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

Reserved on: 7th December 2021
Date of decision: 22nd December, 2021

\+ **C.R.P. 240/2017 & CM APPLs.39489/2017, 11137/2018**

KRISHAN KUMAR MEHRA ..... Petitioner
Through: Mr. Dharmendra Kumar Mishra and Ms. Sunita Saxena, Advocates. (M:9818800830)

versus

ROOP LALL MEHRA & ORS. ..... Respondents
Through: Mr. Vishwa Bhushan Arya, Advocate. (M:8920561855)

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present petition challenges the impugned judgment and order dated 23rd August, 2017, passed by the Ld. ADJ-04 (South East), Saket (*hereinafter "Trial Court"*) in ***Civil Suit No. 208039/2016*** titled ***Shir Krishna Kumar Mehra v Shri Roop Lall Mehra*** by which the application filed by the Respondent No.2/Maj. Prem Kumar Mehta/Defendant No.2 (*hereinafter "Defendant No.2"*) seeking leave to deposit 1/5th share of the sale proceeds of the Defendant No.1 was dismissed. The said application was duly supported by the Petitioner Sh. Krishna Kumar Mehra/Plaintiff/Petitioner (*hereinafter "Plaintiff")* and the Respondent No.3/ Defendant No.3 *(hereinafter "Defendant No.3")* & Respondent No.4/ Defendant No.4 *(hereinafter "Defendant No.4")*. The only contesting party is Defendant No.1/Respondent No.1/Sh. Roop Lall Mehra (*hereinafter "Defendant No.1"*).

Facts

2. The parties to the present revision petition are four sons and one daughter of Late Shri. Pyare Lall Mehra, who passed away on 1st November, 2008. Late Shri. Pyare Lall Mehra was the absolute owner of property bearing No. J-17, Jangpura Extension, New Delhi, admeasuring 279 sq. yards (*hereinafter "suit property"*). The suit property has a ground floor, first and half of the second floor constructed. As on date, the possession of the ground floor is with Defendant No.2. Defendant No.1 is in possession of the first floor and his son and his family are living on the second floor. In effect, therefore, the first and second floor are in the possession of and being enjoyed by Defendant No.1.

3. The suit for partition being ***CS(OS) No.395 of 2009*** titled ***Krishan Kumar Mehra v. Shri Roop Lall Mehra & Ors.,*** was filed by the Petitioner/Plaintiff (*hereinafter "Plaintiff"*) seeking partition and rendition of accounts in respect of properties belonging to his father including movable and immovable property. In this suit, a preliminary decree was passed on 21st December, 2009, by a ld. Single Judge of this Court in the following terms:

> *"7. It is settled law that in case of co-owners, possession of one is in law possession of all. In suit for partition, Court fee to be paid if joint possession is pleaded by the plaintiff on the basis that he is co-owner of the property sought to be partitioned, is fixed court fee under Article 17(vi) of schedule II of Court fee Act presuming joint possession of plaintiff even if plaintiff is not in actual possession. The contention of the defendant No., therefore has no force. The plaintiff is entitled for preliminary decree in his favor.*

> *8. Prima facie, I find that the plaintiff is entitled to 1/5th share in the suit property. As far as, immovable suit property is concerned, a preliminary decree of partition is passed. The legal heirs of Late Sh. Pyare Lall Mehra are entitled to equal share in the suit property bearing No. J-17, Jangpura Extension, New Delhi.”*

4. The Court had, vide the same order, appointed a Local Commissioner to inspect the suit property and submit a report as to whether the suit property can be partitioned by metes and bounds. However, the Local Commissioner reported that a physical metes and bounds partition would not be possible. Accordingly, the High Court directed that an *inter-se* bidding be conducted between the parties.

5. In the *inter-se* bidding, sealed covers were stated to have been placed by the parties before the Local Commissioner and Defendant No.2 offered the highest price of Rs.10,40,00,000/-. Subsequently, an application bearing ***IA No.700/2012*** was filed by Defendant No.2 in ***CS (OS) 395/2009*** seeking permission to file a compromise agreement between Plaintiff and Defendant No.2 to 4, to jointly acquire the suit property from Defendant No.2. In this application, Defendant No.2 sought to satisfy his payment obligation of the bid amount by deposit of only 1/5th share, being the share of Defendant No.1, stating that the other parties being Plaintiff and Defendant Nos.3 to 4 had agreed to not claim their shares in lieu of retaining joint possession of the suit property. The said application was dismissed by the learned Single Judge of this Court *vide* order dated 12th January 2012 on the ground that all parties had not consented to the compromise agreement. Therefore, the High Court directed Defendant No.2

to deposit the balance share of the bid amount i.e., 8,32,00,000/- within sixty days from the date of the order after setting off only his own share of Rs. 2,08,00,000/- being 1/5th of the bid amount.

