

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

Reserved on: 21st November, 2022

Pronounced on: 15th February, 2023

+ EX.P. 118/2019 & EX.APPLs.(OS) 722/2020, 870/2020, 170/2021

BISHWAJEET SINGH & ORS.

..... Decree Holders

Through: Mr. Arvind K. Nigam, Senior Advocate with Mr. Jai Sahai Endlaw, Advocate for DH-1 and Mr. Akhil Sachhar, Advocate for DHs 2 & 3.

versus

BIKRAMJIT SINGH THROUGH LRS. & ORS.

..... Judgment Debtors

Through: Mr. Nikhil Mehra, Mr. Ramnesh Kumar Sahu and Mr. Sangram Vijay Singh, Advocates for JD-2.
Mr. Kirtiman Singh and Ms. Vidhi Jain, Advocates for JD-3.
Mr. Ritin Rai, Senior Advocate with Mr. Aabhas Kshetarpal, Ms. Aditi Laxman and Ms. Aditi Rao, Advocates for JD-4.
JD-1 (deceased) is represented through JDs 2 to 4.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J.

THE CONTROVERSY ON MAINTAINABILITY

1. The present execution proceedings under Order 21 Rule 11 of CPC

arise from final judgment and decree¹ dated 01st October, 2007 [*hereinafter*, ‘**Decree**’] deciding a suit for partition of property bearing No. 54, Friends Colony East, New Delhi-110065, admeasuring 3860 sq. yards [*hereinafter*, ‘**suit property**’]. As per the Decree, the suit property has to be auctioned and sale proceeds have to be apportioned among the parties, as per their respective shares.

2. For convenience, the parties to this execution petition and their respective shares are noted below:

<i>Party in execution proceeding</i>	<i>Name/Description</i>	<i>Party in civil proceeding</i>	<i>Share of suit property</i>
Decree Holder No. 1[“ DH-1 ”]	Bishwajeet Singh	Plaintiff in civil suit.	1/4 th share
Decree Holder No. 2-3	Legal Representatives [<i>hereinafter</i> , ‘LRs’] of Late Mrs. Vijay Kumari, elder sister of DH-1.	Mrs. Vijay Kumari was Defendant No. 3 in civil suit.	1/4 th share
Judgment Debtor No. 1	Late Mr. Bikramjit Singh, elder brother of DH-1, now represented through his LR.	Mr. Bikramjit Singh was Defendant No. 1 in civil suit.	1/4 th share
Judgment Debtors No. 2-4	LRs of JD-1.	<i>Not a party</i>	
<i>Not a party</i>	Mrs. Madhuri Singh, (since deceased) wife/LR of Late Mr. Inderjit Singh, eldest brother of DH-1. <i>Qua</i> her succession, testamentary proceedings are on-going.	Mr. Inderjit Singh was Defendant No. 2 in civil suit.	1/4 th share, which has been ordered to be secured. ²

¹ The formal decree has not been drawn up as yet, thus last paragraph of the judgment is treated as a decree, in light of the judgment of the Supreme Court in *Sir Sobha Singh and Sons Pvt. Ltd. v. Shashi Mohan Kapur (deceased through L.R.)* in C.A. No. 534/2019. The reference to the word “decree” in the judgment is to be read accordingly.

² In FAO (OS) 514/2010, a dispute was raised by Mrs. Madhuri Singh with regard to her 25% share in the suit premises (arising out of the share of her deceased husband Late Mr. Inderjit Singh). Therein, *vide* order dated 21st April 2017, the Bench had ordered that 25% of the sale proceeds received upon auctioning the suit property, after deducting the expenses incurred, are to be secured in the execution proceedings, disbursal whereof shall be subject to the final decision in FAO (OS) 514/2010. The said appeal is still pending.

3. Contrary to the mandate of the Decree, Decree Holders [*hereinafter collectively, 'DHs'*], seek immediate and exclusive physical possession and partition of their 50% share (in the freehold property) by metes and bounds, contending that the Decree stands modified *vide* order dated 05th November, 2019 passed by the Division Bench [*hereinafter, 'DB Order'*].³ The prayer clause for seeking court's assistance in executing the decree, reads as follows:

- "A. Grant immediate exclusive physical possession of 50% of the superstructure of the suit property to the applicants;
- B. Partition the Suit Property by metes and bounds into two equal halves."

4. Judgment Debtors [*hereinafter, collectively, 'JDs'*], in opposition, raise two primary protests by arguing that: (i) granting of possession and partition through metes and bounds, goes beyond the scope of Order XXI Rule 11 of the Code of Civil Procedure, 1908 [*hereinafter, 'CPC'*]; and (ii) the Decree, which was passed with the consent of all parties, only permits sale of suit property, and cannot be altered without mutual consent.

5. Conflicting opinions expressed by the parties have given rise to two critical questions: (a) Does a decree for sale by auction preclude the executing court from directing a partition of the suit property by metes and bounds? (b) Has the Division Bench modified the final judgment and decree in ancillary appeal proceedings related to an interim order?

CONTENTIONS OF PARTIES

6. Mr. Arvind K. Nigam, Senior Counsel for DHs, made the following submissions:

- i. Efforts were repeatedly made to sell the property in question between

³ In FAO(OS) 514/2010 titled *Madhuri Singh v. Bikramjit Singh and Ors.*

the year 2000-2015, including attempts to find buyers outside of court, but to no avail.

