.1 contending that with the passing of the decree, a final partition had

taken place and no further steps remained to be taken. By the order dated 4th February, 1993, the District Judge held the application as not maintainable. In revision, the High Court treated the decree dated 13th July, 1998 as a preliminary decree and entertained the application for a final decree. The High Court rejected the contention that the decree dated 13th July, 1998 stood satisfied for the reason that satisfaction has not been recorded in accordance with Order XXI Rule 2 of the CPC. Directions were issued to the trial court to proceed with the application and take steps for passing a final decree. The Supreme Court was called upon to consider the question as to *whether the decree dated 13th July, 1998 was a final decree or only a preliminary decree?* The appeal was allowed by the Supreme Court *inter alia* holding as follows :-

“19. xxx For purposes of determination whether the said decree was a preliminary decree or a final decree or a decree partly preliminary or partly final, reference has to be made to the decree itself. It is also important to gather the intention of the parties from the compromise application because it was a compromise decree. We have already made reference to both these documents. In our view, intention of the parties is clear i.e. the entire controversy in the suit was sought to be finally settled. In a partition it is not necessary that each and every property must be partitioned and that the parties are put in separate possession of respective portions of properties falling to their share. In the present case, the parties mutually agreed to keep some of the properties joint. The reason for this is also available from the record. The properties which were kept joint were in a state that a partition by metes and bounds was not possible. Property at Serial No. 4 of Schedule I was

under acquisition and there was no point in partitioning it by metes and bounds. Regarding Property No. 6 the share of the plaintiffs had been quantified in terms of money i.e. Rs 7500 (Rupees seven thousand five hundred only) payable by the defendants and the plaintiffs were given a right to execute the decree to that extent. Property at Serial No. 7 was fully occupied by outsiders with whom litigation was going on. The fate of the litigation was unknown. Therefore, understandably, it was not partitioned. **These facts clearly show that at the time of compromise itself the parties had taken a final decision with respect to partition of all the joint family properties and the same had been given effect to. The compromise application does not contain any clause regarding the future course of action which gives a clear indication that nothing was left for the future on the question of partition of the joint family properties. The curtain had been finally drawn.**

20. The learned counsel for the plaintiff also tried to build **argument** based on the fact that the **1978 decree** has been **referred to as a preliminary decree by Defendant 1** in his reply to the plaintiff's application under Order 26 Rules 13 and 14 CPC. According to him this shows that the **defendant himself treated the said decree as a preliminary decree.** This **argument has no merit.** We have to see the **tenor of the entire reply** and a word here or there cannot be taken out of context to build an argument. xxx xxx xxx

21. ... In view of our decision that the decree dated 13-7-1978 was a final decree, the question whether there was an oral arrangement between the parties in October 1985 or there was a fresh family arrangement on 5-7-1992 becomes wholly irrelevant. **In partition matters it is always open to the parties to enter into fresh arrangement. They may even decide to be again joint with respect to the properties which means that they may throw the properties in the common pool again.**

The parties are free to adopt whatever course of action they may choose in future by way of mutual arrangement.

22. The fact that the compromise in 1978 was a final partition between the parties finds support from absence of any averment in the compromise application regarding reservation of right to the parties to seek partition with respect to properties kept joint in future. The decree as a matter of fact leaves nothing for future. As noticed earlier, in a preliminary decree normally the court declares the shares of the parties and specifies the properties to be partitioned in the event of there being a dispute about the properties to be partitioned. After declaring the shares of the parties and the properties to be partitioned, the court appoints a Commissioner to suggest the mode of partition in terms of Order 26 Rule 13 CPC. A perusal of Order 26 Rule 13 CPC shows that it comes into operation after a preliminary decree for partition has been passed. In the present case, there was no preliminary decree for partition and, therefore, Rule 13 of Order 26 does not come into operation. If the plaintiffs considered the decree dated 13-7-1978 as a preliminary decree, why did they wait to move the application for final decree proceedings for 13 years? The only answer is that the plaintiffs knew and they always believed that the 1978 decree was a final decree for partition and it was only passage of time and change in value of the properties which was not up to their expectations that drove the plaintiffs to move such an application.”

(Emphasis by us)

133. In *Rachakonda Venkat Rao*, the Supreme Court rejected the plaintiff’s arguments based on the fact that the 1978 decree had been referred to as a preliminary decree by the defendant no. 1 in a reply to the plaintiff’s application under Order XXVI Rules 13 and

14. The court held that the argument of the plaintiff that the defendant mistreated the decree as a preliminary decree was devoid of merit noting that the reply had to be seen in its entirety as also the conduct of the defendant who had been opposing the prayer in the application for passing the final decree.

134. Upon determination of shareholdings, let us also examine what is the methodology for disposition of the properties to be followed? In this regard, Mr. Anil Airi, learned counsel for the respondents has placed the pronouncement of the Supreme Court reported at (1972) 2 SCC 721, ***R. Ramamurthi Iyer v. Raja V. Rajeswara Rao***. This appeal arose out of a partition suit between Rao and Iyer who owned Odeon Cinema in Madras in equal shares. This cinema was leased to one Isherdas Sahni and Brothers. Rao filed a suit in 1965 stating that apart from other properties owned by the brother, having regard to the nature of the cinema, it was not possible or feasible or convenient to divide it into two halves by metes and bounds and a prayer was made that it to be sold by public auction and the plaintiff be paid his half share in the net proceeds. The defendants disputed the impartibility of the property and asserted that the division by metes and bounds would be just and proper. The right to invoke the “*inherent powers of the court for a decree for sale*” was denied.

135. On 26th July, 1965, the court (in ***Iyer***) appointed a commissioner for the purposes of determining various matters which would enable the court to decide the partibility of the

property. The commissioner filed a report dated 27th August, 1967 noting the defendant's suggestion to divide the property observing however, that business as contemplated by the defendant could not be started therein without detriment to the functioning of the theatre. The learned Single Judge did not give any final decision in the matter though prima facie impression had been formed upon inspection of the property that it was not capable of partition by metes and bounds. At this stage, the plaintiff made an oral request for withdrawing the suit with liberty to file a fresh suit. This request was opposed on the ground that the defendant had invoked the provision of Section 3 of the Partition Act. However, the learned Single Judge took the view that as a preliminary decree had not been passed in the partition suit, it was open to the plaintiff to withdraw the same. Permission was granted to withdraw the suit observing that he had a right to file a suit for partition at any time he pleases.

136. On 14th October, 1966, Rao sold his half share in the cinema to N.C. Subramaniam & Sons who, in turn, on 19th January, 1970, sold the same to Isherdas Sahni & Bros.(P) Ltd. Rao, who was a defendant in the original suit, filed an appeal to the Division Bench of the court for pressing the following questions :

“(1) Whether the court has an inherent power of sale of the property which is not capable of division apart from the provisions of the Partition Act and whether the plaintiff invoked only such an inherent power and not the power under Section 2 of the aforesaid Act?

(2) Whether the plaintiff having invoked the jurisdiction of the court under Section 2 of the Partition Act is entitled to withdraw the suit under Order 23 Rule 1 of the Civil Procedure Code at the same time reserving his right to file a fresh suit on the same cause of action?

(3) At what stage should the request under Section 2 be made, and

(4) Has the defendant who has invoked the jurisdiction of this Court under Section 3 of the Partition Act an indefeasible right to compel the plaintiff to sell the plaintiff's half share to him at a valuation and prevent the plaintiff from withdrawing the suit?"

The plaintiff died during the pendency of the appeal leaving a Will and by an order dated 13th October, 1967 the executor under the Will was impleaded as the second respondent.

137. On a consideration of the afore-extracted questions (in *Iyer*), the High Court expressed the following view :

“4 xxxxx The Partition Act conferred on the court in a suit for partition a power of sale in certain specified circumstances. No general power of sale could be spelt out from the provisions of that Act. It was held that Section 2 of the Partition Act had been invoked by the plaintiff and the plaintiff could not withdraw a suit in the circumstances of the present case. It was further held that the request of the defendant under Section 3(1) of the Partition Act must be inquired into by the trial Judge. Accordingly the appeal was allowed and the trial Judge was directed to restore the suit to his file and frame the necessary additional issue and proceed to dispose of the request made by the defendant under Section 3(1) of the Act in accordance with law. xxxx”

138. This matter was carried in appeal before the Supreme Court. The only question which was pressed before the court for decision was whether, in the circumstances of the case, the trial court could allow the withdrawal of the suit. The court considered the scheme of the Partition Act and observed as follows in para 8 of the judgment :

“8. xxxxx The scheme of Sections 2 and 3 apparently is that if the nature of the property is such or the number of shareholders is so many or if there is any other special circumstance and a division of the property cannot reasonably or conveniently be made the court can in its discretion, on the request of any of the shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and distribute the proceeds among the shareholders. Now where a court has been requested under Section 2 to direct a sale any other shareholder can apply for leave to buy at a valuation the share or shares of the party or parties asking for sale. In such a situation it has been made obligatory that the court shall order a valuation of the share or shares and offer to sell the same to the shareholder who has applied for leave to buy the share at a price ascertained by the court. In other words if a plaintiff in a suit for partition has invoked the power of the court to order sale instead of division in a partition suit under Section 2 and the other shareholder undertakes to buy at a valuation the share of the party asking for sale the court has no option or choice or discretion left to it and it is bound to order a valuation of the share in question and offer to sell the same to the shareholder undertaking or applying to buy it at a valuation. xxxx”

(Emphasis supplied)

139. The rival contentions noted in para 9 are also important and read as follows :

“9. A question immediately arises whether after a shareholder has applied for leave to buy at a valuation under Section 3 the other shareholder who has requested the court to exercise its power under Section 2 of ordering sale can withdraw the suit under Order 23 Rule 1 of the Civil Procedure Code. The answer to this question will depend on the nature of the right or privilege which vests in the co-sharer to seek to derive benefit of the provisions of Section 3. xxxxx On the other hand reliance has been placed by the learned counsel for the respondent on the right which inheres in the other shareholder to claim partition once an action for partition has been instituted. Even if the plaintiff does not wish to prosecute that suit or wishes to withdraw it the defendant or defendants can ask for being transposed to the array of plaintiff to have his or their share partitioned. The following observations of Crump, J. in Tukaram Mahadu Tandel v. Ramchandra Mahadu Tandel [ILR 49 Bom 672] have been cited in support of the above submission:

“But there are other and wider considerations which lead me to hold that plaintiff could not have withdrawn so as to defeat the defendants' claim. It is relevant to point out that in a partition suit a defendant seeking a share is in the position of a plaintiff and one plaintiff cannot withdraw without the permission of another [Order 23 Rule 1(4)].”

It has further been emphasised that in a partition suit the plaintiff is not wholly dominus litis and even on the assumption that Section 3 confers a privilege or an option on the shareholder who is a defendant in a suit for partition the plaintiff is debarred from defeating the

exercise of that privilege or option by resorting to the device of withdrawing a suit under Order 23, Rule 1.”