6. This order dated 12th January, 2012 was carried in appeal to the Division Bench of this Court. In these proceedings being ***FAO (OS) 103/2012*** titled ***Krishna Kumar Mehra v. Roop Lall Mehra.*** Vide order dated 6th March, 2012, the Division Bench directed Defendant No.2 to deposit 1/5th share of the bid amount. Accordingly, Defendant No.2 deposited the sum of Rs.2,09,04,000/- in the Court, which constituted 1/5th share of the total bid amount including interest for late deposit. Vide final order dated 26th March, 2012 in this appeal, this amount was accepted as the final deposit to be made by Defendant No.2, and the order dated 12th January, 2012 was set aside. The Court agreed that the bid amount can only be directed to be deposited *qua* Defendant No.1, since the other parties had made a joint request to forego the remaining amount. The relevant extract of this order dated 26th March, 2012 is as under:

> *"There is now compliance in terms of the impugned order subject to the deposit of the amount during the course of the day alongwith the interest within three days.*
>
> *In our considered view, the same should put the controversy at rest as once the other parties are together (and make a joint request), amount can only directed to be deposited qua respondent no.1 and to that extent the impugned order is liable to be set aside."*

7. This order dated 26th March, 2012 was then assailed before the Supreme Court in ***CA No. 7190-7193 of 2013*** titled ***Roop Lall Mehra v.***

Krishna Kumar Mehra. Vide order dated 16th July, 2015, the Supreme Court decided as under:

> *"We have heard learned counsel for the parties and are of the opinion that the most appropriate course to adopt in this case would be to have the property auctioned by a local commissioner/Court Receiver.*
> *We, therefore, remand the matter to the learned Single Judge to auction the property expeditiously. The civil appeals stand disposed of. Pending applications, if any are disposed of. Status quo, as it exists today."*

8. Thus, the *inter-se* bidding process came to an end and the auction was to be processed in terms of the Supreme Court order. Upon remand, the High Court permitted Defendant No.2 to withdraw the deposited amount vide order dated 29th October, 2015 in ***CS(OS) 395/2009***. Additionally, it appointed a Court Commissioner for conducting the auction of the suit property.

9. During these proceedings, vide order dated 10th February, 2016, the High Court transferred the suit to the Ld. Addl. District & Sessions Judge (South East) Saket Courts, New Delhi (*hereinafter "Trial Court"*) in view of change in its pecuniary jurisdiction and the suit was re-numbered to ***CS(OS) No.341/2016*** titled ***Sh. Krishan Kumar Mehra v. Sh. Roop Lal Mehra & Ors.***

10. Subsequently, the auction was conducted on 14th February, 2016, and the report of the Court Commissioner dated 18th March, 2016, recorded that Defendant No.2 was again the highest bidder. As per this report, during this auction, the four siblings i.e., the Plaintiff and Defendants No.2 to 4 wanted to bid jointly but the said request was rejected by the Court Commissioner. Ultimately, the other three siblings being Plaintiff and Defendant Nos.3&4,

withdrew in favour of Defendant No.2 who was the sole auction purchaser. Defendant No.2 was ultimately held to be the highest bidder for bid amount of Rs. 11,50,00,000/-. He was again directed to deposit 1/5th of the bid amount.

11. Pursuant to this, an application dated 23rd April 2016 was filed by Defendant No.2 before the Trial Court, submitting that in terms of the auction, Defendant No.1 is only entitled to his 1/5th share, amounting to Rs.2,30,00,000/- and after depositing the same, the auction should be taken as final. They stated that the remaining amount deserves to be set off against the share of the Plaintiff and Defendant Nos.2-4, as these other parties were willing to forego their share in lieu of joint ownership of the suit property with Defendant No.2. The case of Defendant No.2 was that Defendant No.1, accordingly, should take his share of the consideration amount and vacant possession of the property ought to be handed over to Defendant No.2, Plaintiff and Defendants Nos. 3 & 4. The application moved by Defendant No.2 was duly supported by the Plaintiff and other Defendants except Defendant No.1. The prayers sought in the application filed by Defendant No.2 with the endorsement of the Plaintiff and Defendant Nos.3 & 4 are as under:

> *"A. The remaining amount of Rs.45,000,00 (forty five lacs) to be jointly deposited on behalf of plaintiff and defendant no.2 to 4.*
> *B. That the amount of Rs. 1, 85, 00, 000 (One Crore Eighty Five lacs) as already deposited, my kindly be deposited as Fixed deposits at the earliest, as there is loss of interest which might have been accrued with the said amount.*

> *C. Peaceful vacant possession of the suit property be handed over to the defendant no.2 jointly together with plaintiff and defendant no.3 to 4."*

