2023:DHC:9316

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

BEFORE

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

\+ **RFA 517/2019 AND CM APPLS. 25174/2019, 39486/2019, 39487/2019, 46100/2019, 1447/2020, 1451/2020, 13958/2021, 34495/2021, 35386/2021, 44855/2021, 44856/2021, 45048/2021, 45723/2021, 16809/2022, 22998/2022, 27367/2022, 41988/2023, 47866/2023, 49473/2023, 49474/2023, 53527/2023 & 55873/2023**

Between: -

MS. SMITA CHAUDHRY
D/O LATE SH. SATISH CHANDER YADAV,
R/O 737, CHURCH MISSION ROAD,
2ND FLOOR, SHIB SAHAI BUILDING,
FATEHPURI, DELHI. .....APPELLANT NO.1

SMT. SHAIL YADAV
WD/O LATE SH. SATISH CHANDER YADAV,
R/O 737, CHURCH MISSION ROAD,
2ND FLOOR, SHIB SAHAI BUILDING, FATEHPURI, DELHI-6.

..... APPELLANT NO.2

MS. POONAM CHAUDHRY
D/O LATE SH. SATISH CHANDER YADAV,
R/O E-39A, EAST OF KAILASH, NEW DELHI.
.....APPELLANT NO.3

MS. NANDITA CHAUDHRY
D/O LATE SH. SATISH CHANDER YADAV,
R/O 737 CHURCH MISSION ROAD,

2ND FLOOR, SHIB SAHAI BUILDING,
FATEHPURI, DELHI-6. ..... APPELLANT NO.4

MS. SONAL CHAUDHRY
D/O LATE SH. SATISH CHANDER YADAV,
R/O 737, CHURCH MISSION ROAD,
2ND FLOOR, SHIB SAHAI BUILDING,
FATEHPURI, DELHI-6. .....APPELLANT NO.5

SH. ASHUTOSH CHAUDHRY
S/O LATE SH. SATISH CHANDER YADAV,
R/O 737, CHURCH MISSION ROAD,
2ND FLOOR, SHIB SAHAI BUILDNG,
FATEHPURI, DELHI-6. .....APPELLANT NO.6

(*Through: Ms. Geeta Luthra, Sr. Advocate with Mr. Aadarsh Kothari, Advocate for Appellant nos.1, 2 and 6.*
Mr. A. S. Chandhiok, Sr. Advocate with Mr. Taranjit Singh Sawhney and Ms. Alka Singh, Advocates for Appellant nos.3, 4 and 5)

AND

LT. COL. GAJ SINGH YADAV (RETD) — (DECEASED)
S/O LATE CH. SURAT SINGH.

SH. PAWAN KUMAR YADAV
S/O LATE LT. COL GAJ SINGH YADAV,
R/O N-21, GREATER KAILASH - 1, NEW DELHI-110048.

.... RESPONDENT NO. 1

SH. ANIL KUMAR YADAV
S/O LATE LT. COL. GAJ SINGH YADAV,
R/O 105A, KANCHENJUNGA APARTMENTS,
SECTOR 53, NOIDA, U.P.
THRU POA SH. PAWAN KUMAR YADAV (RESPONDENT NO.1)

…. RESPONDENT NO. 2

MS. SUSHILA YADAV (DECEASED: 08-02-19)
THROUGH HER LRS I.E. APPELLANT NO. 1 TO APPELLANT NO. 6 AND RESPONDENT NOS. 6 TO 9.

.... RESPONDENT NO. 3

MS. SAROJ NALINI YADAV (DECEASED: 2004)
D/O LATE CH. SURAT SINGH THROUGH HER LRS I.E. APPELLANT NO.1 TO APPELLANT NO. 6 AND RESPONDENT NOS. 6 TO 9.

…. RESPONDENT NO. 4

SMT. NIRMALA DEVI— (DECEASED: 02-02-19)
WD/O LATE SHRI SURENDER KUMAR CHAUDHARY,
THROUGH HER LRS I.E. RESPONDENT NOS. 6 TO 9.

…. RESPONDENT NO. 5

SMT. ANURADHA CHAUDHARY
D/O LATE SH. SURENDER KUMAR CHAUDHARY,
R/O 727/737, CHURCH MISSION ROAD,
FATEHPURI, DELHI-6. …. RESPONDENT NO. 6

MS. HEMANGINI CHAUDHARY
D/O LATE SH. SURENDER KUMAR CHAUDHARY,
R/O 727/737, CHURCH MISSION ROAD,
FATEHPURI, DELHI - 6.

…. RESPONDENT NO. 7

MS. MRINALINI CHAUDHARY
D/O LATE SH. SURENDER KUMAR CHAUDHARY,
R/O 727/737, CHURCH MISSION ROAD,
FATEHPURI, DELHI - 6.

…. RESPONDENT NO. 8

LT. COL. ATUL CHAUDHARY (RETD)
S/O LATE SURENDRA KUMAR YADAV,
(AKA LATE SH. SURENDER KUMAR CHAUDHARY),

R/O E-39A (EAST WING),
EAST OF KAILASH, NEW DELHI-110065.
&
727/737 CHURCH MISSION ROAD,
FATEHPURI, NEW DELHI-6.

…RESPONDENT NO. 9

SMT KAMLA DEVI-DECEASED (14-05-2015)
WD/O LATE SH. JASWANT SINGH
THROUGH HER LR'S I.E. RESPONDENT NO. 11

…RESPONDENT NO. 10

MS. TARUNA YADAV
(ALSO LR OF R.NO.10)
D/O LATE CH. JASWANT SINGH,
V & P.O. KOSLI,
DISTRICT REWARI, HARYANA.

…RESPONDENT NO. 11

SMT. UMRAO KAUR (DECEASED 1988)
WD/O LATE CH. NARAYAN SINGH.
THROUGH HER LR'S I.E. RESPONDENT NO. 13 TO 16

…RESPONDENT NO. 12

SMT. RAJNI YADAV- (DECEASED: 2003)
D/O LATE CH. NARAYAN SINGH,
THROUGH HER LR'S I.E. RESPONDENT NO. 14 TO 16

…RESPONDENT NO. 13

SMT UMA YADAV
D/O LATE CH. NARAYAN SINGH,
C/O CH. VIJAI PAL SINGH,
P.O. SARDHANA,
VILLAGE GHAZIPUR, TEHSIL MAWANA,
DISTRICT MEERUT, U.P.

…RESPONDENT NO. 14

MS. BINA KUMARI YADAV
D/O LATE CH. NARAYAN SINGH,
C/O CH. VIJAI PAL SINGH,
P.O. SARDHANA,
VILLAGE GHAZIPUR, TEHSIL MAWANA,
DISTRICT MEERUT U.P.

…RESPONDENT NO. 15

SMT USHA RANI YADAV-(DECEASED)
D/O LATE CH. NARAYAN SINGH.
THROUGH HER LRS I.E. RESPONDENT NO. 17 TO 19

…RESPONDENT NO. 16

SH. RANBIR SINGH YADAV
728, ARUN VIHAR, SECTOR 37, NOIDA. U.P.

…RESPONDENT NO. 17

SH. VIKAS YADAV
728, ARUN VIHAR, SECTOR 37, NOIDA. U.P.

…RESPONDENT NO. 18

SH. VIVEK YADAV
728, ARUN VIHAR, SECTOR 37, NOIDA. U.P.

…RESPONDENT NO. 19

(Through: Mr.Kuljeet Rawat, Advocate for R-1.
Pawan Kumar Yadav, R-1 in-person.
Mr. Abhishek Kumar Rao and Mr. Shailesh Suman, Advocates for R-2.
Mr. Hem Kumar and Mr. Samarth Chowdhary, Advocates for R-6.
Ms. Hemangini Dar, R-7 in-person.
Mr. Mrinalini Yadav, R-8 in-person.
Mr. Arun Sri Kumar and Mr. Atharv Gupta, Advocates for R-9 with Lt. Col. Atul Chaudhary.
Mr. Rajat Aneja and Mr. Ajay Saroya, Advocates for R-11.)

% Pronounced on: 22.12.2023

J U D G M E N T

"For men may come and men may go, But I go on forever."

1. The aforesaid recitation from Alfred, Lord Tennyson's famous poem 'The Brook', apparently reflects the nerve-wracking ordeal of the present partition suit which has been moving with the snail pace for more than forty-eight years and in a way, sounds like a death knell for the swift administration of justice in civil suits. The right to speedy justice, which flows from the Constitution of India, is the hallmark of a vibrant constitutional democratic setup of our country and the cornerstone of the steady relationship between the courts and litigants meandering for justice. Therefore, the obligation of the State and judiciary as an institution to facilitate uncontrived access to justice accentuates not only the right to approach the court but also the right to expeditious justice.