- ii. JDs as well as DHs had submitted their respective site plans for partition. Although earlier there was disagreement amongst parties, however, DH is now willing to accept either half of the suit property, i.e., side A or side B, each measuring 1930 sq. yds, as per the suit property sharing arrangement.
- iii. Under the Master Plan for Delhi 2021 [*hereinafter*, '**MPD 2021**'], each side, holding 1930 sq. yards of land, is entitled to 100 Floor Area Ratio [*hereinafter*, '**FAR**'], 25% ground coverage and upto 9 permissible dwelling units. This will enable DHs to retain their land, while the other half can be auctioned, to enable JDs to realize cash, as they have prayed for. The 25% share of the branch of Mr. Inderjit Singh (who was earlier represented through his wife – Ms. Madhuri Singh, since deceased), is to be retained in the Court, as she died issueless, and testamentary proceedings are ongoing. DH offered JDs ownership of other half of the suit property along with full cooperation to retain, build, further partition, or sell their land.
- iv. Partition by metes and bounds is the norm and not an exception. Sale of the suit property, as per provisions of the Partition Act, 1893, is only ordered if it is found that the suit property is not physically divisible. Given the peculiar circumstances, *viz.* vast size of the suit property, its unequivocal divisibility, and the 34-year-old litigation, there are compelling enough reasons for this Court to exercise its power under Section 9 of the Partition Act, 1893 and order part-sale and part-partition of the suit property.

- v. There are no practical impediments to the partitioning of the suit property. Modifications to the superstructure and additional construction (built-up area being currently significantly less than permissible FAR) are permitted in a partition, to make the already huge suit property further habitable to the parties, thus negating the argument that it is a single unit use, incapable of partition.
- vi. Partition of properties is, in substance, partition of FAR. Since the suit property's FAR can be divided equally, there are no practical or legal barriers to its partition. Reliance was placed on judgments of Supreme Court in *Sharda Nath v. Delhi Administration*,⁴ and of this Court in *M.G. Ramachandran and Anr. v. MCD*,⁵ which was upheld by the Division Bench.⁶ It was observed that the right to demarcate and construct upon property, without NOC from the other side, is permissible, and authorities will have no objection if the owner of a portion of a property, files an application for building plans individually or jointly, subject to FAR allocation. Parties shall also be entitled to apply for separate mutation, utility connections and other civic amenities. Here, as both sides would have access to municipal roads in the front and the back, as well as separate entrances to the superstructure, no hindrance is envisaged.
- vii. Almost all properties in Friends Colony East stand partitioned. There is an active market for the sale of partitioned properties. The suit property can also be partitioned and constructed upon, with distinct and

⁴ Order dated 17th October 2019 in Civil Appeal No. 1161 of 2009; MANU/SCOR/37305/19.

⁵ 2013 SCC OnLine Del 2224.

⁶ *M.G. Ramachandran v. Municipal Corporation of Delhi*, 2014 SCC OnLine Del 1325.

tradable titles with separate FARs. On the contrary, there is no record, in the recent past, of any sale of property in Friends Colony East as large as the suit property. In real estate sector, it is well understood that all things being equal, smaller plots of divided properties sell for higher prices per square yard, are significantly easier to sell, and have a more liquid market.

7. *Per contra*, Mr. Ritin Rai, Senior Advocate, and Mr. Nikhil Mehra, Mr. Kirtiman Singh and Mr. Aabhas Kshetarpal, Advocates for the JDs, oppose the reliefs, by contending that: (i) the DB Order does not modify the final consent Decree; (ii) Executing court cannot go beyond terms of Decree;⁷ (iii) No attempts have been made to execute the Decree since 2009; and, (iv) The appropriate course for the Court would be to order public auction of the suit property. Additionally, JD-4 has also prayed for directions to occupants to vacate the suit property in order to facilitate its sale by public auction.

8. In response, DHs have submitted as follows:

- i. DB Order dated 05th November, 2019 grants liberty to executing court to look at all possibilities for executing the Decree, which is not limited to the sale of property as originally ordered under the Decree, and hence, this amounts to modification of the final consent Decree and should be treated as such.
- ii. JDs resisted all attempts to put DH in possession of 50% of the suit property, despite the shares having been declared as far back as 9th December, 2019 and DHs are being deprived of the right to enjoy their legitimate share in the suit property.

⁷ Reliance was placed on *Deepa Bhargava and Another v. Mahesh Bhargava and Ors.*, (2009) 2 SCC 294, and *Sarup Singh v. Daryodhan Singh*, 1971 SCC OnLine Del 316.

- iii. The Court has never ruled that larger freehold property was incapable of being partitioned into two halves. DHs have always maintained that the suit property can be partitioned into two halves.⁸
- iv. Reliance by the JDs, on an earlier Report of the Local Commissioner [*hereinafter*, ‘LC’] dated 15th December, 1999 to contend that the suit property cannot be partitioned into two halves, is misplaced. LC’s mandate was to determine whether the suit property was divisible into four independent living units, not two. The predecessors-in-interest of the JDs had filed their objection to the said report, and asserted that the suit property was indeed divisible - not only into four units but also into two units, with DH-1 holding 25% share. Earlier partition attempts did not fructify because DH and JD had submitted separate site plans, and both parties wanted the same side. Now, DH is willing to accept either side under either of the site plans. The filing of site plans to partition the suit property into two halves, by both JDs and DHs, is itself testimony to the fact that the suit property is divisible into two halves.
- v. JDs’ share does not meet the threshold of one moiety, as prescribed under Section 2 of the Partition Act, 1893, to put the suit property for sale.⁹ They dictated their terms to DHs who are together entitled to 50% share,