(Emphasis supplied)

140. On this aspect, our attention has also been drawn to a pronouncement of the Supreme Court reported at ***AIR 1991 SC 700 Mrs. Malati Ramchandra Raut & Ors. v. Mahadevo Vasudeo Joshi & Ors.*** In this case, a suit for partition was filed by the respondents on 17th May, 1972. It was averred that the nature of the suit property was such that the division could not be reasonably or conveniently made and that sale and distribution of the proceedings would be more beneficial for shareholders. The plaintiff prayed that properties be sold and the proceeds be distributed amongst the shareholders. The plaintiff admitted that the defendants together held one-third share and they together held two-third share in the properties. On 20th June, 1972, the plaintiffs took out a notice of motion for appointment of a receiver and injunction. In reply, the defendants stated that they were prepared to buy the shares of the plaintiff on a valuation and requested the court to direct valuation. This very statement was contained in their defence to the plaint. At this stage, the plaintiffs moved an application for amendment of the plaint to delete their averment to the effect that the properties could not reasonably or conveniently be divided and that the sale of properties and distribution of the proceeds would be more beneficial to the shareholders. This application was dismissed.

141. The learned Single Judge of the Bombay High Court (in *Raut*) noted that there was no dispute between the parties as to (i) *their respective shares*; (ii) *that the properties were incapable of division by metes and bounds*; (iii) *that they therefore had to be sold*. The learned Judge held that the defendants had exercised their right under Section 3(i) of the Partition Act to purchase the shares of the plaintiffs in the properties at a valuation, the rights between the defendants and the plaintiffs stood crystalised and concluded. He did not pass any decree in the suit but directed valuation of the properties with reference to the date on which the defendants sought leave of the court under Section 3 and ordered that upon conclusion of the proceedings, the shares of the plaintiffs in the properties could be sold to the defendants at the price so determined. We may extract in extenso the principles laid down by the court, in para 9 of the pronouncement, as to when a right to buy of the defendant crystalised the following terms :

“9. It is the duty of the court to order the valuation of the shares of the party asking for a sale of the property under Section 2 and to offer to sell the shares of such party to the shareholders applying for leave to buy them in terms of Section 3 at the price determined upon such valuation. As soon as a request for sale is made by a shareholder under Section 2, any other shareholder becomes immediately entitled to make an application under Section 3 for leave to buy the shares of the former. The right to buy having thus arisen and become crystallised, the date with reference to which valuation of the shares in question has to be made is the date on which the right arose.”

(Emphasis furnished)

142. The Supreme Court relied (in *Raut*) on the fact that there was no dispute about the extent of the shareholding of the parties and it was held as follows :

“10. The learned Single Judge rightly observed that there was no dispute about the extent of shares held by the defendants. The fact that the legal representatives representing the estate of a deceased defendant had not yet obtained probate or letters of administration did not mean that *the right which arose in favour of that defendant, upon his making an application for leave to buy under Section 3*, was a right which did not accrue to the benefit of his estate, but was postponed till the legal representatives obtained probate or letters of administration. *That right was never in abeyance; it had accrued in favour of the deceased during his life when he sought leave under Section 3 and came to be vested in his estate. That being a right of purchase, the valuation of the shares has to be made as on the date of accrual of the right, and valuation being a fact finding process must be resorted to as soon as possible after such accrual.*

11. Accordingly, the valuation, though made subsequently, has to be made with reference to the time at which the right arose which, in the present case, as found by the learned Single Judge, was on July 5, 1972 when the defendants filed their affidavit seeking leave to buy, or, at any rate, on October 9, 1972 when they filed their written statement reiterating that request. *In a case such as this, where the extent of shares held by the plaintiffs and the defendants is not disputed, the fact that the proceedings continued by reason of the appeal filed by the plaintiffs against the order refusing to allow them to amend their plaint, or for any other reason, was not relevant to the time of accrual of a right arising under Section 3. The fact that a preliminary decree may have to be passed before passing a final decree and that*

no such decree has yet been made is again not relevant, on the facts of this case, to the question as to the time of accrual of a right under Section 3.”

(Emphasis by us)

143. The defendants were thus pressing the principle that in a partition suit, the defendant seeking a share, is in the position of the plaintiff. The Supreme Court in *R. Ramamurthi Iyer* reiterated this principle in paras 10, 11 and 12 construing the effect of a party asking for a sale under Section 3 of the Partition Act and the manner in which a court has to proceed in the following terms :

“10. It seems to us that *the true position under Sections 2 and 3 of the Partition Act so far as Order 23 Rule 1 CPC, is concerned must be determined in the light of the rule enunciated by Crump, J. in the above case as that rule has seldom been doubted and there is a large body of judicial opinion to support it.* (See the cases at p. 224, Law of Co-Sharers by D.N. Guha). The various stages in the proceedings would be as follows under Sections 2 and 3 of the Partition Act:

(1) In a **suit for partition** if, it **appears to the Court** that for the reasons stated in Section 2 **a division of the property cannot reasonably and conveniently be made and that a sale of property would be more beneficial it can direct sale. This can be done, however, only on the request of the shareholders interested individually or collectively to the extent of one moiety or upwards.**

(2) **When a request is made under Section 2** to the court to direct a sale **any other shareholder can apply under Section 3** for leave to buy at a valuation the share of the other party asking for a sale.

(3) The court has to order valuation of the share of the party asking for sale.

(4) After the valuation has been made the court has to offer to sell the share of the party asking for sale to the shareholder applying for leave to buy under Section 3.

(5) If two or more shareholders severally apply for leave to buy the court is bound to order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the court.

(6) If no shareholder is willing to buy such share or shares at the price so ascertained the application under Section 3 shall be dismissed, the applicant being liable to pay all the costs.

11. A question which presents a certain amount of difficulty is at what stage the other shareholder acquires a privilege or a right under Section 3 when proceedings are pending in a partition suit and a request has been made by a co-owner owning a moiety of share that a sale be held. One of the essential conditions for the applicability of Section 2 of the Partition Act is that it should appear to the court that a division of the property cannot reasonably or conveniently be made. To attract the applicability of Section 3 all that the law requires is that the other shareholder should apply for leave to buy at a valuation. Once that is done the other matters mentioned in Section 3(1) must follow and the court is left with no choice or option. In other words when the other shareholder applies for leave to buy at a valuation the share of the party asking for a sale the court is bound to order valuation of his share and offer to sell the same to such shareholder at a price to be ascertained.”

(Emphasis by us)

144. It is well settled then, that, once the shareholders admit the shareholding and there is a request for sale of the property, the court has no option but to direct valuation thereof and proceed to sale. No separate finding by the court with regard to impartibility of the property is necessary. If a shareholder applies for leave to buy the shareholding of the other party under Section 3, the court also has to mandatorily offer to sell the share to such shareholder at the determined valuation.

Is there a format for making the request for purchasing the shares of the other party?

145. Is there formal manner for the court to record its opinion under Section 2 and the manner in which shareholders have to make request to the court for purchase of the property for effecting compliance with the requirements of Section 3 of the Act? On this aspect, the very important observations of the court in para 13 of ***R. Ramamurthi Iyer*** read thus :

“13. In the *argument* of the learned counsel for the appellant emphasis has been *laid* on the fact that in the present case the *court did not give any finding that the property was not capable of division by metes and bounds.* It is thus pointed out that the *essential condition for the application of Section 2 of the Partition Act had not been satisfied and Section 3 cannot be availed* of by the respondent unless it had first been found that the property could be put to sale in the light of the provisions of Section 2. *This submission has hardly any substance inasmuch as the trial court had prima facie come to the conclusion that a division by metes and bounds was not possible.* That was sufficient so far as the proceedings in

the present case were concerned. The language of Section 3 of the Partition Act does not appear to make it obligatory on the court to give a positive finding that the property is incapable of division by metes and bounds. It should only “appear” that it is not so capable of division. It has further been contended that the respondent had maintained throughout that the property was capable of division. He could not, therefore, take advantage of the provisions of the Partition Act. Further he never made any proper application invoking the provisions of Section 3 of the Partition Act and all that he said in his written statement, was that in case the court held that the said property was incapable of division into two shares he was ready and willing to buy the plaintiff's share in the suit at a valuation to be made in such a manner as the court might think proper. In our opinion, this was sufficient compliance with the requirement of Section 3 of the Partition Act. Section 3(1) does not contemplate a formal application being filed in every case. The words employed therein simply mean that the other shareholder has to inform the court or notify to it that he is prepared to buy at a valuation the share of the party asking for sale. In the written statement even if it was maintained that the property was not capable of division by metes and bounds the alternative prayer was necessarily made in para 7 which would satisfy the requirements of Section 3 of the Partition Act.”

(Emphasis by us)

It has been, therefore, clearly held that no formal application is necessary and that there is no obligation on the court to return a positive finding that the property is incapable of division by metes and bounds. It should only appear to the court that the property is

not capable of division. The court can proceed on the information supplied by the defendant in this regard.

If parties to the suit request for sale, is it at all necessary for the court to examine whether property partible or not?

146. Mr. Anil Airi, learned counsel for the respondents submits that the law goes to the extent of stating that if the parties request for sale, it is not necessary for the court to even examine as to whether it was possible to partition the property by metes and bounds. In support of this submission, reliance is placed on the pronouncement of the Supreme Court reported at **(2009) 13 SCC 569 Rani Aloka Dudhoria & Ors. v. Goutam Dudhoria & Ors.** wherein the Supreme Court considered the powers and obligations of a court in a case to which the provisions of the Partition Act apply. The case related to three important partible properties in relation to which the appellant had filed a suit for partition. A preliminary decree was passed in the suit declaring shares in respect of the properties between the parties. The properties were put to auction and bidding was held by the commissioner of partition. Before the Supreme Court, the validity of the sale of the properties was in question on the ground that a purported auction was held de hors the provisions of the Partition Act; that 7 out of 8 plaintiffs had no notice as regards the date fixed for auction; that the respondents-defendants in any event had not deposited the amount required within the stipulated time and as a result the auction sale was required to be set aside. We extract hereunder the

observations and the principles laid down by the court in paras 48 and 49 of the judgment which read thus :

“48. Section 2 of the Partition Act, 1893 provides that whenever in a suit for partition in which, if instituted prior to the commencement of the Act, a decree for partition might have been passed, it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made and that a sale of property and distribution of the proceeds would be more beneficial for all the shareholders, the court may, direct sale thereof subject to the condition that the request therefore had come from a shareholder or shareholders interested individually or collectively to the extent of one moiety or upwards. What therefore was necessary is that there should be a request from a shareholder; a formal prayer to that effect may not be necessary; a positive finding that the property is incapable of division by metes and bounds would (sic not) be necessary and that the property cannot be reasonably or conveniently be partitioned.

49. Section 3 of the Act envisages sale of the property within the shareholders. It unlike the provisions of the Code of Civil Procedure, does not debar a shareholder from taking part in auction inter alia on the premise that the shareholder may be interested in keeping the property to himself. A balance must be struck in regard to the individual interest of the shareholder having regard to the conflicting interest in the respective bids vis-a-vis the value of the property.”