12. Defendant No.1 objected to the said application on the ground that on a conjoint reading of Section 7 of the Partition Act, 1893 *(hereinafter "Partition Act")* and Order XXI Rule 72, 84, 85 CPC, Defendant No.2 is required to deposit the entire amount. As per the Defendant no.1, the only set off that is permissible under law is to the extent of the share of the auction purchaser. In Reply to the objection, Defendant No.2, 3, and 4 and the Plaintiff said that the objection was a part of the delay tactics on behalf of the Objector as the suit property is in Defendant No.1's possession. However, this application has been rejected by the Trial Court vide order dated 23rd August, 2017 which is the subject matter of the present revision petition. Vide the said order, Defendant No.2 was directed to deposit 25% of the bid amount after setting-off only his own 1/5th share on 25th September 2016 and deposit the entire sale consideration fifteen days thereafter.

13. In the revision proceedings, this Court vide order dated 8th November, 2017 directed the Plaintiff to deposit with this Court, the remaining sale consideration of the share of Defendant No.1, i.e., 1/5th of the bid amount, minus 1.85 crores already deposited with the Executing Court/Trial Court. Accordingly, Rs. 45 lakhs stand deposited by the Plaintiff, retained in an FDR. The Court also observed that the Defendant No.1 would not be entitled to any interest accrued on his share in the purchase amount, in case he ultimately fails. On 08nd November, 2017, the following order has been passed by the Court in this revision petition:

*"6. **<u>The counsel for the respondent no. 1 has also been informed that in the event of the respondent no. 1 ultimately failing, he would not be entitled to any interest on the purchase consideration of his share</u>**.*

7. The petitioner to, in the meanwhile, deposit in this Court, the sale consideration of the share of the respondent no. l minus Rs.1.85 crores for which demand draft is stated to have been deposited in the Executing Court. The said monies when deposited, be kept in the maximum interest-bearing account."

<u>Submissions</u>

14. Mr. Mishra, ld. Counsel for the Plaintiff, submits that despite Defendant No.2 and the Plaintiff having already deposited the complete share of Defendant No.1, which is his only legal entitlement, he is objecting to the final decree being passed in a completely unjustified and incorrect manner. He relies upon the following contentions to support his argument:

(i) Defendant No.1 is merely creating impediments in view of the fact that he continues to remain in possession of the first floor and the second floor. His legal rights are fully secured as his $1/5^{th}$ share is secured and deposited before the Court and the same is available for withdrawal by Defendant No.1. Since Defendant No.1 is not on cordial terms with his other siblings, he continues to raise objections in this manner.

(ii) This attitude is highlighted by the fact that the procedure of bidding is no longer objected to by Defendant No.1, as has been recorded in the impugned order. Defendant No.1 does not seek setting aside of the auction either. However, he insists that the entire purchase money ought to be deposited. Even when the

Plaintiff and Defendant No.2,3&4 are willing to let Defendant No.1 buy the property by payment of auction price, he does not have any intention to buy the suit property.

(iii) The four siblings, two of whom are not resident in India, wish to develop the property together and have their separate units for their own use and occupation as the same is the property purchased by their father. Therefore, the only legal question that arises is in respect of whether the set-off of the entire share of the Plaintiff and Defendants No. 2, 3 & 4 can be allowed or not, in the facts and circumstances of this case. It is his submission that the same should be allowed as the other parties are willing to forego their shares and there is no bar against the same.

(iv) Moreover, the use and occupation charges of the suit property which is in possession of Defendant No.1 is at least Rs.1 lakh per floor. However, Defendant No.1 continues to occupy the same, without paying any use and occupation charges.

15. On the other hand, Mr. Arya, appearing for Defendant No.1, submits that the application has been rightly dismissed by the Trial Court and raises three primary submissions:

(i) The first is that the civil revision petition is itself not maintainable under Section 115 CPC read with the first *proviso*.

(ii) Secondly, since the suit itself is pending, the Plaintiff cannot maintain the present revision petition, as he was not the applicant. He relies upon the *proviso* to Section 115(1) CPC, to state that it limits the power of revision of the High Court to only those cases where the order under revision, if made in the favour of the party applying for revision, would have finally disposed of the suit. The revision petition is not maintainable as the aggrieved person, i.e., Defendant No.2 is not the revisionist before this Court. Therefore, the Plaintiff has no *locus standi* to prefer the revision petition.