2. The decision of the Hon'ble Supreme Court in the case of ***Yashpal Jain v. Sushila Devi & Ors.***[1] succinctly encapsulates the significance of a swift and efficient judiciary in the following words:

> *"41. It is undisputedly accepted that the significance of a swift and efficient judiciary cannot be overstated. It is a cornerstone of democracy, a bulwark against tyranny, and the guarantor of individual liberties. The voices of the oppressed, the rights of the marginalized, the claims of the aggrieved—all are rendered hollow when justice is deferred. Every pending case represents a soul in limbo, waiting for closure and vindication. Every delay is an affront to the very ideals that underpin our legal system. Sadly, the concept of justice delayed is justice denied is not a mere truism, but an irrefutable truth."*

[1] 2023 SCC OnLine SC 1377

3. Undeniably, it is an unsaid but inviolable duty upon all the stakeholders to prevent the erosion of public trust in the judiciary by avoiding protracted litigations, which sometimes become convoluted in procedural technicalities. In fact, this court is saddled, and rightly so, by the duty to ensure that the interaction between the litigants and the justice delivery mechanism is based on a foundation of trust. Such interaction must not be plagued by the friction of distrust. In order to ensure the fulfilment of this duty, the courts are duty-bound to ensure harmony between the means and the ends of justice.

4. The aforesaid expression attains even greater significance given the facts of the present case, wherein, unlike a decree based upon the legal rights of the parties, a preliminary decree which was passed on the mutual consent between parties is languishing for execution for the past more than four decades, depriving the litigants from enjoying the fruits of the decree. It is in the said backdrop that the present appeal has been filed under Section 96 of the Code of Civil Procedure, 1908 (*hereinafter 'CPC'*) against the judgment and decree dated 04.08.2018 passed by learned Additional District Judge, Patiala House Courts, New Delhi in Civil Suit No.612592/2016 directing for preparation of final decree of partition of the suit properties.

DESCRIPTION OF PARTIES

5. The parties in the instant appeal are descendants of one deceased Shib Sahai (died in the year 1938). Shib Sahai had three sons namely, Surat Singh (died on 22.08.1963), Nawal Singh (Pre-deceased in the year 1937) and Narain Singh (died on 18.12.1962).

6. The deceased Surat Singh had two wives, namely Hukum Kaur (first wife) and Shyam Bai (second wife), both deceased.

7. Lt. Col. Gaj Singh (since deceased), the son from the first wife namely Hukum Kaur was the original plaintiff. Lt. Col. Gaj Singh was survived by his two sons namely, Pawan Kumar Yadav and Anil Kumar Yadav. Pawan Kumar Yadav and Anil Kumar Yadav are respondent nos.1 and 2 respectively in the instant appeal.

8. From the second wife of Surat Singh namely, Shyam Bai (defendant no.1 in the original civil suit, deleted *vide* order dated 05.08.1986), there were four children, namely, Satish Chander Yadav (died on 20.09.2002, defendant no.2 in the original civil suit), Surender Kumar Chaudhary (died on 17.11.1967), Sushila Kumari Yadav (died on 08.02.2019, defendant no.3 in the original civil suit and respondent no. 3 in the instant appeal) and Saroj Nalini Yadav (died in 2004, defendant no.4 in the original civil suit and respondent no.4 in the instant appeal).

9. Nawal Singh, the second son of Shib Sahai was survived by his son, namely, Jaswant Singh (died in the year 1965) and wife of Jaswant Singh, namely, Kamla Yadav (died on 14.05.2015, defendant no.10 in the original civil suit and respondent no.10 in the instant appeal) leaving behind their daughter, namely, Taruna Yadav (defendant no.11 in the original civil suit and respondent no.11 in the instant appeal).

10. Narain Singh (died on 18.12.1962), who was the younger son of Shib Sahai, was survived by his wife namely, Umrao Kaur (died in the year 1988, defendant no.12 in the original civil suit and respondent no.12 in the instant appeal). Narain Singh and Umrao Kaur had four daughters namely Rajni Yadav (died in the year 2003, defendant no.13 in the original civil suit and respondent no.13 in the instant appeal), Uma Yadav (defendant no.14 in the original civil suit and respondent no. 14 in the instant appeal), Bina Kumari Yadav (defendant no.15 in the original civil suit and respondent no.15 in the instant appeal) and Usha Rani Yadav (deceased, defendant no.16 in the original civil suit and respondent no. 16 in the instant appeal).

11. It is, thus seen that, when the civil suit bearing CS No.562/1975 was filed on 10.09.1975, Lt. Col. Gaj Singh was the plaintiff. The LRs of Surat Singh were the defendant nos. 1 to 9, the LRs of Naval Singh were defendant nos.10 and 11 and the LRs of Narain Singh were defendant nos.12 to 16. Defendant no.17 was the Life Insurance Corporation of India.

12. Satish Chander Yadav, s/o Surat Singh i.e., defendant no.2 in the original suit, had expired on 20.09.2002 and the legal heirs of defendant no.2 are the appellant nos.1 to 6 in the instant appeal, the details of whom are as under:-

- Appellant no.1: Ms. Smita Chaudhary- D/o Lt. Satish Chander Yadav
- Appellant no.2: Smt. Shail Yadav- W/o Lt. Satish Chander Yadav

- Appellant no.3: Ms. Poonam Chaudhary- D/o Lt. Satish Chander Yadav
- Appellant no.4: Ms. Nandita Chaudhary- D/o Lt. Satish Chander Yadav
- Appellant no.5: Ms. Sonal Chaudhary- D/o Lt. Satish Chander Yadav
- Appellant no.6: Mr. Ashutosh Chaudhary- S/o Lt. Satish Chander Yadav

13. Sushila Yadav, d/o Surat Singh, defendant no.3 in the original suit had expired on 08.02.2019. Saroj Nalini Yadav, d/o Surat Singh, defendant no.4 in the original suit expired in the year 2004. They both are represented through appellant nos.1 to 6 as mentioned above and respondent nos.6 to 9, respectively, the details of whom are as under:-

- Respondent no.6: Smt. Anuradha Chaudhary- D/o Lt. Surender Kumar Chaudhary
- Respondent no.7: Ms. Hemangini Chaudhary- D/o Lt. Surender Kumar Chaudhary
- Respondent no.8: Ms. Mrinalini Chaudhary- D/o Lt. Surender Kumar Chaudhary
- Respondent no.9: Mr. Atul Chaudhary- S/o Lt. Surender Kumar Chaudhary

14. Smt. Nirmala Yadav, w/o Lt. Surender Kumar Chaudhary, defendant no.5 in the original civil suit and respondent no. 5 in the instant appeal had expired on 02.02.2019 and is survived by respondent nos.6 to 9 herein. It is thus seen that defendant nos. 6, 7, 8 and 9 are the respondent nos.6, 7, 8 and 9 in the instant appeal.

15. Smt. Umrao Kaur, w/o Lt. Narain Singh, defendant no.12 in the original suit, had expired in the year 1988 and survived by respondent nos.13 to 16, the details of whom are as under:-

- Respondent No.13: Smt. Rajni Yadav- D/o Lt. Narain Singh and she expired in the year 2003 and is now being represented through her LRs, Respondent no.14 to 16.
- Respondent No.14: Smt. Uma Yadav- D/o Lt. Narain Singh (defendant no. 14 in the original suit)
- Respondent No.15: Ms. Bina Kumari Yadav- D/o Lt. Narain Singh (defendant no. 15 in the original suit)
- Respondent No.16: Smt. Usha Rani Yadav (Deceased)- D/o Lt. Narain Singh, represented through respondent nos.17 to 19.

  The details of whom are as under:-

  Respondent No.17: Sh. Ranbir Singh Yadav- H/o Usha Rani Yadav (deceased)

  Respondent No.18: Sh. Vikas Yadav, S/o Sh. Ranbir Singh Yadav

  Respondent No.19: Sh. Vivek Yadav, S/o Sh. Ranbir Singh Yadav

BACKGROUND

16. The original plaintiff namely, Lt. Col. Gaj Singh, s/o Ch. Surat Singh had filed a Civil Suit being CS No.562/1975 on the original side of this court for partition of the properties.

17. As per the pleadings made in the original suit, it was stated that Shib Sahai, grandfather of the original plaintiff left behind him the immovable properties at Delhi and Village Kosli, District Rohtak (Haryana). The details of such properties were mentioned in Schedule A and B at *Annexure-I* of the plaint.

18. It was also stated that Shib Sahai was the common ancestor of the original plaintiff and also of the defendant nos.1 to 16 and was the exclusive owner or possession holder of the properties listed in *Annexure-I* till his death. After his death, his descendants were in continued possession of the said properties.