(Emphasis supplied)

147. This judicial precedent reiterates the enunciation in *Iyer* (para 13) that only a request from a shareholder for sale of the joint

property is necessary and that a formal prayer is not essential. It also lays down clearly that it is not necessary for a positive finding by the court that the property is incapable of division by metes and bounds and that the property cannot be reasonably or conveniently be partitioned.

148. Section 2 of the Partition Act requires identification of the property, shareholders, shareholdings and a request by one of the parties to the sale. Section 2 also contains two options. It first empowers the court to suo motu direct a sale of the property and distribution of the proceeds and also enables the court to do so "*on request of the party*".

In the instant case, there was no dispute so far as the shareholding of the parties or the property is concerned. The order dated 17th November, 2011 is thus a composite order whereby the preliminary and final decrees stand merged. It fully satisfies the requirement of Section 2 of the Partition Act. The parties jointly made a request for sale of the property. As a result, the court proceeded with the exercise of valuation of the property after consideration of reports filed by both sides. All relevant material including circle rates, valuation reports, etc. were placed by both sides. A public auction was conducted at the suit premises after due publicity in newspapers and at the spot. The defendant no.2 made a formal request by way of I.A.No 17200/2013 under Order XXI Rule 89 CPC, for purchasing the property at a price higher than the successful bidder. This was accepted by the court vide

order dated 28th October, 2013. This request of the defendant and order thereon meets the requirements of Section 3 of the Partition Act. The action of the defendants and the proceedings before the learned Single Judge are unassailable being completely in consonance with law.

149. There is also substance in the submissions by Mr. Anil Airi, counsel for the defendants that the directions made on 22nd February 2012 in fact satisfy the requirements of Section 6 of the Partition Act. It is noteworthy that the order of 22nd February, 2012 directing sale of property through public auctions was never challenged by the plaintiffs.

150. In support of its submissions, reliance is placed on behalf of the plaintiffs on the judicial pronouncement of a Single Judge of this court reported at **2009 (1) AD (Delhi) 821, Sukhdev Singh Gambhir v. Amrit Pal Singh Gambhir**. In this case, the court held that there was no request by the plaintiff for sale and even if there was any request, the same stood withdrawn and or superseded by subsequent proceedings. It had not appeared to the court also that at any stage, within the meaning of Section 2 of the Partition Act, it would not be reasonable or convenient to divide the property. For this reason, the court rejected the claim of the defendant no.1 for purchase of the property. The facts in the case before us are completely to the contrary as here both parties have sought sale of the property.

Certain findings of the court squarely apply to the facts of the present case. In para 22, the court has observed that “*a request under Section 2 has to be a request to the court **either orally or in writing***”. It was also observed that Section 2 requires consideration of such request for sale of the property for reasons of the division of property being not reasonable or convenient. In para 25, the court has referred to the conduct of the defendants in that case who were claiming the sale of the property in their favour.

151. The Supreme Court has summarized the grounds of challenge in this case in para 47 thus :

“**47.** Validity of the sale of the said properties, as indicated hereinbefore, is in question inter alia on the premise that:

- (i) The provisions of the Partition Act have not been complied with.
- (ii) Seven out of eight plaintiffs had no notice as regards the date fixed for auction.
- (iii) The respondent-defendants in any event having not deposited the amount required within the time stipulated, the auction-sale was required to be set aside.”

152. In ***Rani Aloka***, one of the main grounds for challenge to the proceedings for sale was that the valuation of the suit property, directed in terms of Sections 2 and 3 of the Partition Act, had not been carried out which was violation of these statutory provisions. It was also observed that the local commissioner who effected sale of the properties had failed to issue notice to all the parties which was imperative under Order XXVI of the CPC. No court

proceedings had taken place for 13 years and no reserve price had been fixed of the properties to be auctioned which was mandatory under Section 6 of the Partition Act.

In para 54, the Supreme Court has observed that law permitted a public sale as well as an agreed inter se sale amongst co-sharers. However, the provisions of the Partition Act were required to be followed.

In paras 60 and 61, it was observed that Section 6(1) mandatorily required fixation of the reserve price. Valuation of the property in the interest of justice is to protect the rights of the properties. In para 67, reference to the conduct of the parties was made.

153. It was on account of the facts and circumstances summarized in para 47 that the court set aside the sale. The failure to issue notices as well as the breach of provisions of the Partition Act were material irregularities. The confirmation of the sale was set aside in these circumstances.

154. In the present case, every step has been carried out with the active participation of the parties. We have discussed at length, the substantive compliance with the statutory provisions, especially, the requirements considered by the Supreme Court, as noted above. Both parties agreed and requested sale of the property. Valuation was carefully carried out; publication of proclamations effected and a public auction conducted in accordance with law. The orders of

the court at every stage have attained finality. The challenge to the impugned order premised on the law laid down by the Supreme Court in this precedent is therefore, misplaced.

155. On the same aspect, Mr. Sindhwani has placed the pronouncement of the Supreme Court reported at *AIR 2007 SC 1077, Hasham Abbas Sayyad v. Usman Abbas Sayyad & Ors.* This judgment was also rendered in the facts of the case. After a passing of the preliminary decree declaring the rights and liabilities of the parties, a local commissioner was appointed who was of the opinion that the property was impartible. An auction sale was effected without any valuation to ascertain the market price thereof. The trial judge held that it was necessary to initiate final decree proceedings and the application filed by respondent no.1 was treated to be an application therefor. In para 26, the court held that the suit property was a residential house and the auction sale was wholly illegal. There was nothing in this case to show compliance of the requirements of law as contained in Rules 13 and 14 of Order XXVI and no decree had been passed under Order XXVI Rule 14(3) confirming or varying the report of the commissioner. The pronouncement in this case has no parity with the facts of the present case.

Summation of the principles from the above judgments

156. We sum up the principles laid down by the Supreme Court in the above judgments thus :

(i) *In a suit for partition, at the first stage, the court decides whether the plaintiff has a share in the suit property and is entitled to division and separate possession.*

This position is exercise of judicial function and results in a decree under Order XX Rule 18(1) termed as preliminary decree under Order XX Rule 18(2) of CPC.

The decree is termed a preliminary decree when further proceedings have to be taken before the suit can be completely disposed of. It is a final decree when such adjudication completely disposes of the suit. It may be partly preliminary and partly final. (Ref. Para 7, 10 – Shub Karan Bubna)

(ii) *If the court can conveniently and without further enquiry, make the division without assistance of the commissioner or upon agreement of the parties or **where the parties agree upon the manner of division, the court can pass a composite decree comprising the preliminary decree** declaring the rights of several parties as well as **the final decree** dividing the properties by metes and bounds in regard to immoveable properties. (Ref : **Shub Karan Bubna, para 18.2 and 20**)*

(iii) *In order to determine whether a decree in a suit was a preliminary decree or a final decree or a decree partly preliminary and partly final, reference has to be made to the decree itself. Where it is a compromise decree, the answer to this issue has to be gathered from the "intention of the parties". The intention would be gathered from the facts which would indicate as to whether anything remained to be done for the future on the question of partition of properties jointly held. (Ref : **Rachakonda Venkat Rao, paras 19 and 22.**)*

(iv) *If a division by metes and bounds **cannot be made** without further enquiry, **then first**, the **preliminary decree** shall be passed and thereafter a commissioner is appointed to physically examine the property to suggest manner of division. (Ref : **Shub Karan Bubna, para 18.2**)*

(v) *Consequential division by metes and bounds is a ministerial or administrative act requiring physical inspection, measurements,*

calculations and consideration of various permutations/combinations/alternatives of division which is referred to the collector/local commissioner under Order XXVI. This duty in the normal course of the proceedings before the court is a continuation of the preliminary decree.

*(vi) If only a preliminary decree is passed at the first stage, no separate application is necessary for passing of a final decree. (Ref: **Shub Karan Bubna and Bimal Kumar**)*

*(vii) On receipt of the report of the commissioner and hearing objections thereto, the court passes the final decree whereby the relief of separating the property by metes and bounds is granted. (Ref: **Shub Karan Bubna, para 18.2**)*

*(viii) In a partition suit, a final decree can be in the form of a decree passed on a compromise between the parties in its entirety leaving nothing to be done in the future. (Ref: **Bimal Kumar, paras 26 and 28**)*

*(ix) In a partition suit, under Section 2 of the Partition Act, having regard to the nature of the property or large number of shareholders or in other special circumstance, if it appears to the court that the division of the property cannot reasonably or conveniently be made and that a sale of the property would be more beneficial, it can direct sale of the property and distribution of the proceeds as per shares declared. In addition, the court may be requested to direct sale by shareholders, interested individually or collectively to the extent of one moiety or upwards. (Ref: **Shub Karan Bubna, para 18.2 and R. Ramamurthi Iyer, para 8**)*

*(x) It is not obligatory on the court to give a positive finding that the property is incapable of division by metes and bounds. It should only, "**appear**" that it is not so capable of division. Parties may jointly agree to such dispossession of the property. (Ref: **R. Ramamurthi Iyer, para 13**)*

*(xi) The request from the shareholder (s) for sale of the property does not have to be in the nature of a formal prayer. (Ref: **Rani Aloka Dudhoria, para 48; R. Ramamurthi Iyer, para 13**)*

*If a party or co-sharer asks for sale of a property under Section 2 of the Partition Act, it is the duty of the court to order the valuation of the shares (Ref.: **Malati Ramachandra Raut**).*

*(xii) The words employed in Section 3(1) only require the shareholder has to merely inform the court or to notify to it that he is prepared to buy at a valuation the share of the party asking for sale. No formal application for the purpose is necessary (**R. Ramamurthi Iyer**).*

*It is obligatory upon the court to offer to sell the same to the shareholder(s) who seek to buy the shares of the other party in terms of Section 3 at the price determined upon such valuation. The court has no discretion or option or choice in this matter. (Ref : **Malati Ramchandra Raut, para 9; R. Ramamurthi Iyer, paras 8 and 11**)*

*(xiii) The right of a co-sharer to purchase a property directed to be sold under Section 3 of the Partition Act accrues on the date the co-sharer request the court to sell the property to him. The valuation of the shares has to be made on the date of accrual of this right. (Ref : **Malati Ramchandra Raut, para 10**)*

*(xiv) In a partition suit, the plaintiff is not wholly dominus litis. After a shareholder has applied for leave to buy at a valuation under Section 3 of the Partition Act, the plaintiff who requested the court to exercise the power under Section 2 of ordering the sale, cannot withdraw the suit under Order 23 Rule 1 of the CPC. (Ref : **R. Rmamurthi Iyer, paras 9 and 10**)*

*(xiii) In partition matters, it is always open to the parties to enter into a fresh arrangement including a decision to be again joint with respect to the properties meaning thereby that they may throw the properties in the common pool once again. (Ref : **Rachakonda Venkat Rao, para 21.**)*

Conclusion

157. The plaintiffs before us have contended that the essential conditions for application of Sections 2 and 3 have not been satisfied. It is submitted that it was the case of the respondents that the partition by metes and bounds stood effected between the plaintiffs on the one hand and Sh. S.P. Kumria on the other hand and that they had acquired the divided share of Sh. S.P. Kumria in the suit property. Mr. Sanjeev Sindhvani, learned Senior Counsel for the plaintiffs submits that if as per the defendants, the property stood partitioned by metes and bounds, it could not be re-partitioned. It is also contended that the proceedings of the learned Single Judge do not meet the mandatory requirements of Section 3 of the Act in as much as there is no specific finding that division by metes and bounds was not possible.