(iii) Thirdly, in any event, he submits that the processes under Sections 2 to 6 of the Partition Act concerning *inter se* bidding had all been concluded prior to the Supreme Court order dated 16th July, 2015, directing public auction of the suit property. Once the order of the Supreme Court had been passed on 16th July, 2015, the auction under section 7 of the Partition Act was the only legally permissible method of passing the final decree. Therefore, once the auction has been affected, the procedure prescribed under Section 7(b) of the Partition Act and under the CPC would have to be followed. According to Order XXI Rule 84 CPC read with Order XXI Rule 72 CPC, the only permissible set off is that of the successful bidder’s share and not of the shares of other decree holders, who may be supporting the successful bidder. In view of this, cartelization by the four siblings against Defendant No.1 is not permissible.

Findings

16. Heard the counsels for the parties and perused the record. From the facts that emerge in this case, the following issues arise for consideration of this Court:

(i) Whether the present revision petition is maintainable at the instance of the Plaintiff?

(ii) Whether the auction purchaser, i.e., Defendant No.2, has to compulsorily deposit the entire auction amount even though all the other decree holders except Defendant No.1 have agreed to forego payment of their respective monetary shares at this stage?

(i) Maintainability

17. At the outset, it is noted that the Petitioner herein – Mr. Krishan Kumar Mehra, as also Respondent Nos.2, 3, & 4 were the Plaintiff and Defendant Nos.2, 3, & 4 respectively in the suit proceedings before the Trial Court. Defendant No.2 was the auction purchaser, who has deposited along with the Plaintiff a total sum amounting to 1/5th share of the bid amount, i.e., the share of Defendant No.1, cumulatively before the Executing Court and before this Court. The application before the Trial Court, which was dismissed vide the impugned order, was filed by Defendant No.2. The Plaintiff, however, has challenged the impugned order by way of the present revision petition.

18. In so far as the objections raised by the Defendant No.1 as to the maintainability of the review petition and *locus standi* of the Petitioner are concerned, it is the settled legal position that in a suit for partition, all co-

sharers are plaintiffs and defendants. Once the preliminary decree is passed, the concept of decree holder and judgment debtor is not strictly applicable as all the parties are decree holders and judgment debtors, as against one another. In ***Nirode Nath Bannerjee v. Amullya Dhone Bannerjee, AIR 1923 Cal 582,*** *J.G. Wooddroffe J.*, observed as under:

> *"1. The point before us is whether the application to set aside the sale falls within the terms of Or. "21, r. 89. Mr. Justice Greaves was of opinion that this was not a sale in execution of a decree because it was a sale by consent and the mere fact that the Court was invited to carry out the sale did not make it a sale in execution of a decree. The decision is however not sought to be supported on this ground. As a matter of fact there could be no consent because infants were concerned in the orders of 26th January 1912 and 11th August 1920. In the first mentioned order it is recited that the Defendants did not appear either in person or by Counsel and on the second occasion the attorney for the Defendants stated that he had received no instructions from his clients. Further the award was not in my opinion by consent The award recited a consent to the sale of the dwelling-house which was one of the motives or reasons actuating the arbitrators in making the award in the terms in which it was given. The objection before us is that there cannot be said to be a decree-holder and judgment-debtor within the meaning of the section and that the amount must be specified in the proclamation of sale as that for the recovery of which the sale was ordered. This, it is said, is not the case here. The case of Virjibun Dass v. Bissesswar Lal I. L. R. 48 Cal.69: s. c. 24 C. W. N. 1032 (1920) supports, it is claimed, the Appellants so far as it goes. That is true so far as it holds that a decree is executed where the order for sale is contained in the judgment itself where there is no*

attachment as also that r. 89 applies in a case where there has been no proclamation of sale but a notification at a Registrar's sale. ***There is here a decree and in a partition suit after decree all share-holders are decree-holders and judgment-debtors as against one another.*** *It must, I think, be taken that the sale, was ordered for the recovery of the sums payable by the award to the Plaintiff and the making over to each of the parties of their share of the sale-proceeds in terms of the award. It is conceded that the section would apply in the case of a sale in execution of a partition decree awarding compensation to one sharer and enforcing payment of such compensation against the share of another sharer. Does it then make any difference that in the present case that the money payable to the Plaintiff is to come out of the whole estate in which both the Plaintiff and the Defendants are interested? I think not, and that we ought not to take a narrow view of the section. Though the Plaintiff's money is to be recovered from the total sale-proceeds in which he has a share, in substance the transaction is one in which the Plaintiff's rights under the award are enforced-for execution means that. I am of opinion then that Or. 21, r. 89 applies to the present case."*

19. The said legal position has also been confirmed by the decision of the Supreme Court in ***Shub Karan Bubna @ Shub Karan Prasad Bubna v. Sita Saran Bubna & Ors.**, **(2009) 9 SCC 689.*** The Supreme Court observed that:

"10. The three decisions relied on by the petitioner (referred to in para 3 above) are not relevant for deciding the issue arising in this case. They all relate to suits for mortgage and not partition. There is a fundamental difference between mortgage suits and partition suits. In a preliminary decree in a mortgage suit (whether a decree for foreclosure under Rule 2or a

decree for sale under Rule 4 of Order 34 of the Code), the amount due is determined and declared and the time within which the amount has to be paid is also fixed and the consequence of non payment within the time stipulated is also specified. A preliminary decree in a mortgage suit decides all the issues and what is left out is only the action to be taken in the event of non payment of the amount. When the amount is not paid the plaintiff gets a right to seek a final decree for foreclosure or for sale. 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. A preliminary decree for partition only identifies the properties to be subjected to partition, defines and declares the shares/rights of the parties.*** *That part of the prayer relating to actual division by metes and bounds and allotment is left for being completed under the final decree proceedings. Thus, the application for final decree as and when made is considered to be an application in a pending suit for granting the relief of division by metes and bounds. Therefore, the concept of final decree in a partition suit is different from the concept of final decree in a mortgage suit. Consequently an application for a final decree in a mortgage suit is different from an application for final decree in partition suits."*

20. Apart from all parties being decree holders in this peculiar situation, in the present case, Defendant Nos.2,3& 4 are supporting the Plaintiff-revisionist. They submit that they are not interested in collecting the monetary amount from the auction purchaser i.e., the Defendant No.2. Their clear stand before this Court is that the Plaintiff and the Defendant Nos. 2 to 4 intend to jointly develop this property, which was purchased by their father, for their own use and occupation. Since Defendant Nos. 2 to 4 are supporting the case of the Plaintiff, the revision petition is not merely at the instance of the Plaintiff but also on behalf of Defendant Nos.2, 3 & 4. They can, in the opinion of this Court, be considered as co-revisionists. Thus, the objection raised by Defendant No.1 as to the *locus standi* of the Plaintiff is not sustainable, especially because the suit from which the present petition arises is a suit for partition.

21. As regards the submission by Defendant No.1 concerning Section 115 CPC, this Court notes that an order in the application, which was filed by Defendant No.2, if passed, would have finally disposed of the suit itself thereby satisfying the *proviso* to Section 115(1) CPC. Thus, the objections of Defendant No.1 concerning maintainability of the revision petition are not sustainable.

(ii) On Merits

22. Coming to the objection on merits, the case of the Defendant No.1 is that since Defendant No.2 did not deposit the entire amount of the auction purchase, the final decree is not liable to be passed.

23. Again, it is to be borne in mind that the present suit is not a suit where the auction involves any third party. The suit is between siblings. The auction purchaser is one of the siblings. As already stated, all the

parties before this Court are decree holders as a preliminary decree has already been passed in their favour vide order dated 21st December, 2009, holding each of them entitled to 1/5th share of the suit property. The order of the Supreme Court dated 16th July, 2015 directed that the property would be auctioned by the Local Commissioner/ or the Court Receiver. As the subsequent events unfolded, the successful auction purchaser was the Defendant No.2, who is one of the siblings. The Defendant No.2, under orders of this Court, has deposited the 1/5th share. The facts in the case at hand are peculiar, inasmuch as the other three decree holders do not insist on their share being paid in monetary terms. The only contesting party is Defendant No.1 i.e., one of the brothers, who is in occupation of the suit property, and whose monetary share has already been deposited by Defendant No.2 and the Plaintiff with the Court. However, Defendant No.1 still refuses to vacate the suit property. It was under such circumstances that the application seeking permission to deposit only the share of Defendant No.1 and setting off of the bid amount against the share of the Plaintiff, Defendant No.2,3&4 came to be moved before the Trial Court. In the application, the stand of Defendant No.2 was that since Defendant Nos.2 has deposited the amount of Rs.1.85 crores already, Defendant Nos.2, 3 and 4 and the Plaintiff should further be permitted to deposit the remaining amount of Rs.45 lakhs with the Trial Court to complete the share of the Defendant No.1. The Trial Court has rejected this application holding that since the auction sale was for the entire suit property and not for 1/5th share in the suit property, Defendant No.2 had to therefore submit the entire bid amount setting off only his own share within fifteen days. It is this reasoning which is assailed before this Court.

24. The 1/5th share of Defendant No.1 amounts to Rs. 2,30,00,000/-, in view of the highest bid of Rs. 11,50,00,000/- placed by the Defendant No.2 for the entire suit property. It has also become abundantly clear during the hearing of this revision petition that Defendant No.1 is not willing to purchase the suit property for the bid amount. Nevertheless, he continues to occupy a substantial portion of the suit property ever since the suit has been filed. Resultantly, all the other siblings have been deprived of the use and occupation of their shares in the suit property except to the extent that the ground floor is in occupation and possession of Defendant No.2.

25. The only argument of Defendant No.1 on the merits of the case is that the set-off would not be permissible, except to the extent of the share of the Defendant No.2 who is the Decree Holder, who later purchased the property in view of Section 7 of the Partition Act.