⁸ Reliance is placed on order dated 26th November, 2015 passed by Division Bench in FAO (OS) 514/2010 titled *Madhuri Singh v. Bikramjit Singh & Ors.*

⁹ Section 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.

that is, one moiety of the suit property. In fact, JDs have misrepresented that they are entitled to 50% share in the suit property under the decree, when in fact, the Division Bench, *vide* order dated 09th November, 2017 in FAO(OS) 514/2010, had clarified that late Mrs. Madhuri Singh's 25% share (which JDs claim) shall be secured by depositing proceeds in the Court. As LR of late Mr. Bikramjit Singh, JDs 2-4 are legally one party, together entitled to 25% share of the total, i.e., 8.33% share individually, as noted in the Order dated 21st April, 2017.

- vi. DHs' claim on late Mrs. Madhuri Singh's share does not prevent them from seeking 50% exclusive possession of DHs' own share, as presently determined. However, if found entitled to a greater share in the succession proceedings, DHs shall limit their claim only to the monetary value of such excess share, whenever the other half is sold.
- vii. As regards JD's objection that Decree has not been modified by way of the DB Order, it was argued that this Court must take into account the ruling which was made by the appellate court while exercising its jurisdiction over the same decree for which execution has being sought in the current case. Any other interpretation would be in the teeth of Order XXI Rule 28 of CPC.¹⁰ The Division Bench was seized with the subject matter for seven years. In the proceedings before them, the Bench examined not only the interlocutory order, but in fact, *vide* order dated 21st April, 2017 disposed of the suit itself, clarifying that the parties are entitled to proceed with execution of the judgment and decree. Subsequently, the Bench modified the Decree and empowered the

¹⁰ Reliance was placed upon *Bhavan Vaja v. Solanki Hanuji Khodaji Mansang*, (1973) 2 SCC 40.

executing court to explore all possibilities for securing to the parties their respective shares, not limited to the sale of the suit property by way of public auction.

- viii. On the objection regarding limitations of the executing court, it was contended that executing court is well within its power to enforce and execute a decree in any manner that the nature of relief requires. Order XXI Rule 28 of CPC stipulates that when an appellate court makes a decision modifying, confirming, or reversing a final decree, the order is considered as part of the proceedings in the original suit.¹¹

ANALYSIS

9. The protracted and intricate litigation between parties, which began with the filing of partition suit CS(OS) 3235/1988 and remains ongoing, is without a doubt, disconcerting. Twenty-five years have elapsed since the preliminary decree was issued on 09th December, 1997, and a further fifteen years have passed since the final Decree was issued on 1st October, 2007. The declaration of shares is the only aspect that has been resolved [*being* 1/4th to each sibling]; however, the parties remain at logger-heads *qua* the method and manner of division.

10. Mr. Nigam has explained that the youngest of the siblings, DH-1, now a septuagenarian, is the last surviving member of the original parties in the civil suit. Having reached an advanced stage of life, he desires to see an end to this 34-year-long tussle. He expresses a keen desire to re-enter his parental

¹¹ Reliance is placed upon: *Rangubai Kom Shankar Jagtap v. Sunderabai Bhratar Sakharam Jedhe*, (1965) 3 SCR 211.

dwelling home, which (undisputedly) was purchased by their mother in 1958. For him, the relief of possession and partition is immediate, in contrast to a sale order. In his view, sale of the property is unfair and distressing, depriving him of the right to inhabit the dwelling home that has enormous sentimental attachment. The history of legal disputes between the parties has also led DH-1 to believe that sale process could be a long and arduous journey with an uncertain outcome. He has underscored the obstacles in selling a freehold property as big as the suit property, which seems to be an unprecedented case in Friends Colony. The thought of finding a new home, even if the sale of the property goes through, is a daunting prospect for him at his advanced age. Therefore, given the possibility of suit property being partitioned, he considers that selling the same may not be best course of action.

11. Keeping all this in mind, and with the objective to bring an end to the conflict, this Court has heard the instant matter extensively over the course of multiple hearings to enable the parties to realize their respective share in the suit property.

12. The above reasons highlighted by Mr. Nigam bring to light compelling urgency of the Plaintiff/DH-1 in pressing for a final resolution to the disputes between parties. However, being a court of law, this Executing Court cannot take a decision based solely on such emotional arguments. While equity can be a relevant factor in ensuring fair and just implementation of a Court's decision in enforcing a decree, but if the judgment is precisely worded, equity has limited maneuverability. Moreover, in cases where a decree stems from a partition suit and the parties are not on equal footing, it is crucial to keep in mind that the final judgment may not always be 'balanced' or 'just' from the viewpoint of all parties involved. In a partition suit, the term 'decree holder'

and ‘judgment debtor’ are not well-defined, even though a decree has a binding effect on all parties involved. The plaintiff to a partition suit is not wholly a *dominus litis*, and a ‘judgment debtor’ to a decree arising therefrom is thus not necessarily the party against whom an unfavourable decision was rendered. For this reason, this Executing Court cannot take a view that prioritizes only the interests of DHs herein, who are likely to be the pressing litigant only due to his swiftness in pressing for execution. Further, even if one were to somehow ignore the collective rights of the JDs herein, and proceed on the assumption that partitioning of the suit property is an equitable relief, yet, this Court finds no room to grant such a relief in the absence of consensus between the parties, as the Decree is for sale thereof.