158. In the present case, there is no dispute to the averments made in the plaint. No written statement came to be filed. On the contrary, it is the case of the plaintiffs that the defendants purchased the 50% shareholding of Sh. S.P. Kumria. It is the categorical and repeated stance of the appellants that they owned only 50% of the suit property. In the prayer clause, the plaintiffs seek partition of the property and entitlement to fifty per cent share, against the defendant.

159. We have noted above the principle that a co-owner can *seek that the property be treated joint*. On 17th November, 2011, both parties i.e. the joint owners of the property, agreed and made a

request for sale of the suit property. It is inherent in such request that the property was not capable of partition by metes and bounds. This position was reiterated by the plaintiffs as well when they specifically stated that they did not have the means to purchase the share of the respondents and demanded a sale by public auction. Furthermore, in the face of such request (as held in ***Rani Aloka Dudhoria***), it was not necessary for the learned Single Judge to formally record that the property was impartible.

160. In any case, sale of portion of joint property by a co-sharer as Shri S.P. Kumria in the case in hand, has to be treated as sale only to the extent of his shareholding and nothing beyond. Both parties have so admitted before the learned Single Judge and so proceeded in the matter.

161. In the present case, there was no dispute to the shareholding of the parties as stated in the plaint. In fact, the plaintiffs, treating the joint property as impartible, were desirous of sale of the property and apportionment of the shares as informed to the court on 17th November, 2011.

162. We find that there is no legal prohibition to passing of the composite order encompassing a preliminary and final decree. No separate preliminary or final decree is required to be passed.

163. As a result of the above discussion, it has to be held that the order passed on 17th November, 2011 was a composite decree in accordance with Section 8 of the Partition Act encompassing the

requirements of Section 2 as well as Section 3. Thereafter only the ministerial acts of auction and disbursement of money remained.

164. The conduct of the plaintiffs in the present case, also amplifies the fact that they have so treated the order dated 17th November, 2011 and on this basis, proceeded in the matter. The plaintiffs have accepted the validity and bindingness thereof as well. There is therefore, full compliance with the requirements of law.

165. The plaintiffs participated in the public auction by submission of the two valuation reports of the property dated 19th May, 2012, one including and the second excluding, the value of the first floor of the property. Not only this, aggrieved by the order of the Registrar General fixing the reserve price of the suit property at ₹15 crores, the plaintiffs filed I.A.No. 22586/2012 seeking fixation of the reserve price at ₹25 crores. The application was dismissed by an order dated 17th December, 2012. The challenge to this dismissal was carried up to the Supreme Court by way of SLP (Civil) No. 8971/2013, which came to be dismissed by order dated 04th March, 2013.

166. The principles laid down in judicial pronouncement (in ***R. Ramamurthi Iyer***) completely negate the contentions of the plaintiffs before us. In the instant case, after being a party to the order dated 17th November, 2011; participation in the auction of the property; the exercise of the option to purchase the share of the plaintiff by the defendant, a co-sharer, under Section 3 of the

Partition Act as well as under Order XXI Rule 89 CPC to offer a price above the highest bid; the defendant having paid to the successful bidder in terms of Order XXI Rule 89(s) and deposited the full amount ordered, the plaintiffs seek dismissal of the suit before us! This prayer is premised on an perceived stand attributed to the defendants, even though no written statement controverting the plaint has been filed. This is not legally permissible.

167. There is another reason why the prayer for dismissal of the suit at the instance of the plaintiffs cannot be granted. In a partition suit, plaintiff is not dominus litus who can withdraw the suit without permission of the other. Once shareholder has sought leave to purchase the shareholding of the party seeking sale of the property, it is the duty of the court to effect valuation of the shares and offer to sell the shareholding to such co-sharer (Section 3). This being the position, a court in a partition suit certainly cannot accede to a prayer of the plaintiff to dismiss the suit on the basis of a non-existent pleading of the defendant.

168. The orders of the learned Single Judge and the record manifest full compliance with every requirement of law.

V. Submission that plaintiffs' application for amendment of plaint was pending – effect thereof

169. Before us, Mr. Sindhvani, learned Senior Counsel has submitted that the impugned order cannot stand as the plaintiffs'

application for amendment of the plaint being I.A.No.13648/2007 was pending from 2007.

170. It is noteworthy that by way of I.A.No.13648/2007 despite seeking to incorporate also a challenge that the sale dated 17th October, 2001 executed by Late Shri S.P. Kumria in favour of defendant no.1 was illegal, non-est, null and void, as prayer 'b', the plaintiffs sought a preliminary decree declaring that it had half share in the said property and a final decree of this share in its favour and against defendants regarding the partition of the property. Therefore, even by the prayer made in this application, the plaintiffs admitted that they as one group and the defendant as the other were entitled to 50% share each in the property. In this application, they only had objection to the identification of the portion specified in the document as forming part of the half share of Shri S.P. Kumria.

171. In the first suit being CS(OS)No.2307/2001, the plaintiffs asserted only pre-emptory right to purchase the property from the defendants under Section 22 of the Hindu Succession Act on the same terms and conditions on which it had been sold to them. They never questioned that the defendant no.1 had purchased the rights, title and interest of Mr. S.P. Kumria in the suit property. Even after filing their amendment application I.A.No.13684/2007, the plaintiffs at no point of time have questioned either the share holding or the right of Shri S.P. Kumria to sell his portion of the property.

172. There is yet another very important aspect of the matter which establishes the dishonesty of the present challenge. In the present case, the plaintiffs had knowledge about the sale effected by Shri S.P. Kumria to the defendant no.1 as back as in the year 2001 when he filed the first suit. Full details of the sale deed, the serial number and page numbers from the Office of the Registrar of Documents; the sale consideration are stated in the plaint in CS(OS)No.2307/2001.

173. The plaintiffs stood also apprised of the sale deed executed by defendant no.1 to defendant no.2.

174. For the first time, by way of I.A.No.13648/2007, the plaintiffs sought amendment of the plaint to incorporate a challenge to the sale deed of 2001. It is well settled that limitation for seeking declaration or cancellation of a registered sale deed is three years from the date when facts entitling the plaintiffs to have the instrument cancelled or set aside first became known to him (**Ref.:** Article 59 of the Schedule to the Limitation Act). The challenge to a sale deed of 2001 laid in 2007 would be hopelessly barred by limitation, more so when the plaintiff knew of the sale deed in 2001 itself, when the first suit [CS(OS)No.2307/2001] was filed. This legal position is so well settled that it does not need any elaboration.

175. The proposed amendment as contained in this application has the effect of withdrawal of the admission on the part of the plaintiff that the defendant was a co-owner of the property. The

same is legally impermissible. Apart from the admission contained in the plaint. The relief sought in the prayer clause 'b', the plaint itself tantamounts to admission of the co-ownership of the defendants of the suit property.

176. Mr. Airi has placed the judgment reported at **2013 SCC OnLine Del 3832, Sarla Aggarwal v. Shri Ashwani Kumar Aggarwal** wherein the court also considered the belated application for amendment which had been filed by the plaintiff in September, 2011 to challenge a sale deed executed by defendant no.1 in favour of defendant no.2 on the 24th of December 2007. The application was therefore, filed after about four years of the transfer. The court rejected the application observing that it was not a case where the transfer came to the knowledge of the plaintiff only around the time she filed the application and it was held that the proposed amendment was not only unnecessary but also malafide, intended only with a view to delay the progress of the suit.

177. The amendment by the plaintiffs filed in 2007 seeking to challenge the sale of 2001 was not maintainable and filed malafide only with a view to delay the progress of the suit. In the order dated 22nd September, 2010, it was observed that this application was filed three years back and the proposed plaint could not be found on record. This application was filed as a ruse to actually bring the proceedings in the suit to a halt as would be evidenced from the proceedings detailed above. For this reason, the application was not pressed by the plaintiffs at any point of time.

178. On the 17th of November 2011 and thereafter, I.A.No.13648/2007 seeking to amend the plaint to include a challenge to the sale deed dated 17th October, 2001 was pending.

179. Yet the plaintiffs clearly agreed that auction sale was to be of the suit property. The plaintiffs were absolutely clear about the full extent of the property being sold. There was no manner of doubt that plaintiffs and defendants had each fifty per cent share in the property being auctioned, irrespective of what may have been claimed. On the suit record, the plaintiffs also accepted the fact that they had no right also in the first floor sold by them on 27th March, 1998. The first floor of the suit property was not to be part of the auction.

180. Given the fact that the plaintiffs were actively participating in the sale of the suit property, it is obvious that they were not interested in pressing I.A.No.13648/2007 whereby amendment of the plaint to incorporate a challenge to the sale deed dated 17th November, 2001, had been sought. This application was rendered infructuous in view of the steps taken by the plaintiffs towards the sale of the property. Consequently, on 22nd March, 2013, this application was so dismissed.

The plaintiffs have accepted the correctness of this dismissal. No appeal was filed against it. It is painful that submissions contrary to well settled legal principles are pressed before court of law.

VI. Appellant's submissions that jurisdiction on a court cannot be conferred by consent, acquiescence, waiver, estoppel

181. It has been urged at some length before us that all orders and proceedings in the suit are open to a challenge at any time and in any proceedings. Learned Senior Counsel for the appellants contend that the consent of the appellants or acquiescence in the proceedings before the learned Single Judge is immaterial as the defendants played a fraud upon the court. Reliance has been placed on Section 105 of the CPC by the plaintiffs to urge that it is legally entitled to assail the orders passed before 15th May, 2014, at any time and in any proceedings, especially before the appellate jurisdiction of this court. Our attention is drawn also to the provisions of Order XLIII Rule 1A of the CPC. It is submitted that such right is available as the orders are based on a “*fraud*” played by the respondents as well as on account of “*mistake and misconception*” of the factual and legal situation of the case on the part of the appellants.