19. With the consent of the parties, a preliminary decree was passed by this court on 19.04.1989. The parties were held to be entitled to the following shares in the properties specified in Schedule 'A' and 'B':-

1) Lt. Col. Gaj Singh Yadav (Retd.)- Plaintiff 300/3600

2) Shri Satish Chandra Yadav- Defendant no.2 432/3600

3) Kumari Sushila Yadav- Defendant no.3 48/3600

4) Kumari Saroj Nalini Yadav- Defendant no.4 48/3600

5) Smt. Nirmala Yadav- Defendant no. 5 72/3600

6) Smt. Anuradha Chaudhary - Defendant no. 6 16/3600

7) Smt. Hemangini Dar - Defendant no. 7 16/3600

8) Smt. Mirnalini Chaudhary - Defendant no. 8 16/3600

9) Major Atul Chaudhary - Defendant no. 9 312/3600

10) Mrs. Kamla Yadav -Defendant no. 10 600/3600

11) Ms. Taruna Yadav - Defendant no. 11 600/3600

12) Smt. Rajni Yadav - Defendant no. 13 285/3600

13) Smt. Uma Devi Yadav - Defendant no. 14 285/3600

14) Ms. Bina Kumari - Defendant no. 15 285/3600

15) Smt. Usha Rani Yadav - Defendant no. 16 285/3600

20. Before the final decree was passed, due to change of pecuniary jurisdiction, the said Civil Suit was transferred to Tis Hazari Courts (Central District), Delhi *vide* order dated 21.08.2003 and was registered as Civil Suit bearing CS DJ No.612592/2016. The same was thereafter, transferred to Patiala House Courts, New Delhi. On 04.08.2018, the impugned judgment and decree directing for preparation of the final decree has been passed.

APPELLANTS' ARGUMENTS

21. Ms. Geeta Luthra, learned senior counsel appearing on behalf of appellant nos. 1, 2 and 6 submits that the preliminary decree and the final decree are obtained by fraud committed by the original plaintiff and the same is illegal *ab-initio* and is *non-est* in the eyes of law.

22. It is argued that in compliance of the order dated 15.12.1987 passed by this court, the original plaintiff- Lt. Col. Gaj Singh Yadav filed an affidavit dated 20.01.1988 and in paragraph no.34 thereto, the original plaintiff misrepresented the fact that in 1966, the agricultural land measuring 113 Kanals and 10 Marlas was sold in public auction

after attachment in the execution decree dated 25.05.1964 in suit no.254/1963 passed by the Court of Shri P.C. Saini, Sub-Judge, First Class, Delhi.

23. It is, therefore, argued that believing such a statement to be true, the appellants consented for a preliminary decree. The appellants, however, later discovered that on various dates, multiple sale deeds were executed with respect to the same Khasra number which was portrayed to have been sold at a public auction, as stated in paragraph no.34 of the said affidavit.

24. It is pointed out that on 07.10.1985, additional issues were framed including as to whether the suit is "*for partial partition*" and if so, as to what would be the effect thereto. According to the appellant, the said issue has never been dropped.

25. It is submitted that on 19.04.1989, a preliminary decree with the consent of the parties was passed holding the parties to be entitled to the shares in the properties mentioned in Schedule A and B as set out in the preliminary decree.

26. It is, therefore submitted that the said preliminary decree has been obtained under misrepresentation amounting to fraud and thus, can be set aside even in ancillary proceedings without the same being challenged in the instant appeal.

27. It is also submitted that during the pendency of the final decree, an application under Order XX Rule 18 of Code of Civil Procedure, 1908 (CPC) dated 19.08.2016 was filed for modification of the

preliminary decree, which was rejected by the learned trial court on 03.02.2017.

28. Civil Revision No. 96/2017 was filed against the said order. The same was dismissed as *vide* order dated 26.04.2018 by this court. Against the order passed by this court in revision, the appellant preferred SLP before the Hon'ble Supreme Court bearing SLP(C) 23224/2018.

29. Before the said SLP could be taken up for hearing, the trial court *vide* impugned judgment and decree dated 04.08.2018 passed the final decree for partition, ordering for sale of the suit property. Therefore, when the SLP was taken up for hearing on 12.10.2018, the liberty was granted to the appellants to pursue their grievance, in accordance with law.

30. It is, therefore, argued that in the instant appeal, the appellants are entitled to raise all their grievances including the grievance with respect to the commission of fraud. Learned senior counsel has extensively read over the affidavit by way of evidence of Lt. Col. Gaj Singh Yadav-original plaintiff and she specifically emphasized on paragraph no.34 of the said affidavit.

31. Learned senior counsel has also placed reliance on a decision of the Hon'ble Supreme Court in the case of ***S.P. Chengalvaraya Naidu v. Jagannath***[2] to substantiate her arguments that no finality in litigation can be prayed where fraud is alleged. She also placed

[2] (1994) 1 SCC 1

reliance on the decisions of the Hon'ble Supreme Court in the cases of ***A.V. Papayya Sastry v. Govt. of A.P.***[3] and ***K.D. Sharma v. SAIL***[4] to buttress her submission that fraud avoids all judicial acts, ecclesiastical or temporal. She has also placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Ram Chandra Singh v. Savitri Devi***[5]**,** to argue that courts under their inherent powers can interfere with the preliminary decree, if the same is found to have been obtained by the commission of fraud. She has further placed reliance on a decision of the Hon'ble Apex Court in the case of ***State of Orissa v. Brundaban Sharma***[6] for the proposition that the lapse of time cannot be an excuse for judgment obtained due to fraud.

32. Mr. A.S. Chandhiok, learned senior counsel appearing on behalf of appellant nos. 3 to 5 submits that the learned trial court has failed to exercise its jurisdiction over the agricultural land.

33. As the submission goes, the rights determined in a preliminary decree *qua* the agricultural land have not been made part of the final decree, thus, making them non-executable. It is submitted that as per Section 2(2) of CPC there can be a preliminary, final or partly preliminary and partly final decree. A preliminary decree will not become final and the suit is said to be pending until a final decree is passed. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of ***Kattukandi Edathil Krishnan v. Kattukandi***

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[3] (2007) 4 SCC 221
[4] (2008) 12 SCC 481
[5] (2003) 8 SCC 319
[6] 1995 Supp (3) SCC 249

Edathil Valsan[7]**.** It is argued that excluding the alleged two acres of land at the village Kosli Haryana from forming part of the final decree vitiates the impugned decree.

34. It is also argued that the learned trial court has wrongly placed reliance on Section 111 read with Section 158 of the Punjab Land Revenue Act, 1887, as applicable to the State of Haryana. According to learned senior counsel, the jurisdiction of the civil court in the cases of partition is concurrent with that of the revenue officer.

35. It is also argued that in the final decree, the learned trial court ought to have referred the consequential questions of the division of property to the revenue officer under Rule 18 (1) and (2) of CPC. Reliance is placed for the aforesaid proposition on the decision of the Hon'ble Supreme Court in the case of ***Jhabbar Singh (D) By LRs. Etc. v. Jagtar Singh***[8]. To buttress, it is added that not including the agricultural land in the final decree, is a manifest error on the part of the learned trial court, which is directly affecting the rights of the parties.

36. It is also argued that the appellant never sought for the change in the shares of the parties as was determined *vide* the consent decree dated 19.04.1989. The appellants were merely seeking inclusion of the entire 80 bighas as was alleged by the plaintiff in the capacity of an attorney. The court has jurisdiction to amend the shares of the parties

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[7] (2006) 9 SCC 166
[8] 2023 SCC OnLine SC 431

suitably if a preliminary decree has been passed, in view of change in circumstances/law.

37. According to him, in any event, even in the final decree, the issue with respect to partial partition ought to have been decided. Since the same has not been done, therefore there is an apparent violation of Order XIV Rule 2 of CPC whereby, the learned trial court was obligated to pronounce judgments on all issues.

38. It is, therefore, submitted that this court in this appeal is empowered to decide questions of law and on facts while independently assessing the evidence.

RESPONDENTS' ARGUMENTS

39. Mr. Kuljeet Rawal, learned counsel appearing on behalf of respondent no.1 submits that during the pendency of the final partition decree, an amendment application under Order VI Rule 17 of CPC was initially filed by the legal heirs of defendant no.2 seeking amendment in their written statement.

40. On 24.09.2005, another application was filed with revenue record and on 26.08.2008 again, an amendment application was filed. It is argued that all three applications were withdrawn and on 19.08.2016, a consolidated application under Order XX Rule 18 of CPC was filed.

41. While pointing out pleadings from the application which was filed on the basis of revenue record and the application under Order XX Rule 18 of CPC, it has been argued that there are various

inconsistencies. Learned counsel refers paragraph nos.5 and 6 of the application dated 10.03.2004 filed under Order VI Rule 17 of CPC, by defendant No. 2(i)-(vi) for amendment of Schedule 'A' to the plaint.