13. Basis the preceding discussion, in order to ascertain the viability of granting the relief sought, let us scrutinize the applicable provisions to acquire a more comprehensive understanding of the executing court's jurisdiction.

Relevant Sections

14. Section 2(2) of the CPC provides the following definition of the term “decree”:

“‘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;”.*

15. Section 47 of CPC stipulates that all questions arising between the parties to suit, in which the decree was passed, shall be determined by the Court executing the decree. It reads as under:

“47. Questions to be determined by the Court executing decree.—(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

[Explanation I.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.—(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]”

16. Section 51 of CPC enlists the powers of an executing court, as under:

“51. Powers of Court to enforce execution.—Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—

- (a) by delivery of any property specifically decreed;*
- (b) by attachment and sale or by the sale without attachment of any property;*
- (c) by arrest and detention in prison for such period not exceeding the period specified in Section 58, where arrest and detention is permissible under that Section;*
- (d) by appointing a receiver; or*
- (e) in such other manner as the nature of the relief granted may require*

*:
Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied—*

- (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree.—*
 - (i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or*
 - (ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or*

committed any other act of bad faith in relation to his property, or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation. —In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.”

What are the powers of the Court of Execution?

17. Prior to analyzing the afore-noted provisions, it is important to recall that the final decree under consideration has resulted from a partition suit in which, at the first stage, the Court decides *inter se* share of parties to the suit property, and their entitlement to seek division thereof. Such preliminary decree passed under Order XXI Rule 18(2) of CPC, determines ownership rights, shares of parties and their entitlement. It establishes the basis for final partition of the suit property in question. If division by metes and bounds cannot be made without further enquiry, then the court proceeds to pass a preliminary decree and takes assistance from a commissioner, who is directed to physically examine the property and suggest means and manner of division. On the basis of this LC's report, the court can grant the final relief of separating the property. However, if it appears that dividing the property is not reasonably or conveniently feasible, or that a sale would be more advantageous, the court may order the sale for distribution of proceeds according to the determined shares. This course can also be adopted by consent between the parties. Thus, the final decree conclusively determines rights of the parties with regard to all or any of the matters in controversy. It is considered to be the final adjudication, because nothing remains to be done

thereafter on the question of partition.

18. Further, the provisions referred to in the preceding paragraphs, concerning powers of executing court, also suggest that the executing court's power is bounded and restricted. The limitation on court's power is also indicated by the wording of Section 51, which begins with the stipulation, "*Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree*". This means that the court has the power to enforce a decree, but that power is limited by the conditions prescribed by the decree. In other words, notwithstanding the range of powers the executing court has been equipped with, it is not open to such court to go beyond the terms of the decree. Under Section 47 of the CPC, which has been relied upon by both the parties in their submissions, the executing court is empowered to determine all questions between the parties in relation to execution, discharge or satisfaction of the decree. It allows the executing court to tailor its enforcement efforts to the specific circumstances of each case, in order to ensure that a decree is enforced effectively. However, under this provision, jurisdiction is limited to deciding objections *qua* executability, on the ground of jurisdictional infirmity or voidness.¹² The said provision does not empower or vest with the executing court, the jurisdiction to re-draw or overwrite the terms of a decree. Power under Section 47 of the CPC is further subject to restrictions relating to execution, which are provided under Order XXI of CPC which deals with diverse situations. In a nutshell, the executing court can neither travel behind the decree, sit in appeal over the decree, nor pass an order jeopardizing right

¹² *Brakewel Automotive Components v. P.R. Selvam Alagappan*, (2017) 5 SCC 371.

of parties as laid out thereunder. Only in limited cases – where the decree is by a Court lacking inherent jurisdiction or is in nullity – can the decree be rendered *non-est* and inexecutable by the executing court.¹³ Therefore, the executing Court, in its endeavor to provide relief to the parties, cannot use any discretion which would tantamount to modifying or altering the decree itself.

19. DHs’ argument that they have not received any benefit from the Decree, although well-intended, holds no weight. Equally persuasive is the argument of JD-3, who has pointed out that in case DHs are put in possession of the suit property, it would set the clock back by more than twenty years, by essentially undoing previous decisions and restarting the trial on an issue that has been resolved for a long time and confirmed through repeated court rulings.

20. The parties applied for partition with the aim of dividing their shares, which resulted in a clear definition of their rights under the preliminary decree. The next step involved allocation of these rights. LC appointed by this Court, as noted above, observed that partition of the suit property was not possible. The paragraphs that follow discuss the suit proceedings, and would show that the parties evinced a preference for partitioning the suit property at different stages. Nevertheless, since the proposal did not gain unanimous approval, a final consent decree was issued mandating the sale of the property. Hence, the exercise which has been done in the suit proceedings prior to final decree, cannot be repeated in the execution proceedings. It is not open for this Court to undertake the exercise of re-examining and re-determining whether the suit property can be partitioned by metes and bounds, and modify the

¹³ *Id.*

decree. The final decree for sale has been passed after much deliberation, over several dates of hearing and across several rounds of discussion amongst the parties. DHs' right to seek partition by metes and bounds was foreclosed on the passing of final decree, and therefore, under the ambit of Section 47 of CPC, executing court cannot now be called upon to re-determine rights of parties relating to possession and partition by metes and bounds.