182. In support of the submission of parties that jurisdiction cannot be conferred on a court by consent, acquiescence, waiver, estoppel, reliance has been placed by the plaintiffs on the judgment of Supreme Court reported at ***1995 Suppl. 4 SCC 544 Association of Engineering Workers v. Dockyard Labour Union & Ors.; (1995) 5 SCC 440 Bhagwant Rai & Ors. v. State of Punjab & Ors.***

183. In the judgment of the Supreme Court reported at **1995 (5) Suppl. 4 SCC 544, *Association of Engineering Workers v. Dockyard Labour Union***, the court was concerned with compliance with Section 12 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 relating to recognition of a union. An application in this regard was required to be made to the Industrial Court under Section 11 of the Act for registration of a recognized union for an undertaking. Section 12 of the statute required that on receipt of such an application for recognition, the Industrial Court was to conduct a preliminary scrutiny to ascertain whether the application was in order and thereafter mandatorily a notice had to be displayed on the notice board of an undertaking declaring intention to consider the application on the dates specified in the notice and calling upon other unions, if any with the undertaking, to show cause, within a prescribed time, as to why the recognition should not be granted to an applicant union. Instead of complying with this mandatory requirement, with the consent of the parties, the Industrial Court resorted to a ballot of the workers. The Supreme Court declared that such consent cannot cure the illegality of substitution of the procedure by one not prescribed by the Act. In the present case, no statutory violation could be substantiated by the plaintiffs. There is no parity between the facts of this case and the present case.

184. In **(1995) 5 SCC 440, *Bhagwant Rai & Ors. v. State of Punjab & Ors.***, it was contended that there is no estoppel against a

statute and even an admission wrongfully made is of no consequence. This case related to assessment of property tax which as per law had to be based on standard rent expected to be received under the relevant rent law and on the actual rent received by the landlord from the tenant. An admission by the landlord that he was prepared to pay the tax on the basis of the actual rent, cannot estop him from questioning the assessment made by the authorities on the basis of the actual rent. This is for the reason that when statute prescribes a particular mode for determining annual rent, assessment has to be done in that manner alone and there cannot be any estoppel against the statute.

For the same reason, the pronouncement reported at **(1970) 3 SCC 181, *Ferozi Lal Jain v. Man Mal & Anr.*** wherein a decree of eviction passed on consent and compromise between the parties was set aside on the ground that it was in contravention of the rent control enactment.

185. On the question of jurisdiction, the Supreme Court, in a pronouncement reported at **(2005) 7 SCC 791, *Harshad Chiman Lal Modi v. DLF Universal Ltd.*** has held thus:

“30. We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of

issues. *The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage.* Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity.”

186. The above judgments deal with substantive objections, violations and issues going to the root of exercise of jurisdictions by the courts and not to the matters which were the subject matter of the orders passed by the learned Single Judge in the present case.

187. The appellants have also not explained as to how the learned Single Judge did not have jurisdiction either territorial or pecuniary or over the subject matter.

It is the admitted case of both parties that each have 50% shareholding in the property. Both parties expressed total consent for sale of the property and all orders stem therefrom. The appellants do not show which admission was wrongfully made by the plaintiffs to which it is being held bound? The appellants are also unable to show which statute is violated.

188. Mr. Sanjeev Sindhvani, learned Senior Counsel for the appellants has relied upon the pronouncement of the Supreme Court reported at *(2012) 5 SCC 265, C.N. Ramappa Gowda v.*

C.C. Chandre Gowda. In this case, a challenge was laid to the order dated 5th October, 2010 passed by a Division Bench of the High Court of Karnataka accepting the respondent's/*defendant's appeal*. It appears that the *appellant's suit for partition* had been *decreed* by the trial court under Order VIII Rule 10 of the CPC for *non-filing of the written statement by the defendant*. The Supreme Court accepted the challenge for the reason that the decree was passed by the trial court without entering into the merits of the plaintiff's case and without directing it to lead evidence in support of the case, in the absence of the written statement. So far as the decree of the trial court was concerned, the court observed that there was no consideration by the trial court as to why it believed the documents relied upon by the plaintiff. No reason had been recorded as to whether the property was ever partitioned among the coparceners. The Supreme Court reiterated the well settled legal dictum that "*assertion is no proof and hence the burden lay on the plaintiff to prove that the property had not been partitioned in the past even if there was no written statement to the contrary or any evidence of rebuttal*".

189. It is noteworthy that in **C.N. Ramappa Gowda**, the decree was challenged at the instance of the defendants against whom the decree stood passed under Order VIII Rule 10 CPC for not filing its defence. Before the Supreme Court, the defendant explained the reasons for the default for not filing the written statement. In the present case, the orders have been passed with the consent of both

sides. The defendant did not file a written statement and has permitted finalization of the auction sale which in effect is a decree in terms of the plaint. The defendant has not challenged the claim of the plaintiff or the orders of the court. Despite having got the decree prayed for by them, it is the plaintiffs in the present case who seek to challenge the order issuing the sale certificate, clearly manifesting their dishonesty and malafide. The appellants have no grounds at all to raise the challenge in the present case.

The judgment in *C.N. Ramappa Gowda* has clearly, no application to the present case.

190. In support of this submission reliance is placed on the pronouncement of the Supreme Court reported at *AIR 1960 SC 941 : (1960) 3 SCR 590, Satyadhyan Ghosal & Ors. v. Deorajin Debi (Smt.) & Anr.*

In *Satyadhyan Ghosal*, the Supreme Court was concerned about the applicability of the principles of res judicata to an order of remand. The Supreme Court held that the same was in the nature of interlocutory judgment which did not terminate the judgment and therefore, the correctness thereof could be challenged in an appeal from the final order. The plaintiffs contend that prior proceedings did not culminate in adjudication or decision upon the rights and therefore principles of res judicata are not applicable. To say the least, this submission is completely misconceived.

191. In the present case, the learned Single Judge, with the consent of the defendants, has accepted the case of the plaintiff. The order recorded on 17th November, 2011 is in the nature of a decree in favour of the plaintiff. The plaintiff accepted the validity and bindingness thereof and has not assailed the same on the limited issue of the extent of the property which should be considered therein. The plaintiff accepted the adjudication on its application being I.A.No.9460/2012 whereby it sought to include the first floor of the property. This portion of the property was sold by the appellants along with Late Shri S.P. Kumria vide a Sale Deed as back as on 27th March, 1998. This sale deed was not the subject matter of any issue in the 2001 suit filed by it or the plaint filed in 2006. The pronouncement in *Satyadhyan Ghosal* has no application to this case.

192. Before us, the plaintiffs have actively and fully participated in each and every stage of the auction sale. In fact, the mode of the sale was adopted on their specific submission. At the first instance, the court had directed inter se bidding between the parties. The appellants on 8th February, 2012 made the submission that they did not have the financial resources to purchase the share of the defendants. The court had directed a public auction on the next date i.e. on 22nd February, 2012. The plaintiffs have thereafter energetically engaged in the valuation of the property and fixation of the reserve price. At one stage, they stated that they had

identified a purchaser at a price above the highest bid. Several adjournments were taken to bring him to court.

193. I.A.No.22586/2012 was filed by the appellants regarding fixation of the reserve price. The appellants carried the challenge to the reserve price up to the Supreme Court of India. By I.A.No.10059/2012, the appellants sought extension of time for filing the valuation report and prayed for taking it on record. The appellants had submitted that there was delay of three days on account of sickness of appellant no.1. They have filed multiple valuation reports and then on 14th of August 2012 informed, which one should be looked at. The reserve price was fixed upon consideration of the circle rates and material placed by the appellants before the learned Single Judge.

194. The dates of the auction were fixed five times in the presence of the plaintiffs and with their consent.

The proclamation notices were finalized in accordance with law with the active participation of the plaintiffs; published in well known newspapers and were affixed on the suit property. Finally, the auction on 26th July, 2013 was conducted after inspection of the property by the court auctioneer as well as the inspection of the suit property by the bidders. The plaintiffs duly facilitated the same. The auction was held on the spot in the presence of the plaintiffs. No objection at all was laid.

195. The only orders which were subject matter to appeals were the orders dated 17th November, 2011, 14th May, 2012 and 18th May, 2012 by way of FAO(OS)Nos.277/2012 and 279/2012. These appeals were unreservedly withdrawn on 6th July, 2012. The plaintiffs challenged the order dated 17th December, 2012 challenging the fixation of the reserve price by way of SLP(C)No.8971/2013 which was dismissed on 4th March, 2013. The order dated 8th May, 2013 with regard to the reserve price was challenged by FAO(OS)No.338/2013 which was withdrawn with liberty on 29th August, 2013. The challenges to the reserve price were based on the order dated 17th November, 2011. The outcome thereof has been accepted by the plaintiffs. It is not open to the plaintiffs to re-agitate challenges to those orders or assert that orders accepted by them and fully complied with were illegal.

196. The appeal has been carefully drafted after the passing of the order dated 15th May, 2014 directing issuance of the sale certificates to the defendants. As ordered on 28th October, 2013, the defendants have paid the amount of ₹13,06,250/- to the successful bidder which includes 5% of its deposit in the auction sale in accordance with Order XXI CPC. Further, the defendant has deposited the sum of ₹20,00,000/- in terms of the court orders dated 15th May, 2014. There is not a whisper of challenge to any of these orders in the appeal.

197. A court fee of only ₹20/- has been affixed on the memorandum of appeal challenging the order dated 15th May,

2014. It is not open to the plaintiffs in the facts of the instant case to expand the scope of the present appeal by way of laying an oral challenge thereto.

198. The plaintiffs rely on the pronouncements reported at **(2009) 157 (DLT) 272, East End Apartments Co-Operative Group Housing Society v. Delhi Development Authority & Anr.** and contend that such order is a nullity and non-est in the eyes of law which can be challenged in court at any time.

199. We find that no details of the fraud played by the respondents have been pleaded or placed before us. A vague submission that the appellants have made a mistake or had misconception of the factual and legal situation of the case is urged. Again no details of either the mistake or the misconception have been pointed out. The appellants in fact have never made any such submission at any stage of the proceedings before the learned Single Judge. We therefore, see no illegality in the proceedings conducted before the learned Single Judge or merit in this backhanded challenge.

200. It is unfortunate that in the written submissions of the appellants a surreptitious attempt has been made to expand the scope of consideration by this court. The appellants have challenged specifically only the order dated 15th May, 2014 whereby the learned Single Judge directed issuance of the sale certificates in favour of the defendant no.2. There is no challenge at all to any other order or stage in the sale of the property.

201. In the oral submissions before us also, the plaintiffs have sought to challenge every order passed by the court before the impugned order dated 15th May, 2014 even though there was no challenge to those orders and they have attained finality. This is completely impermissible. The legality and correctness of these orders, including the orders dated 29th May, 2012 and 23rd March, 2013, were accepted by the plaintiffs and they have attained finality.

202. We note one more submission pressed by the defendants. The plaintiff has filed the instant appeal assailing an order dated 15th May, 2014. The Code of Civil Procedure permits the appeals to be filed against the orders which have been detailed under Section 104 of the CPC. Clause (i) of sub-section 1(i) of Section 104 specifically stipulates that an appeal would lie from any order made under the Rules from which an appeal is expressly allowed by Rules. So far as the Rules are concerned, it is necessary to refer to Order XLIII which is concerned with appeals from orders. So far as orders under Order XXI of the CPC is concerned, Clause (j) of Rule 1 of Order XLIII stipulates that an appeal would lie only against an order under Rule 72 or Rule 92 of Order XXI setting aside or refusing to set aside a sale. The plaintiff's application seeking setting aside of the sale came to be rejected by an order dated 30th May, 2014. No appeal was filed against this order which has attained finality. The order dated 15th May, 2014 (which merely directed issuance of a sale certificate) has been assailed by

way of the present appeal. Such an order may not be appealable in view of the mandate of Section 104(1)(i) and Order XLIII Rule (1)(j) of the CPC.