42. The Paragraph nos.5 and 6 of the application dated 10.03.2004 reads as under:-

> *"5. That, however, to effect the partition of the entire properties, of the parties which comprise of 80 Bighas of land situated at village Kosli, it is just and proper that schedule 'A' to the Plaint 18 amended accordingly. In this regard it may be stated that the plaintiff himself had in an earlier suit titled "Unrao Kaur Versus Chaudhary Surat Singh" which was also a suit for Partition, vide Plaint dated 16 March, 1963, mentioned the extent of the Agricultural lands at Village Kosli to be 80 Bighas. There has been no diminishing in the Agricultural lands since the said earlier Plaint except for 23 Bighas which was auctioned in execution of a money decree against the family.*
>
> *6. That since the present is a partition suit all the parties enjoy the same status and it is open to the Applicant/Defendant to apply for amendment of the Schedule to the Plaint giving particulars of the properties of the family to be partitioned. The Applicant/ Defendant respectfully states that unless the schedule is so amended, all the disputes and differences between the parties will not be fully and finally settled and separate proceedings will have to be undertaken for partition of the remaining lands i.e. lands in excess of 16 Bighas at Village Kosli. Since the properties have hot been partitioned, as yet and the proceedings for final decree are pending before this Hon'ble Court, it is just and proper that all the joint properties of the parties are brought within the ambit of the said suit."*

43. The averments have also been pointed out from the application dated 24.09.2005 under Order VI Rule 17 of CPC that the same was filed on the basis of revenue record from paragraph no.6(A) onwards. Paragraph no.6(A) consists of the Khasra numbers which were shown to be under the ownership of the heirs of Shri Surat Singh as per the Jamabandi for the year 1967-68.

44. While taking this court through the application under Order XX Rule 18 of CPC, pleadings made in paragraph no.6 thereof, have been read over to indicate that similar averments have been made describing them to have been noticed at the relevant time, whereas, the revenue record, as has been referred in paragraph no. 6(A), was already with the appellants in the year 2005, as can be seen from the contents of the application referred hereinabove.

45. It is, thus, submitted that the said application was rightly rejected by a detailed order passed by the Additional District Judge-14, Central, dated 03.02.2017 and a reference is made to paragraph nos. 27 to 29 of the said order.

46. Learned counsel has also pointed out that in revision, as preferred by the appellant against the order passed by the learned trial court, this court has given a categorical finding that the said application was misconceived and the same was dismissed with the cost of Rs.2,00,000/-.

47. Reference is made to paragraph nos.13 to 16 of the order dated 26.04.2018 passed in C.R.P. No. 96/2017 titled as ***Smita Chaudhary & Ors. v. Lt. Col. Gaj Singh & Ors***[9]**.**

48. It is, therefore, argued that the Hon'ble Supreme Court in terms of order dated 12.10.2018 did not set aside the order passed by the learned trial court and the High Court. The Hon'ble Supreme Court has only granted liberty to the appellant to pursue their grievances in

[9] 2018 SCC OnLine Del. 8798

accordance with law. It is argued that both the orders attained finality and the submissions dealt with on merit cannot be allowed to be re-agitated in the instant appeal as the same recourse would not be in accordance with the law.

49. He has relied upon the order passed by the Hon'ble Supreme Court on 12.10.2018, which reads as under:-

> *" UPON hearing the counsel the Court made the following*
>
> ***ORDER***
>
> *Mr. D.N. Goburdhan, learned counsel appearing for the petitioners, submits that the final decree has already been drawn up. If that be so, this Special Leave Petition has been rendered infructuous.*
>
> *It will be open to the petitioners to pursue their grievances in accordance with law.*
>
> *Subject to the above liberty, this Special Leave Petition is dismissed. Pending interlocutory application(s), if any, is/are disposed of."*

50. Learned counsel has also read over orders dated 02.02.2018, 15.02.2018 and 17.04.2018, passed by the learned Additional District Judge during the pendency of the final decree. It is highlighted that the parties have taken a categorical stand that their shares to be separated from the groups.

51. Learned counsel has also placed reliance on the decisions in the cases of ***Jt. Collector Ranga Reddy Dist. & Anr. v. D.Narsing Rao & Ors.***[10] and another decision of the Hon'ble Supreme Court in the case

[10] (2015) 3SCC 695

of ***Ganga Retreat & Towers Ltd. & Anr v. State Of Rajasthan & Ors.***[11]

52. In addition to the aforesaid submissions, learned counsel has relied upon paragraph no. 34 of the affidavit so as to indicate that there was no suppression of facts or fraud committed by the original plaintiff. He explained that the agricultural land left by Shib Sahai was measuring 129 Kanals and 10 Marlas (73 Bighas) in the revenue estate of village Kosli.

53. In 1966, the agricultural land measuring 113 Kanals and 10 Marlas was sold in the public auction after attachment in execution of a compromise decree dated 25.05.1964. Land measuring 113 Kanals and 10 Marlas was sold leaving only 16 Kanals i.e. 2 acres, which has been duly shown in Schedule 'B' of the plaint. Since the land measuring 113 Kanals and 10 Marlas was already sold before the institution of the civil suit, therefore, the same was not the subject matter of the civil suit.

54. Further, the land was sold in public auction in favour of one Jagdish Singh, S/o Shri Chander Singh and Shri Sultan Singh, S/o Shri Gopal Singh in the ratio of 2/3rd and 1/3rd each respectively and the same was mutated in the revenue record in their names. The said fact was confirmed in the statement of Shri. Tej Bhan, Patwari of Halqa Kosli, Tehsil Jhajjar, District Rohtak, who appeared as D2W6 in Suit No.577/1966 titled as ***Smt. Kamla Devi Yadav v. Col. Gaj Singh & Ors.***

[11] (2003) 12 SCC 91

55. It is explained that much after the said public auction, Lt. Col. Gaj Singh Yadav acquired 2/3rd share of Shri Jagdeep Singh and his 2/3rd share was mutated in his favour in the revenue record. Since the same is self-acquired and separate property, therefore, there was no reason to include the same in Schedule 'B' of the suit property.

56. Learned counsel, therefore, sought to explain that the argument of fraud is completely misconceived and the same does not have any legs to stand.

57. Learned counsel appearing on behalf of respondent no.1 also submits that the trial court has rightly relied upon the decision in the case of ***Indu Singh v. Prem Chaudhary***[12] for the proposition that irrespective of the fact that moiety or upwards do not make the request for sale of the joint properties/properties, a sale can be directed under Order XX Rule 18 (2) of CPC, as the civil court is fully empowered to pass such directions. He explains paragraph nos.15 and 16 of the said decision, which is an opinion of Hon'ble Justice Valmiki J. Mehta in the case of ***Indu Singh (supra).*** He also relies on paragraph no.80 and 82 of the said decision which is the opinion of Hon'ble Justice R.K. Gauba.

58. While reading paragraph no.82, he submits that the courts in such factual circumstances ought not be helpless and can exercise the inherent jurisdiction of the civil court to do complete justice, coupled with the authority vested in it, under Order XX Rule 18 (2) of CPC, 1908.

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[12] 2018 SCC OnLine Del 8951 (FB)

59. He, then, submits that on the issue of power with the trial court to proceed for sale in case the properties cannot be divided by metes and bounds, there is consensus of two Hon'ble Judges in the case of ***Indu Singh (supra)*****.** He then explains paragraph no.3 of the said decision, which is an opinion of Hon'ble Justice S. Ravinder Bhat (as his lordship then was) and then submits that even a careful perusal of paragraph no.3 would not show any divergent view on the aforesaid aspect and therefore, according to him, the principle of law as has been laid down by the Full Bench of this court in the case of ***Indu Singh (supra)*** is fully applicable in the instant case and has rightly been relied upon by the trial court.

60. Mr. Abhishek Kumar Rao, learned counsel appearing on behalf of respondent no.2 submits that the ground of fraud alleged by the appellants is completely misplaced.

61. According to him, the principle and test for impeaching a decree on the ground of fraud has been well settled by various pronouncements of the Hon'ble Supreme Court and the High Courts.

62. He also submits that for a decree to be set aside on the ground of fraud, fraud must have been committed on court. Fraud only be said to have been committed on a court, when a party before court contrives to deprive the other side of the opportunity to test the falsehood of the case of the defrauding party.

63. The maxim '*fraud vitiates every solemn act'* is only attracted in case of proven and established acts of fraud. A mere allegation of

fraud is of no consequence. Without admitting the allegation of fraud, he submits that even if the sale deeds are executed and the entire land was not included, at this stage, in the absence of there being an appropriate challenge to the concerned sale deeds, those properties cannot be included in the properties of Schedule 'B'.

64. According to him, the actual reason to agitate all these issues is to delay the proceedings so the fruits of the decree shall not be enjoyed by the other side, whereas the appellants continue to enjoy the possession of the property which has been decreed for sale. He has placed reliance on a decision of the High Court of Madras in the case of ***L. Chinnayya v. K. Ramanna***[13]. He also places reliance on the definition of collateral fraud and extrinsic fraud from Black's Law Dictionary 11th edition.

65. The learned counsel appearing on behalf of respondent no.2 has also distinguished the decision relied upon by the appellants. He submits that the decision relied upon by the appellants would not have any application under the facts of the present case.