21. Now that the powers of this court stand clarified to the above effect, this brings us to the next crucial question, as follows:

What are the terms of the Decree and whether they have been modified by the Division Bench?

22. In order to find answer to the above captioned query, it would be necessary to examine the orders leading to the passing of the final Decree, commencing from 09th December, 1997 when the preliminary decree was passed on the following terms:

“ xx ... xx ... xx

27. *There shall be a decree;*

- a) directing the division of the premises bearing No. 54, Friends Colony, New Delhi, into 4 shares and 1/4th share shall be allotted to the plaintiff;
- b) directing the allotment of 1/4th share to Smt. Maduri Singh, (second defendant), 1/4 share to Smt. Vijay Kumari (defendant No. 3) and 1/4th share to the first defendant;
- c) directing the dismissal of the claim of the plaintiff regarding moveable properties mentioned in the scheduled to the plaint;
- d) restraining the first defendant from dis-possessing the plaintiff from the first floor of the annexe portion of property bearing No. 54, Friends Colony, New Delhi;
- e) restraining the first. defendant from preventing the plaintiff from using the common portions in the premises of 54, Friends Colony, New Delhi;
- f) directing the first defendant to pay the plaintiff the costs of the suit;”

23. After the preliminary decree, the Court undertook consequential action of determining whether division of property was possible by way of metes and bounds. For this purpose, as is usually the case, an LC was appointed to

physically examine the suit property and suggest the manner of division. He was directed to visit the suit property and submit a plan, prepared through a qualified architect, to demarcate separate shares of each of the parties. The LC apprised the court that it would not be possible to divide the suit property into four equal parts, and submitted a report dated 15th December, 1999 to that effect. At that stage, Plaintiff/DH-1 herein agreed that the suit property cannot be partitioned by metes and bounds and should be put to sale. This was also the view orally expressed by the LC, as noted in the Order dated 19th October, 2000, whereupon the court observed that:

"I am fully satisfied that the suit property is incapable of being partitioned by metes and bounds".

And ordered:

"...I am of the opinion that a division of the suit property cannot be reasonably or conveniently made and that the sale of the suit property and distribution of the proceeds would be very beneficial for all the shareholders".

24. The 1/4th co-sharers were directed to submit their sealed offers/bids for sale/purchase of their respective shares/rights in the suit property. The preliminary decree was assailed in appeal by Defendant No. 1/JD-1 herein in RFA(OS) 1/1999, whereupon the following order was passed:

"C.M. 500/2000 in RFA(OS) 1/99

In view of the order passed on 12.7.99 that the proceedings may continue but final decree will not be passed, no further orders are required to be passed on this application by which the appellant has sought stay of an order passed on 19.10.2000 by learned Single Judge. The order passed on 19.10.2000 is one of the interlocutory orders passed and can be said to be a step towards passing final decree. Any party aggrieved by interlocutory orders has an adequate remedy of challenging the said orders after passing of the Decree, in case the said party would feel aggrieved by the Decree.

With these observations the application is dismissed."

25. Parties could not agree on a plan of partition and on 20th February, 2007, consented that the suit property be sold and purchaser be given vacant

possession. They sought time to explore possibility of getting a purchaser, failing which, it was to be sold through public auction. On the subsequent date, the following order was passed:

“ xx ... xx ... xx
Since no mode of partition has been found feasible and in view of consent recorded on 20.2.2007, the suit property is put to sale by public auction. At this-stage learned counsel for defendant no.1 states that defendant no.1 is willing to purchase the share of the other parties. If that be so, defendant no.1 can participate in the public auction to the exclusion of his share.
List before the Joint Registrar for finalization of the proclamation terms and for taking necessary action for sale of the suit property.
 xx ... xx ... xx”

26. The aforementioned order, dated 17th May 2007, was also assailed in appeal,¹⁴ wherein the Division Bench *vide* order dated 27th August 2007, declined to interfere, with the following observations:

“ xx ... xx ... xx
Facts were noted and recorded by the learned Single Judge in order dated 19th January, 2007 but the parties were given one more opportunity to find a solution and the suit was adjourned to 20th February, 2007. On 20th February, 2007, when the matter was listed before learned Single Judge, all parties agreed that they were unable to find any mode for amicable division of the suit property and agreed that the suit property be sold and purchaser be given vacant possession. The parties prayed for some time for getting a purchaser failing which, it was agreed that the suit property will be sold by public auction. Thus, the learned Single Judge was considerate and even at that stage on 20.2.2007 granted time to the parties and explore possibility of getting a purchaser.

Consent given by learned counsel for the appellant for putting the property to auction has been accepted and acted upon by learned Single Judge for rejecting the application being IA 5783/2007. In these circumstances, we are of the considered opinion that reliance on Section 3 of the Partition Act is misplaced. We may reiterate the fact that the parties have failed to find out suitable and appropriate mode for dividing the suit property in last ten years.

Appellant/defendant No.1 is in physical possession of the suit property to the exclusion of others. As recorded by learned Single Judge, the appellant cannot be permitted to resile from the consent for sale recorded in the order dated 20.2.2007 and therefore no specific application was required to be filed. The Court has also recorded that the appellant can participate in public auction and purchase. the share of other parties as recorded in order the dated 17.5.2007.