203. It could be urged that in view of this position, the appeal deserved to be rejected on this short aspect. However, the appellants would rely on Section 10 of the Delhi High Court Act to support maintainability of the present appeal.

204. Detailed submissions stand first made before us by both parties before this objection was raised. Given the conduct of the appellants, if the appeal was rejected on this ground, the question of maintainability of the appeal above would have led to protraction of the litigation. In the interests of justice, it was essential to set down the legal position pressed before us.

We are refraining from adjudicating on this objection of the respondents.

205. For all these reasons, the instant appeal has to be confined to the challenge to the order dated 15th May, 2014. The plaintiffs cannot expand the scope thereof.

VII. How is the court to proceed after dismissing objection to an auction?

206. In the present case, I.A.No.15051/2013 was filed by the plaintiffs under Order XXI Rule 90 CPC in the nature of objections to the auction sale of the property on 26th July, 2013. This

application was dismissed on the 3rd of October 2013. The order dated 3rd October, 2013 has not been challenged anywhere. How was the learned Single Judge to proceed in the matter? What directions must a court issue once it concludes that the objections to auction sale are without merit?

207. We note here that the defendants filed an application being I.A.No.17200/2013 dated 25th October, 2013 under Order XXI Rule 92(2) and sought payment of 5% of the bid amount to the highest bidder. This application was allowed on 28th October, 2013. In view of the provisions of Order XXI Rule 92(1), the moment the plaintiff's application under Order XXI Rule 89 was rejected, the sale had to be confirmed.

208. Light on this aspect is thrown by judicial pronouncements, some of which have been placed by Mr. Anil Airi, learned counsel for the defendants before us.

209. In **151 (2008) DLT 91, Polychem Ltd. v. Bhushan Grover**, the learned Single Judge was considering the sale of property of a judgment debtor through proclamation of the court. It was observed that the provisions of Order XXI Rule 92 were imperative and that under sub-rule 1 thereof, the court has to confirm the sale in which event, it would become absolute. The contingency where the court stands relieved of such obligation would be where an application under Rule 89 setting aside the sale was made which required deposit of the amount by the person claiming interest in the property sold (Rule 89). The second contingency is on grounds

of fraud or irregularity in the sale (Rule 90). The third contingency noted by the court was under Rule 91 whereby the purchaser made an application for setting aside the sale on the ground of the judgment debtor not having saleable interest.

210. Our attention has been drawn to a pronouncement of the Supreme Court reported at *(2012) 13 SCC 568, Ram Karan Gupta v. J.S. Exim Ltd. & Ors.* wherein the court has construed the scope of Order XXI Rules 84, 85 and 89(1)(a) of the CPC. The court held that the deposit of the bid amount which ran into crores of rupees by demand drafts was proper compliance of the law. So far as an application by a judgment debtor to set aside execution of the sale is concerned, the court held that the deposit of 5% of the purchase money was a condition precedent and the judgment debtor not having been effecting this deposit while filing the application for setting aside execution of the sale, it was held that the application as well as the belated offer of the appellant for payment of the entire amount was rightly rejected by the executing court as confirmed by the high court. It is also noteworthy that in para 17 of this pronouncement, so far as an order for sale of property under the Partition Act, 1893 is concerned, the court held that the same was a “deemed decree” under the Code. We may usefully extract paras 17 and relevant portion of para 18 hereunder:

“17. This Court in *Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel* [AIR 1968 SC 372] held that the rule is intended to confer a right upon the judgment-debtor, even after the property is sold, to

satisfy the claim of the decree-holder and to compensate the auction-purchaser by paying him 5% of the purchase money. In *Challamane Huchha Gowda v. M.R. Tirumala* [(2004) 1 SCC 453] this Court held that it gives a final opportunity to put an end to the dispute, at the instance of the judgment-debtor before the sale is confirmed by the executing court and enables him to save his property. ***Order 21 Rule 89 CPC is, therefore, intended to: (i) to save the judgment-debtor from the threatened deprivation of his property, (ii) to satisfy the claim of the decree-holder, and (iii) to compensate the auction-purchaser.*** Rule 89 of Order 21 CPC also applies to a sale in execution of a decree for payment of money and an ***order of sale of property under the Partition Act, 1893*** is a ***deemed decree under the Code*** and, therefore, an application for setting aside sale in execution of such decree is maintainable. It also applies to a decree passed in terms of an award in a partition suit, so also to a sale in execution of mortgage decree.

18. Order 21 Rule 92 CPC provides for confirmation of sale, as also setting aside the sale, which reads as follows:

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Sub-rule (1) of Rule 92 deals with cases where no application to set aside the sale is made or such an application is made and disallowed. In all these cases, the Court shall make an order confirming the sale. Sub-rule (2) of Rule 92 covers those cases where an application for setting aside is made and allowed or in an application under Rule 89 requisite deposit has been made, in all such cases, the Court is bound to set aside the sale.”

(Emphasis supplied)

211. It needs no repetition that the order dated 17th November, 2011 ordering sale of the property is a deemed decree. The

appellant's challenge thereto by way of FAO(OS)No.279/2012 was withdrawn on 6th of July 2012. It has since attained finality.

212. The plaintiffs filed I.A.No.15051/2013 under Order XXI Rule 90 CPC challenging the auction without even offering to deposit 5% of the bid amount, clearly a pre-condition (**Ref.: *Ram Karan Gupta***). The application was also therefore, rightly rejected by the order dated 3rd October, 2013.

The plaintiffs have thus accepted the legal position that the order dated 17th November, 2011 and that the procedure prescribed under the CPC for sale of the property in accordance with the Partition Act was being followed.

213. Mr. Anil Airi, learned counsel for the respondents has referred to the pronouncement of the Calcutta High Court reported at ***AIR 1978 CALCUTTA 589, Life Insurance Corporation of India v. Subkaran Mohansaria & Ors.*** wherein also the court reiterated the requirement of law that if an application for setting aside the execution sale is dismissed, the court has no option but to confirm the sale. It was also further noted that no separate application was necessary for this purpose. Reliance was placed on the pronouncement of the Supreme Court reported at ***AIR 1968 SC 86, Hukumchand v. Bansilal*** in para 10 wherein it was made clear that “where no application is made under Rule 89 or 90 or 91 of Order XXI or where such application is made and disallowed, the court shall make an order confirming the sale and thereupon the sale shall become absolute”. In para 10, the Calcutta High Court

also relied on a judgment reported at *AIR 1967 SC 608, Janak Raj v. Gurdial Singh* wherein the court had observed that where the application for setting aside the sale was either not made or if made, was disallowed, “*the court has no choice in the matter but to confirm the sale and the sale must be made absolute*”.

214. In the pronouncement reported at *(1987) 3 SCC 146 Ganpat Singh v. Kailash Shankar*, the Supreme Court observed thus:

9. ... Such an application has also to be made within the prescribed period of limitation of sixty days from the date of sale under Article 127 of the Limitation Act, 1963. Article 134 prescribes a limitation of one year for an application for delivery of possession by a purchaser of immovable property at a sale in execution of a decree

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12. ... Under Order 21 Rule 92 where no application is made under Rule 89, Rule 90 or Rule 91 or where such application is made and disallowed, the court shall make an order confirming the sale, and thereupon the sale shall become absolute. It is submitted by the learned Counsel that it is not correct that the sale becomes absolute only under the circumstances as mentioned in Rule 92, and that apart from the provisions of Rules 89, 90 and 91 of Order 21 of the Code, an auction sale can be challenged on grounds other than those mentioned in the said rules. Counsel submits that if an application for setting aside sale is made and disposed of, the sale will become absolute after the disposal of such application, even though the application is not one as contemplated by Rule 89, 90 or 91 of Order 21 of the Code.

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14. ... No provision of the Code has been pointed out to us under which a sale can be set aside apart from the provisions of Rules 89, 90 and 91 of Order 21 of the Code. There can be no doubt that when an application

for setting aside the sale is made, the order passed by the executing court either allowing or dismissing the application will be final and effective subject to an appeal that may be made under the provisions of the Code. It is inconceivable that even though no appeal has been filed against an order dismissing an application for setting aside the sale another application for setting aside the sale can be made without first having the order set aside. Such an application will be barred by the principle of res judicata.

215. In view of the above, on the 3rd of October 2013 upon the rejection of the challenge to the auction, the requirements under Order XXI Rule 92 stood satisfied. The respondent validly exercised the option to better the bid and pay the amount equivalent to 5% of the bid to the bidder.

216. The respondents before us have also placed the pronouncements of the Supreme Court reported at **(2006) 2 SCC 608, *Philomina Jose v. Federal Bank Ltd. & Ors.*** wherein the court was considering the effect of passing of a final decree in a foreclosure suit under Order XXXIV of the CPC on the mortgager's right of redemption. It was being urged in ***Philomina Jose*** that there was no final decree in the case and the right of the mortgager to redeem the property was available to him till confirmation of sale in pursuance to the decree. The high court had held that by passing of the decree of sale, the mortgage security merged into the decree and thereafter the right to redemption is not available. On this aspect, akin to the present case wherein the defendants have urged that the order of the court recorded a

composite decree, in para 13 of the judgment, the Supreme Court rules thus :

“13. xxx xxx *Composite decrees* were passed in both under Order 34 *Rules 4 and 5 together*. Those were the provisions in regard to enforcement of mortgages, and *whatever may be the wording of the decree*, they *shall be deemed to be passed under Order 34 Rule 5* as it stood at the time of the passing of the decree. It is not necessary that all the clauses mentioned in the provisions under which the decree is passed should be incorporated in the decree. *While interpreting such a decree, it must be read as if all the provisions therein are incorporated in the decree*. The court may not at the time of passing of the decree, be aware as to which contingency will happen in future. Each of the decrees was under Order 34 Rule 5 of the Code as it stood before 20-11-1990.”

(Emphasis by us)

217. In the present case as well, the plaintiffs have invoked the jurisdiction of the court under Partition Act. A question is raised that there is non-compliance with the requirements under Sections 2 and 3 of the Partition Act. The order dated 17th November, 2011 does not mention any provision under which it is passed. In the light of the principles laid down in *Philomina Jose*, it is not necessary that all the clauses under which the decree is passed should be incorporated in the decree. There is deemed inclusion in it of all provisions of law applicable at the time of passing of the decree. While interpreting the decree, it must be read as if all the provisions applicable at the time of passing the decree are incorporated in it.