66. Respondent no.6 is represented by Mr. Ashish Mohan, Advocate. Learned counsel while placing reliance on the contents of the memorandum of cross objection under Order XLI Rule 22 of the CPC, registered as *CM No.34495/2021* submits that in view of the decision rendered by the Hon'ble Supreme Court in the case of ***Vineeta Sharma v. Rakesh Sharma and Ors.***[14]**,** the impugned final

[13] (1915) ILR 38 Mad 203
[14] (2020) 9 SCC 1

decree deserves to be set aside as the daughter is also entitled to an equal share to that of a son in a coparcenary property.

67. According to him, since no final decree was passed until the commencement of the Hindu Succession (Amendment) Act, 2005 (hereinafter 'Amendment Act'), the change in law brought about by the said Amendment Act, must be given effect in its letter and spirit, as is held in ***Vineeta Sharma (supra)***.

68. According to him, at the time when the preliminary decree was passed, the judgment in ***Vineeta Sharma (supra)*** did not exist or operate. The Hon'ble Supreme Court has categorically held that daughter becomes a coparcener with effect from the date of the Amendment Act, irrespective of the date of birth being earlier in point of time.

69. It is, therefore, prayed that the full effect of the change in law, introduced by way of the Amendment Act and as interpreted by the judgment in the case of ***Vineeta Sharma (supra)*** be given by accepting the cross objection of the respondent no.6. Therefore, the respondent no.6 is entitled to her lawful share in the coparcenary by way of a final decree.

70. Learned counsel has also submitted that the defendant no.5 (now deceased) *vide* statement dated 22.02.2018 relinquished share in favour of respondent nos.6, 7 and 8 equally.

71. Respondent no.11 had also relinquished her share of 1200/3600 in favour of respondent no.9. It is also submitted that as per the

preliminary decree dated 19.04.1989, the trial court has granted the following shares to the parties:

i. Nirmala Yadav 72/3600;
ii. Anuradha Chaudhary 16/3600;
iii. Hemangiri Dar 16/3600;
iv. Mrinalini Chaudhary 16/3600;
v. Major Atul Chaudhary 312/3600

72. Thus, a total share of 432/3600 was granted to the legal heirs of Lt. Surendra Kumar Yadav. According to him, the effect of the substituted Section 6 of the Hindu Succession Act, 1956 would accordingly entitle aforesaid parties to an equal share of 86.4/3600 each.

73. Besides this, the share of the parties will have to be determined on the basis of the relinquishment by the other defendants. Learned counsel has also placed reliance on the decision in the case of ***Income Tax Officers v. J.B. Magharam and Co. and Ors.***[15] and the recent decision of the Hon'ble Supreme Court in the case of ***Prashanta Kumar Sahoo and Ors v. Charulata Sahu and Ors***[16]**.**

74. Respondent no.9 is represented by Mr. Arun Sri Kumar. He opposes the submissions made by the appellants. He also relies upon his cross objection registered as *CM No.1447/2020* under Order XLI Rule 22 read with Section 96 of the CPC, 1908.

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[15] (1964) 53 ITR 638 (Bom)
[16] 2023 SCC OnLine SC 360

75. His endeavour is to seek setting aside of the final decree by allowing the cross objection, directing for his separate share of 1530/3600 (42.5%) in the suit Schedule 'A' property, vertically divided and clearly demarcated separately from the shares of the other parties. He also presses for his separate 330/3600 share (9.17% share) in the suit Schedule 'B' (Item b to g) property in village Kosli, District- Rewari, Haryana.

76. Learned counsel for respondent no.9 further submits that the power of a civil court to order sale is circumscribed by the Partition Act, 1893 (hereinafter referred to as *'Act of 1893'*) and no independent power to order a sale exists. While taking this court through the provisions of Sections 2, 3 and 9 of the Act of 1893, he submits that the division of a property has to be made and that the sale of a property and distribution of the proceeds to all the shareholders can only be directed on the request of any of such shareholders interested, individually or collectively to the extent of one moiety or upwards. According to him, one moiety would mean @ 50% of the share. He then submits that the court can even pass a final decree by which the suit properties are partly divided and partly sold. He submits that the 42% share of respondent no.9 may be divided and given to him and the share of the smaller shareholders can be sold collectively. He has presented a model of suit property in Delhi describing 42% share and its possible allocation.

77. He explains the decision relied upon by the learned trial court in the case of ***Indu Singh (supra)*** and submits that the separate opinion

of Hon'ble Mr. Justice S. Ravindra Bhat (as his lordship then was) specifically rejects the interpretation that a court would have inherent power to compel a sale even without a request being made by parties holding at least one moiety share. He explains that the view expressed by Hon'ble Mr. Justice Valmiki Mehta is *per incuriam* and contrary to the express provisions of the Act of 1893 as also the law laid down by the Hon'ble Supreme Court in ***R. Ramamurthi Iyer v. Raja V. Rajeswara Rao***[17]***, Rani Aloka Dudhoria and Others v. Goutam Dudhoria and Others***[18], the decisions of the Calcutta High Court in the case of ***Nritya Gopal Samanta v. Pran Krishan Dan and Others***[19] ***and Gadadhar Ghose v. Janaki Nath Ghosh and others***[20].

78. With respect to submissions made by the appellants, learned counsel for respondent no.9 submits that in the absence of there being a challenge to the preliminary decree, the same cannot be challenged in an appeal arising from the final decree. According to him, Section 97 of CPC squarely forecloses any such effort. He also refers to Section 96(3) and Order XXIII Rule 3A of CPC, to support his contention. According to him, various efforts were made by the parties after passing of the preliminary decree to revisit their shares. Each of such objections were rejected and each rejection would constitute a decree within the definition of Section 2(2) of CPC. It follows that there is no bar on a court making any number of decrees in a suit. If no such appeal was preferred by the unsuccessful parties against those

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[17] (1972) 2 SCC 721
[18] (2009) 13 SCC 569
[19] AIR 1952 Cal 893
[20] AIR 1969 Cal 59.

prior orders, those decrees can be stated to have already attained finality. Attempts to revisit such earlier decrees, in whatsoever mode, are hit by the doctrine of *res judicata* and also bar under Section 97 of CPC.

79. He also submits that the consent decree in the year 1989 was not based on the then prevailing legal position, but was based on mutually acceptable terms to give and take. The shares were allotted to the individual parties and not to the branches of the families. None of the contested issues were put to trial, only in the interests of achieving a quietus to the litigation. Since there was no judicial finding on the various debated issues in the preliminary decree, therefore, any contention attempting to re-open the preliminary decree in the light of subsequent change in law needs to be rejected.

80. With respect to cross objections *(CM APPL.34495/2021)* of respondent nos.6-8, respondent no.9 submits that the respondent nos.6-8 are the sisters of respondent no.9. He submits that the cross objection of respondent no.6 is misconceived and such a cross objection is not maintainable in light of the provisions under Section 96(3) and Section 97 of CPC.

81. He also submits that the decision of the Hon'ble Supreme Court in the case of ***Vineeta Sharma (supra)*** is not an authority for permitting consent decrees to be reopened on the ground of change in law.

82. According to him, the consent decree passed in the instant case has the character of a 'family settlement', which cannot be reopened on the grounds of change of law or on any other ground. The allotment of shares was not based on the earlier prevailing law, therefore, the change in law is not a material fact in the instant case.

83. It has been argued that respondent nos.6-8 had previously also, attempted to seek re-working of shares on the exact same ground and the same was rejected *vide* order dated 05.01.2018 by the learned trial court which remained unchallenged. The same ground cannot be re-agitated when it has already attained finality *inter partes* and the same is barred by the principle of estoppel and *res judicata.*

84. He then submits that the preliminary decree is not a tentative decree and is conclusive on the matters decided therein. He places reliance on the decision of the Hon'ble Supreme Court in the case of ***Venkata Reddy and Others v. Pethi Reddy***[21].