¹⁴ FAO(OS) 305/2007 titled *Bikramajit Singh Thru LRs v. Bishwajeet Singh & Anr.*

Appellant can participate in public auction to the exclusion of his share. It is also brought to our notice by learned counsel for the respondent that the appellant/defendant No.1 had contrary to the interim injunction order entered into a registered memorandum of understanding with a third party.

Contempt application was filed against the appellant/defendant No. 1. The appellant is admittedly in possession of the suit property and therefore stalling and delaying the proceedings and, therefore, for last ten years the preliminary decree remains on paper and has not been acted upon. We are not inclined to interfere with the order passed by learned Single Judge. The appeal has no merit and the same is dismissed."

27. Thereafter, on 01st October, 2007, the Decree was passed in the following terms:

"CS(OS) No.3235/1988

The Preliminary Decree was passed on 09.12.1997. The parties were not able to find an amicable division of the suit property in question. It is in view thereof that on 20.02.2007 it was agreed that the suit property be sold and the purchaser will get vacant possession of the suit property. The parties were also, not able to get any purchaser failing which the suit property had been agreed to be sold by public auction. Learned counsel for the parties state that the shares of the parties have changed on account of inter se documents executed between the parties. In view thereof the share of the plaintiff is 31.218 per cent, of LR's of defendant no. 1 is 50 per cent and of the defendant no.3 is 18.782 per cent. A final decree is thus passed in for respect of the suit property declaring the share of the parties as aforesaid as also the agreement to put the suit property to public auction by sale to implement the division of the suit property. In pursuance to and the Decree, now the suit property would be sold through the public auction." [Emphasis supplied]

28. Taking into account the repeated unsuccessful efforts to divide the suit property by metes and bounds, parties consented to a decree for sale as they were in agreement that partition by metes and bounds was not a feasible option. From the above orders, it is but obvious that the final Decree was passed as a consequence of parties agreeing to the sale of suit property by public auction to implement the division of shares as determined in the preliminary decree, and towards that effort, a proclamation of sale was issued on 12th February 2009. This is also manifest from the order dated 23rd October 2007, when parties stated that they were not possessed of sufficient funds to

pay stamp duty for preparing the decree, and the amount for purchase of requisite stamp duty be deducted out of sale proceeds to be realized from the sale of suit property.

29. Thereafter, parties engaged in efforts to find a way for the sale of the suit property, as recorded in order dated 25th March 2008 to the following effect:

“CS (OS) 3235/1988

xx

...

xx

...

xx

It has been agreed between the parties that the suit property question has to be put to sale. The difficulty is with the procedure of sale. Earlier, public auction was directed which did not meet with a success. Thereafter, the parties sought time to find out a way as to how the suit property has to be sold. Today also, the court is faced with the same problem as the plaintiff and the defendants are not in agreement as to the mode in which it is to be sold.

After some discussion, it appears that the appropriate method of sale of the suit property would be that both the plaintiff and the defendants shall jointly seek buyers and both parties would be at liberty to arrange for a buyer. The object being that the highest price is obtained for the suit property. The counsel for the parties state that three weeks time be given to them in the first instance to carry out this exercise. In case they do not achieve any success, then the counsel submit that the alternative of a public auction can be explored by this court once again.

The counsel for the parties will sit together and settle the terms within a week. The learned counsel for the parties agree that, broadly speaking, the terms settled in the earlier proclamation by this court would be the basis for the terms of the sale except for the price.”

30. Several attempts were made to sell the suit property through public auction, but without any success. The attempt at an inter-party bidding was also unsuccessful.

31. On 27th August, 2007, the Division Bench in FAO(OS) 305/2005 held that since the parties had consented to sale of property by public auction, Appellant cannot be allowed to retract from the same, and the suit property must be sold in such a manner.¹⁵

32. Another Division Bench *vide* Order dated 11th August, 2010, while

¹⁵ FAO(OS) 305/2005 titled *Bikramjit Singh thru LRs & Ors. v. Bishwajeet Singh & Anr.*

issuing notice in an appeal filed by (late) Ms. Madhuri Singh, also restrained Respondents therein/DHs and JDs 1-4 herein, “*from changing status quo with regard to possession and from entering into any contract for sale of property*”, and stayed the suit proceedings before the Single Bench.¹⁶

33. In the same matter, on 21st April, 2017, the Appellate Court re-affirmed the Decree passed by the Single Judge, in the following terms:

“CM APPL. 14312/2010 (stay)

1. The present application has been filed by the appellant praying inter alia for staying the suit proceedings and for restraining the respondents from selling, transferring, alienating or creating any third party interest in the suit premises, i.e., premises bearing No. 54, Friends Colony (East), New Delhi.

xx ... xx ... xx

5. Having regard to the fact that the shares of the parties in the suit premises have already been declared in the preliminary decree and a final decree came to be passed in the suit as long back as on 01.10.2007, this leaves the aspect of apportionment of the sale proceeds between the parties upon auctioning of the suit premises.

6. We are of the opinion that no further orders are required to be passed in the suit. Only because the appellant has a dispute with the legal heirs of the deceased respondent No.1 cannot be a ground to deprive the others of their shares in the suit premises. The suit is disposed of and the parties are held entitled to seek execution of the judgment and decree dated 01.10.2007, in accordance with law.