VIII. The plaintiffs have failed to pay costs awarded on them

218. While dismissing I.A.No.9460/2012 by the order dated 18th May, 2012, the learned Single Judge had imposed costs of ₹50,000/- holding that the application was absolutely false and frivolous and that the plaintiff was adopting one or the other means to cause delay. By this application, the plaintiff had prayed for modification or recall of the order dated 17th May, 2011 seeking to include a challenge to the sale deed dated 27th March, 1998 which had been executed by them in respect of the first floor of the property.

219. The FAO(OS) No. 338/2013 was filed by the plaintiff, whereby the order dated 8th May, 2013 was challenged. The appellant sought interim orders of stay of the auction. On 26th July, 2013 while granting stay of the auction, the Division Bench directed the appellant to deposit costs of ₹50,000/- in the next three days. The appellant failed to do so.

220. Hearing in the present appeal commenced on 11th February, 2015 when the respondents pointed out the appellants' failure to pay costs. We have now been informed that on 29th July, 2013 the appellants have deposited an amount of ₹50,000/- vide pay order no. 024943 dated 28th July, 2013 in FAO(OS) 338/2013.

Additionally, it has been claimed that the costs imposed vide order dated 18th May, 2012 had also been deposited again only on 13th March, 2015 vide receipt no. 60 with the Delhi High Court Bar

Association Security & Welfare fund i.e. after we started hearing this appeal. This deposit is certainly not in compliance of the order. This is yet, another instance of the appellants' dishonesty.

221. On the 10th of October 2013, the plaintiff had submitted before the Ld. Single Judge, that he had identified a bidder for the property as permitted by the court but sought one more opportunity to place on record 10% of the bid amount and to bring the bidder to court. This opportunity was granted to the plaintiff subject to payment of costs of ₹50,000/- till the next date of hearing. The learned Single Judge specifically directed that the costs would stand waived only in case the plaintiff gets the bidder on that date who was willing to deposit 10% of the bid amount by means of a bankers cheque. The plaintiffs never produced the bidder and were therefore, bound to pay the costs to the defendants.

It is an admitted position that these costs have not been paid till date. No extension of time or waiver was sought by the plaintiffs. Clearly, the malafide of the plaintiffs stares from the record.

IX. Costs

222. It would be truly unfortunate if such litigation and unscrupulous litigants as the present plaintiffs are not discouraged from their ulterior designs. These plaintiffs have managed to desist finalization of the sale and dispossession for a tedious amount of time since 17th November, 2011 under one pretext or the other. The

amount of judicial time expended on their diverse & repeated frivolous applications & appeals cannot be measured in monetary terms. There cannot be an iota of justification for the conduct that the plaintiffs have resorted to.

223. This court has had the opportunity to extensively deal with the concept of costs, statutory provisions governing it, its objective and quantum in the pronouncements reported at:

- (i) **2015 SCC OnLine Del 11528, Harish Relan v. Kaushal Kumari Relan & Ors., RFA(OS) 162/2014** - (pronounced on 3rd August, 2015, *Paras 61-126*); and
- (ii) **2015 SCC OnLine Del 11515, Sicpa India Private Limited v. Kapil Kumar & Ors., RFA(OS) 127/2014** - (pronounced on 26th August, 2015 - *Paras 24.1-24.70*).

We refrain from burdening this judgment with the reasoning therein contained.

224. Imposition of heavy costs is the only medium to send a glaring message to restrict the unscrupulous and frivolous litigants from wasting valuable judicial time for wrongful gains. Actual realistic costs should be imposed as a matter of practice to discourage such frivolous litigation.

225. The importance of imposing costs on those unscrupulous litigants who seek equity with *unclean hands* and engage in frivolous litigation has been dealt with in several pronouncements

of the Supreme Court (*Ref: (2012) 6SCC 460 - Padmawati v. Harijan Sewak Sangh & Ors.; (2011) 8 SCC 249 - Ramrameshwari Devi v. Nirmala Devi & Ors.; and (2012) 5 SCC 370 - Maria Margarida Sequeira Fernandes v. Erasmo Jack De Sequeira*). It was mandated that costs must be awarded to discourage the dishonest and unscrupulous litigants from abusing the judicial system. It was observed that, the court was recommending imposition of costs “*not out of anguish*”, but following the fundamental principle that “*wrongdoers should not get benefit out of frivolous litigation*”.

226. In *Ramrameshwari Devi*, on the aspect of awarding costs to disincentivize such unscrupulous litigants from wasting the scarce judicial time, the Supreme Court noted thus:

“43. ... We are clearly of the view that unless we ensure that *wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations*. In order to curb uncalled for and frivolous litigation, the courts have to ensure *that there is no incentive or motive for uncalled for litigation*. It is a matter of common experience that court's otherwise *scarce and valuable time is consumed or more appropriately, wasted* in a large number of uncalled for cases.”

(Emphasis by us)

227. The object of imposition of costs is that it should act as a deterrent to frivolous litigation and when a party is sued without cause, costs should invariably follow. They should be in the nature of incidental damages allowed to a party for successfully

vindicating their rights in court and the party to blame shall pay costs to the party without fault. (Ref: *ILR (1921) 48 Cal 427 - Manindra Chandra Nandi v. Aswini Kumar Acharjya* and (2010) 8 SCC 1- *Vinod Seth v. Devinder Bajaj & Anr.*)

The plaintiffs before us are such litigants.

228. This court has also noted the huge strain caused by unnecessary and dishonest litigation on the limited judicial resources, which it is compelled to spread unnecessarily and valuable time thereon. (Ref: 138 (2007) DCT 62, *Goyal MG Gases Pvt. Ltd. v. Air Liquid Deutschland GmbH & Ors.* and *ILR (2012) IV DEL 110, Punjab National Bank v. Virendra Prakash.*)

229. In *Ashok Kumar Mittal v. Ram Kumar Gupta*, (2009) 2 SCC 656, expounding on the object and scope of the jurisdiction to impose costs, the Supreme Court emphasized that a more realistic approach relating to costs needs to be adopted to act as a deterrent to vexatious litigation. It observed thus:

"9. The present system of levying meagre costs in civil matters (or no costs in some matters), no doubt, is wholly unsatisfactory and does not act as a deterrent to vexatious or luxury litigation borne out of ego or greed, or resorted to as a "buying-time" tactic. More realistic approach relating to costs may be the need of the hour."

(Emphasis by us)

230. On the aspect of what should constitute costs and quantum thereof, in the pronouncement reported at (2005) 6 SCC 344 *Salem Advocate Bar Association v. Union of India*, the Supreme Court

observed that costs awarded should be the actual realistic costs including the *cost of the time spent* by the successful party, *the transportation and lodging*, if any, or any *other incidental costs besides the payment of the court fee, lawyer's fee, typing and other costs* in relation to the litigation. It was also articulated that these 'actual realistic costs' should be realistic and nominal.

231. In a judgment reported at (2012) 1 SCC 455 *Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust*, on the same aspect the Supreme Court held thus:

“23. There is one more aspect which requires serious consideration. *What is the meaning of the words “actual realistic costs” assuming that costs could be awarded on such basis?*

xxx xxx xxx

The actual realistic cost should have a correlation to costs which are realistic and practical. It cannot obviously refer to fanciful and whimsical expenditure by parties who have the luxury of engaging a battery of high-charging lawyers. If the logic adopted by the High Court is to be accepted, then the losing party should pay the costs, not with reference to the subject-matter of the suit, but with reference to the fee paying capacity of the other side.

xxx xxx xxx

27. ... Prosecution and defence of cases is a time consuming and costly process. A plaintiff/petitioner/appellant who is driven to the court, by the illegal acts of the defendant/respondent, or denial of a right to which he is entitled, if he succeeds, to be reimbursed of his expenses in accordance with law. Similarly a defendant/respondent who is dragged to court unnecessarily or vexatiously, if he succeeds, should be reimbursed of his expenses in accordance with law.

Further, it is also well recognised that levy of costs and compensatory costs is one of the effective ways of curbing false or vexatious litigations.”

(Emphasis by us)

232. The Supreme Court has repeatedly noted the ill effects of dilatory tactics adopted by parties in courts. To curb this tendency, in para 54 of ***Ramrameshwari Devi***, the court had given the following guidelines:

“54. While imposing costs we have to take into consideration **pragmatic realities** and be realistic as to what the defendants or the respondents had to **actually incur in contesting the litigation** before different courts. We have to also broadly take into consideration the **prevalent fee structure of the lawyers and other miscellaneous expenses** which have to be incurred towards **drafting and filing** of the counter-affidavit, **miscellaneous charges** towards **typing, photocopying, court fee**, etc.”

(Emphasis by us)

233. In ***Sanjeev Kumar Jain***, on the aspect of costs being awarded by appellate courts, the Supreme Court further went on to observe:

***“32. xxx xxx xxx
...Costs should invariably follow the event and reasons must be assigned by the appellate court for not awarding costs. If any of the parties have unreasonably protracted the proceedings, the Judge shall have the discretion to impose exemplary costs after taking into account the costs that may have been imposed at the time of adjournments.”***

(Emphasis by us)

234. The interpretation of the Civil Procedure Code, and the Delhi High Court Rules, in respect of the cost awarding power of the appellate jurisdiction of this court, has already been discussed by us at length in *Harish Relan* and *SICPA*. Sections 35, 35A, 35B of the **Code of Civil Procedure, 1908** govern the imposition of costs in civil proceedings. A reading of Order XXA (Rules 1 & 2) of the Code would show that costs shall be awarded in accordance with rules made by the respective High Courts in such behalf. Upon perusal of the **Delhi High Court Rules, 1967**, we find that Rule 11 Part C thereof is captioned “*Award of Costs in Civil Suits*” and thus *apply to civil suits alone*. There is no statutory provision even providing for imposition of costs, let alone restricting the exercise the power to do so in appellate jurisdiction. We also find that in the, only the manner in which counsel’s fee may be computed in the appeal against the decree on the original side, is provided. There is no provision in the Delhi High Court Rules as to the manner in which the costs in appeals are to be evaluated or imposed. One of the several components constituting costs is counsel’s fee. From a conjoint reading of the above provisions, it would appear that in appeals, there is a restriction only by way of an upper limit so far as legal fees are concerned. The maximum that would be admissible on this account would be an amount of ₹25,000 (being half of ₹50,000 in accordance with Chapter XXIII read with Rule 12 of Chapter 16 B).

235. There is therefore, no other limitation by statute or the Rules at all on the appellate court to impose actual, reasonable costs on the losing party.