26. Under the scheme of the Partition Act, Sections 3 to 6 permit *inter se* sale and purchase of shares of various parties among themselves by seeking the highest price. The order of the Supreme Court directed the auctioning of the suit property by a Court Commissioner. Such an auction, as per the parties, was directed to take place under Section 7 of the Partition Act. Section 7 of the Partition Act reads as under:

> "***7. Procedure to be followed in case of sale.—****Save as herein before provided, when any property is directed to be sold under this Act, the following procedure shall,* ***<u>as far as practicable</u>****, 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, 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 form time to time by rules prescribe in this behalf, and **until such rules are made the procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees."***

27. Apart from Section 7 of the Partition Act, Order XXI Rules 72 & 84 CPC require consideration. Order XXI Rules 72 and 84 CPC read as under:

> *"**72. Decree holder not to bid for or buy property without permission**.—(1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.*
> *(2) Where decree-holder purchases, amount of decree may be taken as payment.—Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.*
> *(3) Where a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree holder.*
>
> *Xxx*

> ***84. Deposit by purchaser and re-sale on default***.— *(1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold.*
>
> *(2) Where the decree-holder is the purchaser and is entitled to set-off the purchase-money under rule 72, the Court may dispense with the requirements of this rule."*

28. A perusal of the said rules shows that, if the decree holder purchases a property with permission of the Court, the share of the decree holder, who is the purchaser, can be set off and the Court can then enter upon satisfaction. In this case, the question is whether the other decree holders' share can be set off against the purchase money to be deposited. As noted above, Section 7 provides that for the properties which are directed to be sold under the Partition Act. The provisions of CPC would apply only '*as far as practicable*'. In effect therefore, there is no strict application of the provisions of the CPC as the Legislature was conscious of the fact that in partition suits, an auction could also involve one of the co-sharers or decree holders purchasing the suit property. The strict applicability of the provisions of Order XXI CPC can thus be relaxed by the Court while exercising its discretion.

29. This is also clear from a reading of the judgment of the Andhra Pradesh High Court in ***Pabba Satyamma v. Pabba Sathyamma and Ors., 2010 (6) ALT 52***. In this case, the High Court held that mere irregularity in the procedure of the auction sale is *ipso facto* not sufficient to vitiate the

auction sale proceedings. Substantial injury to the person complaining has to be established before the Court. The Court further observed that the phrase *'as far as practicable'*, in effect, means that the Court ought to have acted fairly and reasonably with due application of mind. The observations of the Court read:

> *"21.* ***<u>The precedents relied on by the learned Counsel for the Respondents are clearly to the effect that the mere proof of irregularities in conduct of a sale or its publication is not enough, but substantial injury to the person complaining must also be established.</u>*** *Of course, the presupposition is that there was an attempt to follow the prescribed procedure even if there was some material irregularity in it. It is also true that in the present case, the procedure prescribed under Order XXI Rules 66 and 67 etc., was not followed strictly in letter. But, it is seen from the newspaper publication made that the trial Court made an effort to comply with such procedure in spirit. The waiver of fresh newspaper publication by the revision Petitioner/1st Defendant itself may suggest the absence of any apprehension of inadequate notice to the prospective bidders due to noncompliance with the procedures nor is it complained that any non- mention of the value of the parties in the newspaper publication had any adverse impact on fetching an appropriate price. The price fetched in the auction is '3,05,000/- more than the price estimated by the independent Advocate Commissioner on a local enquiry and also the upset price fixed by the trial Court on the basis of the said commissioner's report. The price fetched, therefore, cannot be considered to be an inadequate or low price, which, ex facie, indicates adverse impact of the material irregularities on the proper conduct of the sale.* ***<u>As what Section 7 of the Act mandates the Court to do is only to follow the procedure prescribed in the Code of Civil Procedure "as far as practicable" and</u>***

> ***as the Court appears to have acted fairly and reasonably with due application of mind, there appear no reasons to set aside the auction sale conducted by the Trial Court herein and to put the clock back to resume the procedure all over again for conducting the sale.*** *The relevant considerations were definitely kept in mind by the trial Court while accepting the final bid and in the light of the above circumstances, the Civil Revision Petition has to fail.”*

30. The strict applicability of Order XXI CPC as is canvassed by Defendant No.1 is, therefore, in the opinion of the Court, not ‘*practicable*’ in the case at hand.