85. Learned counsel for respondent no.9, to substantiate his argument that no appeal shall lie from a consent decree, places reliance on the decision of the Hon'ble Supreme Court in the cases of ***Shobha Dhawan v. Ramesh Chandra Kapoor***[22]***, Pushpa Devi Bhagat (decease, by LR) v. Rajinder Singh***[23] and ***Katikara Chintamani Dora and Others v. Guntreddi Annamanaidu and Others***[24] and the

[21] AIR 1963 SC 992
[22] SLP (C) No.18599/2016
[23] (2006) 5 SCC 566
[24] (1974) 1 SCC 567

decision of this court in the case of ***Shobha Dhawan v. Ramesh Chandra Kapoor***[25]**.**

86. With respect to the proposition that a consent decree recorded by a court can only be modified with the consent of parties, learned counsel for respondent no.9 places reliance on the decision of the Hon'ble Supreme Court in the case of ***Gupta Steel Industries v. Jolly Steel Industries Pvt. Ltd. and another***[26] and the decision of this court in the case of ***Moorianthakath Ammo v. Matathankandy Vattakkayyil Pokkan***[27]**.**

87. With respect to the proposition that no appeal shall lie from a final decree where no appeal preferred to preliminary decree, learned counsel for respondent no.9 places reliance on the decision of this court in the case of ***Shobha Dhawan (supra)***, the decisions of the Hon'ble Supreme Court in the cases of ***Sital Parshad v. Kishorilal***[28] ***Venkatrao Aanantdeo Joshi v. Sau. Malatibai***[29]**, *Kaushalya Devi and others v. Baijnath Sayal (deceased) and others***[30] and ***Mool Chand and Others v. Dy. Director, Consolidation and others***[31]**.**

88. With respect to the proposition that principles of *res judicata* are applicable to different stages in the same suit/proceeding even in cases of change in law, learned counsel for respondent no.9 places reliance on the decisions of the Hon'ble Supreme Court in the cases of

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[25] 2016 SCC OnLine Del 1229
[26] (1996) 11 SCC 678
[27] (1940) 52 LW 339
[28] AIR 1967 SC 1236
[29] (2003) 1 SCC 722
[30] (1961) 3 SCR 769
[31] (1995) 5 SCC 631

Bhanu Kumar Jain v. Archana Kumar and another[32]***, Kalinga Mining Corporation v. Union of India and others***[33]***, S. Ramachandra Rao v. S. Nagabhushana Rao***[34] and ***Y.B. Patil and Others v. Y.L. Patil***[35]**.**

89. With respect to the proposition that a final decree for 'sale' cannot be ordered in a partition suit, unless applied for by at least one sharer under the Act of 1893, learned counsel for respondent no.9 places reliance on the decisions of the Hon'ble Supreme Court in the cases of ***R. Ramamurthy Iyer (supra), Rani Aloka Dudhoria and others (supra),*** the decision of the High Court of Calcutta in the cases of ***Nritya Gopal Samantha (supra)*** and ***Gadadhar Ghose (supra).***

90. Learned counsel for respondent no.9 also submits that various issues tried to be challenged in the instant appeal have already been considered between the parties in the cases of ***Smita Chaudhary and others v. Lt. Col. Gaj Singh and others***[36]***, Sushila Yadav v. Lt. Col. Gaj Singh and others***[37] and ***Uma Devi Yadav and another v. Lt. Col. Gaj Singh and others***[38]**.**

91. Mr. Rajat Aneja, learned counsel appearing on behalf of respondent no.11, namely, *Taruna Yadav,* refutes the submissions made by learned counsel appearing for respondent no.9 and he strongly opposes the cross objections filed by the said respondent.

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[32] (2005) 1 SCC 787
[33] (2013) 5 SCC 252
[34] 2022 SCC OnLine SC 1460
[35] (1976) 4 SCC 66
[36] 2018 SCC OnLine Del 8798
[37] 2012 SCC OnLine Del 5044
[38] 2000 (56) DRJ (Suppl) 734

92. Learned counsel submits that the prayer made in the cross objections registered as *CM APPL 1447/2020* by respondent no.9 is not maintainable.

93. He further submits that in the absence of there being an appropriate application for modification of the preliminary decree, respondent no.9 after passing of a final decree cannot claim relief beyond the relief granted to the parties by way of a preliminary and final decree. He submits that respondent no.9 has misconstrued the orders passed during the pendency of the final decree and has pre-supposed that the preliminary decree stood amended and therefore, respondent no.9's claim of 42.5% shares in the suit Schedule 'A' property is completely not acceptable.

94. Learned counsel for respondent no.11 also explains that merely on the basis of the order dated 20.07.2016 passed by the court below, the preliminary decree cannot be treated to have been amended. He submits that the order dated 20.07.2016 simply records the fact that respondent no.11 had filed an affidavit stating that she is voluntarily giving up her share in the suit property 727-737, Church Mission Plot, Fatehpuri, Delhi-110006 in favour of defendant no.9-Col. Atul Choudhary. The said affidavit was only taken on record. No consequential directions were issued by the concerned court, much less amending the preliminary decree and therefore, on the basis of the order dated 20.07.2016, no rights are accrued in favour of respondent no.9 so as to claim any enhanced share beyond the share allocated in the preliminary decree.

95. Learned counsel also explains from the impugned final decree from paragraph nos.28 and 29 that the court below has correctly recognized the rights of the parties only to the extent of the ratio as specified in the preliminary decree. He, then, contends that any claim beyond the scope of the preliminary decree by respondent no.9 is untenable in law and the same cannot be granted in cross objections filed by the said respondent.

96. Learned counsel has also taken this court through additional reply by respondent no.11 to *CM APPL 44855/2021* and has explained from paragraph no.3 onwards the circumstances under which the relinquishment deed was executed. According to him, no amount was paid by respondent no.9, except a sum of Rs.1 Crore. However, the amount agreed to be paid by respondent no.9 as per the mutual consent agreement dated 25.01.2016 was a sum of Rs.1,75,00,000/-. Learned counsel, therefore, made the following broad propositions:-

a) final decree cannot disturb the preliminary decree. To substantiate the aforesaid proposition, he placed reliance on a decision of this court in the case of ***Ravinder Kaur v. Gagandeep Singh***[39],

b) preliminary decree should be modified by the trial court before passing of the final decree in the event of change or supervening circumstances. He placed reliance on the decision in the cases of ***Ganduri Koteshwaramma & Ors. vs. Chakiri***

[39] MANU/DE/0936/2016

Yanadi & Ors.[40] and ***Smt. Swaran Lata and Ors. v. Shri Kulbhushan Lal and Ors.***[41]***,***

c) *inter se* dispute to be dealt with in a separate proceeding. To support this proposition, he placed reliance in the case of ***Northern Eastern Publishing and Advertising Co. Ltd. v. Nirmal Gupta and Ors.***[42] and ***Ravi Narayan Agarwal & Ors v. Sushil Kumar Agarwal & Ors.***[43].

97. He then concludes while submitting that the share of respondent no.11 cannot be altered in the instant proceedings of appeal. The issue with respect to the alleged purchase/transfer of 1/3rd share of respondent no.11 of the Delhi property cannot be gone into in the instant proceedings.

98. Learned counsel for respondent no.11, however, supports the stand taken by learned counsel for respondent nos.1 and 2 that the properties in question cannot be partitioned by metes and bounds and therefore, the trial court has rightly proceeded to direct for sale. To supplement the aforesaid submissions, he submits that Section 2 of the Act of 1893 will have no application in the instant case, as the said Section is applied to any suit for partition which has been instituted prior to the commencement of the Act of 1893. He then, contends that the instant civil suit is not a case which has been instituted prior to

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[40] MANU/SC/1216/2011
[41] MANU/DE/0321/2014
[42] 238 (2017) DLT 501
[43] 277 (2021) DLT 129 (DB)

commencement of the Act of 1893 and, therefore, the entire section would have no relevance.

99. Mr. Arun Srikumar, learned counsel appearing on behalf of respondent no.9 in rebuttal of the submissions made by respondent nos.1 and 2 and in rejoinder to the submissions made by learned counsel appearing on behalf of respondent nos.6 and 11, highlights certain aspects.

100. According to him, the court below was alive to the transfer of shares as discernible from paragraph nos.13, 28, 30 and 31 of the impugned judgment. While highlighting the words 'or their successor in interest' used in various paragraphs, he submits that the sale proceeds shall be distributed amongst the parties or their successor in interest in the ratio as specified in the present decree. He then contends that respondent no.9 is the successor in the interest of respondent nos.10 and 11 in the Delhi property.

101. Learned counsel has also presented the summary of rejoinder arguments advanced by respondent no.9 and sur-rejoinder to the case advanced by respondent no.6. It is argued that respondent no.11 has not made any formal prayer with respect to the oral arguments. It is submitted that the attempt of respondent no.11 to resign from her settlement with respondent no.9, has been set up only in her reply to an I.A. filed by respondent nos.1 and 2 for permission to transfer their share. According to him, the submission of respondent no.11 travelled

beyond the scope of a regular appeal/cross-objection under Section 96 of CPC/Order XLI Rule 22 of CPC.

102. He further submits that a registered relinquishment deed was executed by respondent no.11 way back in the year 2016 in respect of her undivided share in Delhi property. The same remained unchallenged for about three years and the challenge subsequent thereto, is time-barred. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of ***Dahiben v. Arvindbhai Kalyanji Bhanusali***[44]**.** It is argued that the submissions made by respondent no.11 cannot be appreciated in the teeth of the registered document and the submissions are contrary to the mandate of Section 91 of the Indian Evidence Act, 1872 and Section 52 of the Registration Act 1908, which clearly says that any plea founded on an oral agreement and/or unregistered MoU as against a registered and unregistered relinquishment deed is untenable.