7. As a result, the interim order dated 11.08.2010 is modified to the extent that the parties in possession of the suit premises will maintain status quo with regard to the possession and they are restrained from entering into any contract for the sale of the suit premises, till the execution proceedings that may be filed by any of the parties, attain finality.

8. As there is a dispute raised by the appellant with regard to her 25% share in the suit premises, an amount to the extent of 25% of the sale proceeds received on auctioning the suit premises, after deducting the expenses incurred, shall be secured in the execution proceedings. Disbursal of the said amount is made subject to a final decision in the present appeal.

9. The application is disposed of.” [Emphasis supplied]

34. Thus, the Division Bench in FAO(OS) 514/2010 disposed of the suit CS(OS) 3235/1988 on 21st April 2017. This was then clarified *vide* DB Order dated 05th November, 2019. The said appellate order reads as under:

“CM 3899/2018 (for modification of order dated 21st April, 2017)

xx ... xx ... xx

¹⁶ FAO(OS) 514/2010 titled *Madhuri Singh v. Bikramjit Singh & Ors.*

3. Ms. Mini Pushkarna, learned counsel for the Applicants/Plaintiffs expresses the concern that the said order, not having recorded the failed attempts at having the suit property auctioned, forecloses the possibility of the LR's of the Plaintiff, actually seeking possession of their share of the suit property by metes and bounds. Incidentally, the LR's of the Defendant No.3 also expressed the same concern.

4. Having perused the orders passed prior to 21st April, 2017, and the fact that the repeated attempts of auctioning the suit property have failed, the Court clarifies that the order dated 21st April, 2017 passed by this Court will not be construed as having foreclosed other possibilities of executing the Decree dated 1st October, 2007. In other words, in the execution proceedings to be initiated by the parties for executing the said final decree, it will be open to the executing court to explore all possibilities of securing to the parties their respective shares, as determined by the Decree, not limited to the sale of the suit property by way of a public auction. This should sufficiently allay any apprehension that may be harboured by either the Plaintiff or the Defendant No.3.

5. The application is disposed of in terms of above order.

CS(OS) 514/2010 & CMs 27307/2018, 32236/2018 and 35376/2019

6. This appeal was originally filed by the Defendant No. 2 in the suit, who has, during the pendency of the present appeal expired. There are applications under Order XXII Rule 4 Civil Procedure Code ("CPC") for her substitution in the appeal by several applicants. It appears that the Appellant, prior to her death, purportedly executed more than one Will, and there are probate proceedings concerning the said Wills, which are still pending in the Civil Courts in Nainital and Delhi. Clearly, therefore, the present applications seeking substitution of the Appellant will have to await the final outcome of those proceedings.

7. This appeal itself is directed against an order dated 31st May 2010, which purportedly crystallizes the entitlement of the Appellant/Defendant No. 2 in the suit, as far as her share in the suit property is concerned.

8. During the pendency of the present appeal, subsequent to the order dated 21st April 2017, extracted hereinabove, it has been clarified by an order dated 9th November 2017, that the 25% share of the present Appellant, would have to come from the share of the Defendant No. 1 in the suit i.e. the 50% share of Defendant No. 1. It has been clarified by the order dated 21st April, 2017 that the share of 25% of the present Appellant, will be secured by the executing court in the execution proceedings.

9. The Court is of the view that the abovementioned orders sufficiently protect the interest of the LR's of the Appellant/Defendant No. 2. The Court is therefore not prepared to add anything further to what has already been expressed by the above order dated 21st April, 2017 and the further clarification of this Court by the order dated 9th November, 2017.

10. As far as the entitlement of the Applicants to be substituted for the Appellant is concerned, the Court directs that depending upon the outcome of the probate proceedings, the executing court will entertain the applications on behalf of the present Appellant and their claim will stand protected in terms of the above orders of this Court.

11. The appeal and the applications are accordingly disposed of."

[Emphasis Supplied]

35. Later, by way of an order dated 24th January 2020 in a review petition against the DB Order, the Bench made observations to the following effect:

“Review Petition No. 24/2020

3. The parties are agreed upon modification of the order dated 5th November, 2019 to the limited extent that in para 11 of the said order the Court has noted that the appeal stands disposed of.

4. It is stated that the Appellant’s entitlement to a share in the suit property is yet to be considered and has to be decided in the appeal. It is further stated that the Appellant is required to be substituted by her Legal Representatives.

5. Accordingly, this Court modifies the order dated 5th November, 2019 and directs that para 11 thereof will now read as under:

“11. The applications are accordingly disposed of. The appeal is set down for hearing on 30th April, 2020 to determine the above question. The execution proceedings may continue in accordance with law.”

6. The Review Petition is disposed of in the above terms.

FAO (OS) 514/2010

7. List for hearing on 30th April 2020 in the limited question as indicated in the order dated 5th November 2019 as modified hereinabove.”

36. The said appeal continues till date. Thus, at the outset, JDs’ reliance on disposal of the suit is unavailing, as the said order clearly states that parties had the right to enforce the Decree dated 01st October, 2007.

37. Having read the flow of orders leading up to the instant execution petition, we can now deal with the effect of the DB Order (dated 5th November 2019), as already extracted in the preceding paragraphs, which is the mainstay of DH’s claim for seeking partition by metes and bounds, as they rely on the same to contend that the DB Order has modified the Decree. DHs have argued that under Order XXI Rule 28 of CPC, since the order in appeal related to the same decree of which execution is sought herein, as per the ‘doctrine of merger’, Division Bench had modified the Decree by empowering the executing Court to consider partition, firstly and comprehensively, prior to exploring possibility of a sale.