31. On a careful consideration of the facts of the case, it is clear that the only intention of Defendant No.1, who is the only contesting brother, is to continue to enjoy the property without incurring any occupation charges. While Defendant No.1’s share is deposited, insisting on the technical plea requiring Defendant No.2 to deposit the entire purchase amount while allowing setting off only Defendant No.2’s share is to defeat the intent and purport of the preliminary decree which demarcated his share to only $1/5^{th}$ share of the suit property. Since, in these partition suits, all the parties are decree holders to the extent of $1/5^{th}$ portion of the suit property, in the opinion of this Court, there is no provision in law, which would bar any or some of the decree holders to forego their monetary shares, especially in family matters of this nature. The Court would be taking a very pedantic approach, if such a technical plea came in the way of final disposal of such a matter, while safeguarding the interest of all the parties.

32. There is also another reason why the Court is of the opinion that this would be the correct course of action. Even if Defendant No.2 brings the

entire bid amount minus his own share of the bid amount, after releasing the 1/5th share of Defendant No.1 since none of the decree holders wish to accept the monetary payment, the remaining amount would have to be merely refunded to Defendant No.2. This entire exercise would be nothing but an irrational and futile exercise. The Supreme Court directed auction of the property which has been duly complied with. The rationale behind set off under Order XXI Rule 72 CPC read with Section 73 has also been captured by the Madras High Court in ***A.M.A Murugappa Chettiar v S.M.A.M Ramasami Chettiar*** **AIR 1935 Mad 893** the Court observed as under:

> *"Provided that if there are several decree-holders entitled to rateable distribution, the purchase money shall be paid into Court, lands some support to the learned, counsel's argument, but those words 1 must reject as being repugnant to the provisions already mentioned. Under Section 121, Civil P.C., the rules in Schedule 1 must be regarded as a part of the body of the Code, but the High Court may alter or annul them by following the procedure prescribed in part 10 and Section 128 goes on to enact that the High Court has power to make rules inconsistent with those in Schedule 1. Rule 199 of the Civil Rules of Practice (the rule in question) occurs in the body of the rules made under the previous Code of Civil Procedure, to which Section 157 of the present Code applies. That section says that the rules made under the repealed Code shall have operation only "so far as they are consistent with this Code," i.e. the present Code. I am therefore prepared to hold that Rule 199 to the extent to which it is opposed to, and inconsistent with, the provisions of Schedule 1, cannot take effect. In to Reference under Stamp Act 1914 Mad. 652 does not, in my opinion, lay down any general rule in the opposite sense. The*

*inconvenience and hardship that results, should the contrary view prevail, is obvious Let us suppose that the amount due to the decree holder purchaser is Rs. 20,000 and to the rival decree-holder Rs. 400 (i.e., one fiftieth of the other amount)***. *<u>Let us further suppose that the amount of the bid is Rs. 10,200. The decree, holder would then be entitled to Rs. 10,000 and the opposite party to Rs. 200. According to the respondents' contention, although the amount due to the other person is Rs. 200 only, the decree-holder is nevertheless bound to bring into Court the entire sum of Rs. 10,200. It is with a view to avoid this result that the various provisions to which I have referred, have been enacted; it would be a barren formality to require the decree-holder to bring in the Rs. 10,000 to which he himself is entitled. I am therefore of the opinion that the only amount that the petitioner was bound to bring into Court was the sum due to those decree-holders whose execution applications were pending on the date of the sale.”</u>***

33. Following the said rationale, this Court has no doubt that the correct course of action would be to allow Defendant No.1 to obtain his share of 1/5th of the monetary value of the bid amount and dispose of the remaining suit as settled between the parties.

34. Furthermore, the inclusion of Order XXXII A CPC in respect of suits relating to the matters concerning the family would also show that there is a duty upon the Court to endeavour to settle disputes between the parties. Order XXXII (A) Rule 3 CPC reads as under:

“3. ***Duty of Court to make efforts for settlement.—***
(1) In every suit or proceeding to which this Order applies, an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the

case, to assist the parties in arriving at a settlement. In respect of the subject-matter of the suit.
(2) If, in any such suit or proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.
(3) The power conferred by sub-rule (2) shall be in addition to, and not in derogation of, any other power of the Court to adjourn the proceedings."

35. A careful perusal of the above provisions shows that to the extent possible, and so long as it is consistent with the nature and circumstances of the case, the Court is duty bound to assist the parties in arriving at an amicable settlement. In the present case, the Plaintiff and the Defendant Nos.2 to 4 have, in effect, resolved their disputes. They have agreed to use and occupy jointly the suit property, which was purchased by their father. Plaintiff and the Defendant Nos.3 and 4 have agreed not to insist on receipt of their share of the monetary consideration by the auction purchaser, i.e., Defendant No.2.