103. It is also argued that the plea of breach of any agreement cannot be the reason to undo the transaction which has admittedly been concluded by registering a relinquishment deed. The aggrieved party must resort to an appropriate remedy and for the said proposition also, the reliance is placed on the same decision in the case of ***Dahiben (supra).***

104. It is also submitted that the relinquishment of share by respondent no.11 in favour of respondent no.9 was not only made by

[44] (2020) 7 SCC 366

way of a registered instrument, but it was also specifically reported to the trial court and recorded in its orders. Relinquishment was conceded and a concession of fact made by a counsel of a party before a court of law which is binding on such party. Such an order tantamounts to the consent decree and cannot be appealed considering the embargo in Section 96 (3) of CPC. Reliance is placed on the decision in the case of ***Vimleshwar Nagappa Shet v. Noor Ahmad Sheriff and Ors.***[45]

105. The only forum where subsequent consent decree can be challenged is before the trial court under Order XXIII Rule 3A of CPC, which admittedly has not been done. Even if such an attempt is made, the same would be of no help to respondent no.11, in view of the law laid down in the decision of the Hon'ble Supreme Court in the case of ***State of Maharashtra v. Ramdas Shrinivas Nayak and Anr.***[46] It is submitted that the mere act of not drawing up a formal decree in respect of a settlement would not deprive the parties of the benefit of the settlement entered into by them before a court of law. Even, the settlement is capable of being executed through execution proceedings though not reduced to a decree formally. Reliance is placed on the decision in the case of ***Sir Sobha Singh and Sons Pvt. Ltd. v. Shashi Mohan Kapoor (deceased)***[47] and ***Salahuddin Mirza v. Mohd. Qamar***[48]**.**

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[45] (2011) 12 SCC 658
[46] (1982) 2 SCC 463
[47] (2020) 20 SCC 789
[48] 2021 SCC OnLine Del 5019

106. With respect to submissions made by respondent no.6, it is submitted that respondent no.6 had admittedly sought to take benefit of the Amendment Act before the trial court itself but had failed. No cross-objection would lie in an appeal arising from a final decree in respect of matters which were not the subject matter of the said final decree. Section 96(3) and 97 of CPC procedurally bar any effort to seek to apply the judgment in ***Vineeta Sharma (supra)***. It is submitted that the decision in the case of ***Vineeta Sharma (supra)*** does not deal with the consent decree at all. It is also submitted that the Amendment Act itself protects all watertight alienations made prior to 20.12.2004 whether by registered instrument or court decree.

107. Much emphasis has been laid on family settlement in the year 1981 resulting in the passing of the consent decree to highlight that the same was not in line with the then prevailing law and rather involved in many elements of give and take. Various factors have been highlighted in this regard. It is, thus, argued that change in the law is an irrelevant factor in the present dispute.

108. With respect to oral submissions advanced by the appellants and respondent nos.1 and 2, it is argued that no finding is necessary in one way or the other in the present appeal to the effect that no other properties are available for division amongst the family members. It is submitted that if such properties are traced at any time and are still available for partition, parties can always have their legal recourse. With respect to legal submissions raised by respondent no.11, learned

counsel has highlighted the 86th report of the Law Commission of India on the Act of 1893.

109. While taking this court through recommendation no. 5.20, it is highlighted that the language of Section 2 of the Act of 1893 is not happily worded, however, in no case, Section 2 can be interpreted to mean that the same would have an application if a suit was instituted prior to the commencement of the Act of 1893.

110. Learned counsel appearing on behalf of respondent no.6, while placing reliance upon his rejoinder submission to the submissions made by respondent no.9, submits that *qua* the females of the family in terms of ***Vineeta Sharma (supra),*** until and unless the final decree of partition is passed, the partition does not stand concluded. Consequently, due to a change in law, the females will be equally entitled for the share in the property and equivalent share as respondent no.9. Respondent no.9 primarily argues that in terms of Sections 96 and 97 of CPC, the objections in form of cross-objection or cross-appeal may not be maintainable.

111. Learned counsel for respondent no.6 further points out that the entitlement of respondent no.6 in the property is by birth and not by inheritance. Therefore, the nature of the properties will not change and respondent no.6 will be entitled for her share as a coparcener since birth, with effect from the enforcement of the Hindu Succession Amendment Act, 2005. Reliance was placed upon ***Vineeta Sharma (supra)***.

112. According to him, severance of place of worship, food and residence as stated by the learned counsel for respondent no.9 in their submission, the same does not affect the partition between the parties or has an effect on the joint character of the properties. While relying upon paragraph no.22 of ***Vineeta Sharma (supra),*** he submits that in a joint Hindu family, all the members are lineally descended from a common ancestor and include their wives and unmarried daughters.

113. Learned counsel for respondent no.6 further submits that there is no waiver of right by respondent no.6 in the preliminary decree. According to him, a wavier cannot be granted for a right which is not known to the party and the same must be a voluntary and an intentional relinquishment. He places reliance on a decision passed by the Apex Court in the case of ***P. Dasa Muni Reddy v. P. Appa Rao***[49] and a decision passed by the Hon'ble Orissa High Court in the case of ***Sarda Mines Pvt. Ltd. v. State of Odisha.***[50]

ISSUES

114. Having heard the learned counsel appearing on behalf of the parties, the following broad issues arise for consideration of this court:

I. Whether the final decree is liable to be set aside, in absence of there being any challenge to the preliminary decree, owing to the ground that the preliminary decree was obtained on the basis of suppression of facts by the original plaintiffs?

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[49] (1974) 2 SCC 725
[50] AIR 2022 Ori 12

II. Whether the impugned final decree is liable to be set aside on the ground of not being in tandem with the provisions of the Partition Act, 1893, inasmuch as the learned trial court has directed for sale in lieu of division by metes and bounds?

III. Is the preliminary decree liable to be modified to the extent of reworking of shares *qua* respondent nos.6 to 9 on account of subsequent change in law *viz.*, enactment of the Hindu Succession (Amendment) Act, 2005?

IV. Whether the parties could be lawfully permitted to transfer their undivided shares to third parties, pending a court sale, as prayed by respondent no.1?

V. Whether a Receiver needs to be appointed in the given facts and circumstances of the case?

ANALYSIS

Issue I

115. The preliminary/consent decree, allegedly being a product of suppression of material facts, is the genesis of the dispute. The primary fulcrum of the grievance raised by the appellants in the instant case is that the consent decree was obtained by suppressing the factum of the existence of certain properties which do not form part of the preliminary decree and therefore, the preliminary decree is itself null and void. However, whether such a contention could be raised at the stage of an appeal against the final decree without there being a challenge to the preliminary decree, is the question of law which needs to be answered. It is, therefore, appropriate to forthrightly delve into

the provisions of law governing the consent decree and concerned issues therein.

116. Order XXIII Rule 3 of CPC deals with the compromise of suit. In Rule 3, amendments were made by the Act No. 104 of 1976, whereby, a proviso and an explanation were added. Order XXIII Rule 3 of CPC reads as under:

> *"**3. Compromise of suit**.—Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:*
>
> *Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.*
>
> *Explanation.—An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this Rule."*

117. The same amendment Act No. 104 of 1976, led to the insertion of a new Rule i.e., Rule 3-A, which bars a suit against a compromise or consent decree on the ground that the compromise on which the decree is based was not lawful. Order XXIII Rule 3-A of CPC is reproduced as under:

> *"**3-A. Bar to suit**. —No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."*

118. Section 96 of CPC which deals with appeal from original decree reads as under:

> ***"96. Appeal from original decree***
>
> *(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.*
> *(2) An appeal may lie from an original decree passed ex parte.*
> *(3) No appeal shall lie from a decree passed by the Court with the consent of parties.*
> *[(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed [ten thousand rupees.]]*

119. A conjoint reading of Order XXIII Rule 3-A and Section 96(3) of the CPC expressly indicates that neither any appeal shall lie from a consent decree passed by the court nor any suit shall lie to set aside the consent decree owing to the unlawfulness of the compromise which led to the passage of the consent decree.

120. While extensively dealing with the exposition of law on the consent decree under Rule 3 as well as Rule 3-A of Order XXIII of CPC in the case of ***Banwari Lal v. Chando Devi***[51]**,** the Hon'ble Supreme Court held that the object of the Amendment Act No. 104 of 1976 is to compel the party challenging the compromise to question it before the court which has recorded the compromise. In paragraph nos.6 and 7, it has been held as under:

> *"6. The experience of the courts has been that on many occasions parties having filed petitions of compromise on basis of which decrees are prepared, later for one reason or other challenge the validity of*

[51] (1993) 1 SCC 581

such compromise. For setting aside such decrees suits used to be filed which dragged on for years including appeals to different courts. Keeping in view the predicament of the courts and the public, several amendments have been introduced in Order 23 of the Code which contain provisions relating to withdrawal and adjustment of suit by the Civil Procedure Code (Amendment) Act, 1976. Rule 1 Order 23 of the Code prescribes that at any time after the institution of the suit, the plaintiff may abandon his suit or abandon a part of his claim. Rule 1(3) provides that where the Court is satisfied: (a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw such suit with liberty to institute a fresh suit. In view of Rule 1(4) if the plaintiff abandons his suit or withdraws such suit without permission referred to above, he shall be precluded from instituting any such suit in respect of such subject-matter. Rule 3 Order 23 which contained the procedure regarding compromise of the suit was also amended to curtail vexatious and tiring litigation while challenging a compromise decree. Not only in Rule 3 some special requirements were introduced before a compromise is recorded by the court including that the lawful agreement or a compromise must be in writing and signed by the parties, a proviso with an Explanation was also added which is as follows:

'Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation.—An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this Rule.'