38. In the opinion of the Court, the aforementioned construction of the

observations made in the DB Order, is wholly misconceived. The aforementioned proceedings note the efforts and stance of parties, which leads to only one conclusion – that the final decree before the Court is for sale of the property. The Division Bench, by way of the DB Order, has only clarified its earlier order dated 21st April, 2017, making it clear that the said order should not be construed as having foreclosed other possibilities of executing the Decree dated 01st October, 2007, in terms of the decree and in accordance with law. Appellate Court has given further clarity by using the expression “*in other words*”, indicating that the executing Court can explore all possibilities of securing to parties their respective shares, as determined by the final Decree, which are not limited to sale of the suit property by way of a public auction. This merely enables the executing Court to secure respective shares of the parties by other modes of sale, apart from public auction, which can only mean that parties can now sell the property by other means, for example – to a buyer by consent, or, to any of the parties by way of buy-out of shares of others. However, the final Decree, which arises from a judgment of the same date and calls only for the sale of the property as method of disposal of property, remains intact, and it would be a stretch to read it in any other manner. Allowing partitioning of the property, as prayed for in the relief clause extracted in para 3 herein, would necessarily mean that the decree has been reversed, which cannot be countenanced. Thus, Court cannot accept DHs’ notion that the directions in the DB Order imply any alteration or modification of the Decree.

39. All parties to the suit were duly represented in appeal, a fact strongly emphasized by DH to suggest the binding nature of the DB Order. Indeed, the order of Division Bench is binding on this Court under Order XXI Rule 28

CPC, having been passed in relation to execution of Decree, and this is not in contest in any manner. However, we cannot ignore that the said proceedings related to an interim order. The final judgment and Decree was not assailed by the appellant therein (late Mrs. Madhuri Singh) and was not the subject matter of the appeal. Division Bench did not deliberate upon the final judgment, and therefore, the observations clarifying its earlier order does not tantamount to a direction to the executing court to separate or divide the suit property in a manner different from the one set out in the Decree. Therefore, in the opinion of this Court, it is not open for this Court to partition the suit property and put DHs in possession of 50% thereof.

40. It is also noted that while DHs have joined hands to claim one moiety in the suit property and seek possession thereof, however, there is no such agreement between JDs. Therefore, even if the Court were to, at this juncture, assume that partition plans suggested by parties are viable and the suit property could be partitioned by metes and bounds, granting such a relief would put interest of other JDs in jeopardy. Order dated 01st October, 2007, has to be interpreted to ensure that it benefits all parties including JDs, who resolutely maintain that they do not wish to partition and are interested in sale of the suit property. They have serious objection with respect to the workability of the option of part-sale. The substantive ends of justice have to be seen for not just DHs but for all parties, and as such, DHs' suggestion of part-possession and part-sale of the suit property is unworkable and riddled with complications as the JDs are not in agreement with each other.

41. The suit property admeasures 3860 sq. yards. DHs submitted that they are entitled to 1930 sq. yards and are seeking division of permissible FAR, and further seek partition by contending that each partition side holds 1930

sq. yards, which would entitle them to 100 FAR, 25% ground coverage and up to 9 permissible dwelling units. In the opinion of the court, this would entail sub-division of the suit property, which is impermissible, and nonetheless, division on the basis of FAR is clearly beyond the terms of the Decree. Thus, despite pleas raised by DHs citing feasibility of division under municipal norms and bye-laws such as MPD 2021, this Court remains unconvinced. Considering multiple ownership rights, partition by metes and bounds would necessarily entail such sub-division of the suit property, which is beyond what is prescribed under MPD 2021.¹⁷ This Court is also mindful of the fact that at some point, predecessor-in-interest of JDs 2-4 [*being* late JD-1] had supported/preferred physical partition and opposed sale of the suit property, but then, DHs have also taken a vacillating position, and such issues were finally put to bed when the suit court took note of the fact that parties were not able to resolve their differences by way of partition, and passed the final consent Decree.

42. For the foregoing reasons, this Court is of the opinion that, since the Decree has not been modified by the Division Bench, the only course of action that now remains is to proceed with sale of the suit property, for which, as directed by the Division Bench, the executing Court shall explore other possibilities of sale, such as *inter-se* bidding amongst parties or sale to identified buyer, with consent of all parties.

43. For such reason, present execution petition, with its prayers A and B as

¹⁷ Terms and Conditions (iv) of Chapter 4.0 of the Development Controls, Activities Permitted, Planning Norms and Standards of the Master Plan for Delhi-2021, provide as follows:—

“iv. Subdivision of plots is not permitted. However, if there are more than one buildings in one residential plot, the sum of the built up area and ground coverage of all such buildings, shall not exceed the built up area and ground coverage permissible in that plot.”

filed, is not maintainable. All parties are at liberty to press for fresh execution of the judgment and decree dated 01st October, 2007, in conformity with the terms stated therein.

44. Unfortunately, the legal battle for DH-1 must be postponed to another day. Nevertheless, the Court exhorts the parties to put their differences aside, turn over a new leaf and reach a harmonious resolution through negotiations.

45. Dismissed, with liberty as aforesaid.

SANJEEV NARULA, J

FEBRUARY 15, 2023

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