36. The only factor to be borne in mind by this Court while proceeding in this direction is to ensure that none of the legal rights of Defendant No.1 are prejudiced in any manner. Defendant No.1's rights, even if the entire money is deposited as is requested by him before the Trial Court as well as before this Court, would still be to limited to receipt of his 1/5th share. Since the said 1/5th share has already been deposited in the Court, Defendant No.1 was free to withdraw it but he has deliberately chosen not to do, only to raise the objection of non-deposit by Defendant No.2 thereby

enabling him to continue to remain in occupation of the premises without any payment.

37. On a query put by the Court, Defendant No.1's counsel has submitted that the entire first floor is in the occupation of the Defendant No.1 and the second floor, which is partly constructed, is in possession of Defendant No.1's son and his family. In effect, therefore, despite having a right only in respect of $1/5^{th}$ share of the property, Defendant No.1 is enjoying roughly $2/3^{rd}$ of the constructed areas of the property. In other words, even though Defendant No.1 has the legal title over merely 20% of the suit property, he is enjoying 66% of it.

38. This shows that the entire objection of Defendant No.1 is completely inequitable, inasmuch as the other siblings having agreed not to sell their shares but to instead physically occupy their shares of the property concerned, the decree ought to be held as having been satisfied *qua* all parties upon deposit of $1/5^{th}$ of the bid amount. The phrase '*as far as practicable*' in Section 7 of the Partition Act vests considerable discretion in the Court, especially when dealing with partition disputes between family members, where the purchaser is also a family member and the decree holders, whose share constitute $4/5^{th}$ of the suit property, are supporting the auction purchaser. Moreover, the objections of the Defendant No.1 against his own siblings are spiteful to say the least. The legislative mandate under Order XXXII A of the CPC is to expedite, endeavour and assist the parties in arriving at a settlement, which in this case would translate to ensuring that the legal rights of Defendant No.1 are not prejudiced while at the same time enabling the recording of the amicable resolution of disputes amongst other siblings.

39. Some other relevant factors which support the above conclusion of this Court are:

(i) The property in question is a prime property in South Delhi where rentals are on the higher side.

(ii) Since the deposit of the amount which constitutes the entire share of the Defendant No.1, was directed to be deposited by this Court on 8th November, 2017, four years have passed. The Court had recorded, vide the said order that Defendant No.1, would not be entitled to any interest in the sale consideration once the entire amount has been deposited.

(iii) All the siblings are senior citizens and any further delay in a final resolution of this dispute would result in considerable prolongation. The suit itself was filed in 2009 and 12 years have already passed. Various rounds of applications, appeals, have already been exhausted by the parties concerned. All along it appears that Defendant No.1 being in possession of 2/3rd of the suit property, took advantage of this possession and continued to raise frivolous objections.

40. Accordingly, this Court holds that the objections raised by Defendant No.1 are not tenable. Under such circumstances, the present revision petition is liable to be allowed in the following terms:

(i) The Defendant No.1 and his family, shall vacate the first floor and second floor of the suit property in their occupation within 6 weeks from the date of judgment and the keys of both the floors shall be deposited with the Trial Court.

(ii) Upon the keys being deposited before the Trial Court, the sum of Rs. 1.85 crores lying deposited with the Trial Court, shall be released on the same day by way of a bank transfer/Demand Draft in favour of Defendant No.1. The remaining 45 lakhs lying deposited before this Court shall also be released within a week of the keys being deposited with the Trial Court, by way of bank transfer/demand draft in favour of Defendant No.1.

(iii) Upon the receipt of the sum of Rs.2.30 crores, Defendant No.1 shall have no further right, title or interest in the suit property.

(iv) The Trial Court shall pass a final decree of partition and hand over the keys of the property to the Defendant no.2, in the presence of Petitioner, Defendants 3 & 4 or their respective counsel.

(v) In view of the fact that Defendant No.1 has enjoyed the use and occupation of the property beyond his share and has intentionally delayed the passing of the final decree in the suit as also in view of the order dated 8th November, 2017 passed by this Court, the interest, which has accrued on the sum of Rs.2.30 crores shall be paid to Defendant No.2.

(vi) Additionally, costs of Rs.1 lakh shall be paid by Defendant No.1 to the Petitioner within eight weeks.

41. This revision petition is allowed in the above terms. All pending applications are disposed of in the above terms.

42. The matter shall be listed before the trial court on 2nd February, 2022 for ensuring compliance of the above orders.

43. A copy of this order be sent to the Court of Ld. ADJ-04 (South East), Saket in ***Civil Suit No. 208039/2016*** titled '***Krishna Kumar Mehra v. Roop Lall Mehra.***

44. The digitally signed copy of this order, duly uploaded on the official website of the Delhi High Court, www.delhihighcourt.nic.in, shall be treated as the certified copy of the order for the purpose of ensuring compliance. No physical copy of orders shall be insisted by any authority/entity or litigants.

PRATHIBA M. SINGH
JUDGE

DECEMBER 22, 2021
dk/SK/MS