Counsel's Fee

236. Under the Delhi High Court Rules, the fees admissible to the counsel in the appeal are to be calculated at a rate equivalent to half of what would be paid for the suit. For this purpose, let us calculate the fees which could be admissible to a counsel for the defendants on the suit claim. In the instant case, the suit has been valued at ₹30,00,000/- (Rupees Thirty Lacs) by the plaintiff. Thus as per the Schedule to Chapter XXIII, the counsel fees in the present suit has to be computed in the following manner :

1.	If the amount or value shall exceed ₹1,00,000/- and not exceed ₹5,00,000/-		
	Up to ₹1,00,000/-	:	₹6,500/-
	On the remainder	:	At 2%
2.	If the amount or value shall exceed ₹5,00,000/-		
	Up to ₹5,00,000/-	:	As computed above
	On the remainder	:	At 1%
	<i>However, in case the amount of fee shall exceed ₹50,000/- or the actual, whichever is less, subject to the condition that a certificate of fee must be filed.</i>		

237. Keeping in view the above mandate of Rules, the fees of the defendant's counsel in the suit would be computed in the following manner:

Computation on total suit value of ₹30,00,000/-			
	<i>For the amount upto ₹5,00,000/-</i>		
(i)	Up to ₹1,00,000/-	:	₹6,500/-
	On remainder i.e. ₹4,00,000/- @ 2%	:	₹8,000/-
	Total	:	₹14,500/-
(ii)	<i>Computation on balance ₹25,00,000/- @ 1%</i>	:	₹25,000/-
	Total value (₹ 25,000 + ₹14,500)	:	₹39,500/-

238. In appeals, the fee has to be halved and therefore, a defendant would be entitled to half of ₹39,500/- which comes to ₹19,750/-. We note that, in view the prevalent rates of counsels' fees, this amount is on an extremely lower side. However, keeping the stipulation under the Delhi High Court Rules and the caution by the Supreme Court in the above pronouncements that Rules on the subject must be complied with, we are compelled to restrict the counsel's fee to ₹19,750/- as part of the costs.

239. Rule 7 of Chapter 16 Part B provides for a case where there are several defendants. It stipulates that "*fee for each of the defendants who shall appear by a separate counsel may be allowed, in respect of his separate interest*".

240. In light of the above rule, the respondents represented by the same counsel, shall be entitled to a sum of ₹19,750/- only as counsels fee.

Abuse of Judicial Process

241. It is also necessary to advert to the power of the court under Section 151 of the CPC. This statutory provision specifically states that “*Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court*”. The spirit, object and intendment of the statutory provisions, as well as statutory scheme shows, that the inherent powers of the court are complementary to the powers specifically conferred on the court by the Code, and are in addition thereto. While Section 35A is confined to award of compensatory costs in respect of “*false or vexatious claims or defences*”, Section 151 takes within its ambit a much wider area of litigation which tantamounts to abuse of process of court. Section 151 therefore, enables a court to pass orders as may be necessary for the ends of justice, or to “*prevent abuse of process of the court*” which is beyond the “*false and vexatious*” litigation covered under Section 35A and are wide enough to enable the court to pass orders for full restitution. It is trite that an order imposing reasonable and realistic costs is necessary to do the right and undo the wrong by an unscrupulous litigant in the course of administration of justice. This court, constituted for the purpose of doing justice, must be deemed to possess the power to pass an order necessary to prevent the abuse of the process of the court in exercise of its appellate

jurisdiction under the Delhi High Court Act and the Code of Civil Procedure.

242. The instant case manifests abuse of judicial process of the worst kind. Filing of frivolous application, adopting dilatory tactics by taking adjournments time and again, pleading contradictory stands before this court, non-payment of costs imposed and pressing pleas contrary to settled legal positions tantamount to the grossest abuse of the judicial process. More so, the entirety of this litigation is misconceived and without any merit. It has had the effect of entangling valuable rights of the defendants in this legal tussle.

243. It has been observed in several judicial pronouncements of the Supreme Court that non-obedience & non-compliance with orders of the court is contumacious and has to be treated as criminal contempt of court as interfering and obstructing with the administration of justice. (Ref: ***(2014) 8 SCC 470 Subrata Roy Sahara v. Union of India; AIR 1962 SC 1893, East India Commercial Co. Ltd v. Collector of Customs, Calcutta; (1971) 1 SCC 749 Makhan Lal v. State of Jammu & Kashmir; 1982 CriLJ 2255, State of Gujarat v. Secretary, Labour Social Welfare and Tribunal Development Deptt. Sachivalaya***)

Principles on which costs may be awarded in the present case

244. We note that on 27th October, 2014, we had passed an order directing the appellants to make a deposit of an amount of ₹5,00,000/- in this court by way of a bankers cheque in the name of the Registrar General towards costs which may be quantified at the time of final adjudication. This quantification was not premised on any detailed examination as undertaken in the present judgment.

The final quantification of costs was to abide by the ultimate adjudication, as, if we agreed with the plaintiffs, the amount deposited in this appeal, would be refunded to them.

245. The appellant filed CM No.18965/2014 seeking waiver of the deposit. On 2nd March, 2015, we were informed that costs of only ₹2,50,000/- have been deposited and that the plaintiffs did not have the means to deposit the remaining amount. Apart from this amount, the amount of ₹50,000/- is lying deposited by these plaintiffs in FAO(OS) No.338/2013.

246. We have held that the present appeal is completely malafide & without substance. In this background we are of the view that each of the appellants/plaintiffs deserve to be burdened with heavy costs.

247. We have noted above that by November, 2013, the defendant no.2 had deposited the full amount of ₹5,32,50,000/-, being 50% of the total sale price of ₹10,65,00,000/-.

248. Despite this, the plaintiffs have continued in occupation of the entire Ground Floor while, despite paying the full amount for

the suit property, the defendant no.2 is in possession of one room on the First Floor & the Basement (one hall & a pantry) thereof.

The defendants also claim to have been dispossessed by the plaintiffs from the one room on the ground floor of which they were in possession.

249. The Defendant No. 1 had paid the full sale consideration to Sh. S.P. Kumria for his half share, which fact is not disputed.

250. On 6th December, 2013, while accepting offer of the defendants, directions were issued to it to pay to the highest bidder for payment of 5% in view of the statutory provision of Order XXI Rule 92 of the CPC. A sum of ₹13,62,500 also stands paid by the defendant to the highest bidder.

The suit record shows that the Sale Certificate was directed to be issued as per order dated 15th May, 2014, upon the defendant no.2 additionally depositing an amount of ₹20,00,000/- with the Registrar General of this Court, towards the claim of the auctioneer, as costs of auction proceedings. All steps have been taken with the concurrence of the plaintiffs who laid no objection to the proceedings.

251. In Execution Petition No.298/2014 defendant No. 2 seeks peaceful possession along with use and occupation charges at the rate of ₹2,00,000/- per month (w.e.f. 28.10.2013) from the appellants herein.

252. So what would be reasonable and fair costs in the present case? There are three appellants who, as discussed above, have acted in consort in the aggressive pursuit of, first, the auction, and then, their completely dishonest challenge. Let us examine the costs (apart from legal and other costs) which must have been enured by the defendant no.2. A simplistic and obvious examination could be of assessing interest which would accrue to the defendant no.2 on its deposit of ₹5,32,50,000/-. We have not added to the amounts of ₹13,62,500/- and ₹20,00,000/- as part of the principal amount.

253. If we were to assess the interest, which the amount of ₹5,32,50,000/- could have fetched, at 6%, 9% or 12%, if computed quarterly or on simple basis, we arrive at the following figures :

Computation @6% interest

Compounded quarterly	: ₹67,35,730/-
Simple	: ₹63,90,000/-

Computation @9% interest

Compounded quarterly	: ₹1,03,74,758/-
Simple	: ₹95,85,000/-

Computation @12% interest

Compounded quarterly	: ₹1,42,05,507/-
Simple	: ₹1,27,80,000/-

254. The justification for these costs may be examined from another perspective. Forty seven months ago, on 17th November, 2011, the parties agreed to inter se bidding to purchase the other party's share in the suit property. If the costs of ₹6,00,000/- are

spread over this period, it comes to a paltry sum of ₹4,255/- per month per appellant. If these are spread over twenty four month period from 28th October, 2013, when the offer of the defendant no.2 for purchasing the share of the appellant for ₹10.65 crores was accepted by the court, the costs would come to ₹8,333/- per month per appellant. If the costs were to be spread over the seventeen month period from the 15th May 2014 when the sale certificate was directed to be issued, it would come to a sum of ₹11,765/- per month per appellant. Looked at from any angle, this amount cannot be considered exorbitant or unfair.

255. Certainly our order dated 27th October, 2014 of pre-deposit of ₹5,00,000/- would not be just and fair. It certainly is not sufficient. Full compensation may not be possible or permissible. We therefore, confine the award of costs at a conservative limit of a total of ₹6,00,000/- apart from counsel's fee to be equally shared by the appellants. If we were to look at the interest component alone, the amount of ₹6,00,000/-, is nowhere near the amount which could have been earned by the defendant no.2.

256. We may note that this levy of costs also does not consider the suffering from the completely unnecessary litigation on the part of the defendants. Such suffering is best noted by the Supreme Court of India in para 191 of its judgment reported at **(2014) 8 SCC 470, Subrata Roy Sahara v. Union of India** which is as follows :

“191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be

evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. *One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side of every irresponsible and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault?*

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XXX

XXX

194. Does the litigant concerned realise that the litigant on the other side has had *to defend himself, from court to court*, and has had to incur expenses towards such defence? And there are *some litigants who continue to pursue senseless and ill-considered claims to somehow or the other defeat the process of law...*

...When the litigating party understands that it would have to compensate the party which succeeds, unnecessary litigation will be substantially reduced. At the end of the day, Court time lost is a direct loss to the nation. It is about time that the legislature should evolve ways and means to curtail this unmindful activity. We are sure that an eventual determination one way or the other would be in the best interest of this country, as also, its countrymen."

(Emphasis supplied)

257. In the present case, having consented to and participated with alacrity in the process of sale of the premises, this unfortunate appeal has been filed on objections which were never raised before

the learned Single Judge at any point till the property has been auctioned.

258. Today the amount of over rupees five crores is lying deposited by the defendant no.2 in this court on the original side. So the submission of lack of means to pay costs is not available to the appellants.

259. In as much as the defendants were represented by the same counsel, only one set of fees would be admissible as legal fees.

X. Result

260. In view of the above, it is held as follows :

- (i) the appeal is dismissed with costs.
- (ii) costs of the present appeal are assessed at a total of ₹6,00,000/- payable in equal shares of ₹2,00,000/- by each of the three appellants.
- (iii) In addition to (ii), counsel's fee is assessed at ₹19,750/- also payable in equal shares by the three appellants.
- (iv) The amount of ₹2,50,000/- lying deposited in the present appeal as well as the amount of ₹50,000/- lying deposited in FAO(OS) No.338/2013 shall be forthwith released by the Registry in favour of the defendant no.2.

(v) The appellants shall be liable to pay the balance amount of costs within four weeks from today. In case, the amount is not so paid, it shall be open for the respondent no.2 to seek payment thereof from the amount lying deposited before the learned Single Judge towards the purchase price of the property.

(vi) In view of the above, CM Nos.13019/2014 and 18965/2014 do not survive and are also dismissed.

GITA MITTAL, J

P.S. TEJI, J

OCTOBER 20, 2015

aj/kr