7. By adding the proviso along with an Explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the court which had recorded the compromise in question. That court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The Explanation made it clear that an agreement or a compromise which is void or voidable under the Contract Act shall not be deemed to be lawful within the meaning of the said Rule. Having introduced the proviso along with the Explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3-A in

> *respect of institution of a separate suit for setting aside a decree on the basis of a compromise saying:*
>
> *'**3-A. Bar to suit**.—No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.' "*

121. In the case of ***Pushpa Devi Bhagat (supra),*** the Hon'ble Supreme Court, after relying on the provisions of Order XXIII Rule 3 and Rule 3-A of CPC, recorded the conclusion in paragraph no.17 of the decision, which reads as under:

> *"17. The position that emerges from the amended provisions of Order 23 can be summed up thus:*
>
> *(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC.*
>
> *(ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) of Rule 1 Order 43.*
>
> *(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3-A.*
>
> *(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 Order 23.*
>
> ***Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made.*** *The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21-8-2001 by alleging that there was no valid compromise in accordance with*

> *law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27-8-2001) filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by the second defendant was not maintainable, having regard to the express bar contained in Section 96(3) of the Code."*
>
> *[Emphasis supplied]*

122. In ***Triloki Nath Singh v. Anirudh Singh***[52]**,** the Hon'ble Supreme Court again, while referring to earlier judgments, reiterated the same proposition i.e., the only remedy available to a party to a consent decree to avoid such consent decree is to approach the court which recorded the compromise and separate suit is not maintainable. The relevant paragraph nos.17 and 18 of the said decision, are reproduced as under:

> *"17. By introducing the amendment to the Civil Procedure Code (Amendment) Act, 1976 w.e.f. 1-2-1977, the legislature has brought into force Order 23 Rule 3-A, which creates bar to institute the suit to set aside a decree on the ground that the compromise on which decree is based was not lawful. The purpose of effecting a compromise between the parties is to put an end to the various disputes pending before the court of competent jurisdiction once and for all.*
>
> *18. Finality of decisions is an underlying principle of all adjudicating forums. Thus, creation of further litigation should never be the basis of a compromise between the parties. Rule 3-A Order 23 CPC put a specific bar that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. The scheme of Order 23 Rule 3 CPC is to avoid multiplicity of litigation and permit parties to amicably come to a settlement which is lawful, is in writing and a voluntary act on the part of the parties. The court can be instrumental in having an agreed compromise effected and finality attached to the same. The court should never be party to imposition of a compromise upon an unwilling party, still open to be questioned*

[52] (2020) 6 SCC 629

on an application under the proviso to Order 23 Rule 3 CPC before the court."

123. It can be inferred from the decision in ***Triloki Nath Singh (supra)*** that the rationale behind the enactment of Rule 3-A under Order XXIII of CPC was to achieve a quietus and consequently, finality of decision rendered through compromise between the parties. The complete scheme of Order XXIII Rule 3 and subsequent Rule 3-A alludes to evade multiplicity of litigation and therefore, creation of further litigation cannot be envisaged to be the basis of a compromise between rival parties.

124. In the case of ***R. Janakiammal v. S.K. Kumarasamy***[53]**,** the Hon'ble Supreme Court while relying upon the decision in ***Pushpa Devi Bhagat (supra)*** *and* ***Banwari Lal (supra),*** has held that no sooner a question relating to the lawfulness of the agreement or compromise is raised before the court that passed the decree on the basis of any such agreement or compromise, it is that court and that court alone which can examine and determine that question. Moreover, a consent decree could only be modified when all the parties who were part of the said decree consent for the same, as has been affirmed in the cases of ***Gupta Steel (supra)*** and ***Pokkan (supra).***

125. The unequivocal position of law that emerges from the above line of precedents, at the cost of repetition, indicates that a consent decree can neither be assailed in an appeal nor by way of a separate

[53] (2021) 9 SCC 114

suit. Furthermore, the unlawfulness of the compromise, which formed the genesis of such consent decree, could be assailed only before the court which recorded the compromise. It merits reiteration that the legislative policy of preventing vexatious litigation, multiplicity of proceedings and capping the life of a suit is duly manifested in Rule 3-A and Rule 3 of Order XXIII of CPC. Furthermore, the view taken above is also in line with the larger objective of giving certainty and predictability to the rights and liabilities of the parties and to not let them agitate and reagitate by attempting to invoke the jurisdiction of different judicial forums. Such is not the intent of the procedure established by law.

126. Having noted the scope of challenge to a consent decree, another incidental aspect that requires consideration is whether the correctness of a preliminary decree can be challenged in an appeal arising out of the final decree without preferring an appeal against the preliminary decree. To determine the aforesaid question, it is pertinent to refer to Section 97 of CPC, which is extracted as under:

> *"97. Appeal from final decree where no appeal from preliminary decree.- Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."*

127. It is clearly discernible from the language of Section 97 of CPC that where any party aggrieved by a preliminary decree fails to appeal from such decree, it is precluded by law from disputing its correctness in any appeal against the final decree.

128. The Hon'ble Supreme Court, in the case of ***Mool Chand v. Director, Consolidation (supra),*** has categorically held that a party will not be permitted to challenge the correctness of a preliminary decree in an appeal against final decree, if it fails to prefer an appeal against the preliminary decree. Paragraph nos.26 and 27 of the said decision read as under:

> *"26. Thus, if an appeal is not filed against the preliminary decree and its correctness is not challenged, it becomes final and the party aggrieved thereby will not be permitted to challenge its correctness in an appeal against final decree.*
>
> *27. The Privy Council in Ahmed Musaji Saleji v. Hashim Ebrahim Saleji [AIR 1915 PC 116 : 42 IA 91 : 42 Cal 914] held that failure to appeal against a preliminary decree would operate as a bar to raising any objection to it in an appeal filed against final decree. This Court in Venkata Reddi v. Pothi Reddi [1963 Supp (2) SCR 616 : AIR 1963 SC 992] has held that the impact of Section 97 is that the preliminary decree, so far as the matters covered by it are concerned, is regarded as embodying the final decision of the court passing that decree. It observed as under:*
>
> > *"A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, insofar as the matters dealt with by it are concerned, be regarded as embodying ... the final decision of the court passing that decree."*
>
> *This decision was relied upon in Gyarsi Bai v. Dhansukh Lal [AIR 1965 SC 1055 : (1965) 2 SCR 154] in which it was observed as under:*
>
> > *"It is true that a preliminary decree is final in respect of the matters to be decided before it is made.... It is indisputable that in a mortgage suit there will be two decrees, namely, preliminary decree and final decree, and that ordinarily the preliminary decree settles the rights of the parties and the final decree works out those rights."*

129. A similar view has been taken by the Hon'ble Supreme Court in the case of ***Venkatrao (supra).***

130. It is noteworthy that the appellants in the instant case contend that since the consent decree was itself obtained by fraud and misrepresentation of facts, therefore, the preliminary decree is liable to be set aside as it was unlawful in the eyes of law. Even assuming for a moment that the argument raised by the appellants is true and requires a thoughtful consideration on merits, in view of the explicit bar envisaged under CPC, as discussed above, the appellate proceedings against the final decree are not an appropriate stage to challenge the same. The only recourse which was available to the appellants to ventilate their grievance was to approach the court which had passed the preliminary decree as that court would alone have had the adequate jurisdiction to entertain the plea raised by them. If this court were to examine this issue in appellate proceedings, the same would be in the teeth of the mandate under Order XXIII of CPC which requires the unlawfulness of the compromise to be dealt by the court recording such compromise.

131. The entire case of the appellants is based upon the alleged deliberate exclusion of the agricultural land admeasuring 113 Kanals and 10 Marlas, which was sold in the public auction after attachment in the execution decree dated 25.05.1964 in Suit No.254/1963 passed by the Court of Shri P.C. Saini, Sub-Judge, First Class, Delhi. The said fact was brought to the notice of the appellants in the year 1988 i.e., before the passing of the preliminary decree, *vide* the affidavit filed by the original plaintiff- Lt. Col. Gaj Singh Yadav on 20.01.1988.

132. Paragraph no. 34 of the affidavit by way of evidence of Lt. Col. Gaj Singh Yadav-original plaintiff dated 20.01.1988 reads as under:-

> *"34. The properties described in Schedule 'A' and 'B' to the plaint were the only properties available for partition at the time of institution of the suit. The same properties are still available for partition. There is no other ancestral property. Only a vague plea has been taken by the contesting defendants i.e. defendants - no.1 to 8 alleging that the suit is for partial partition without giving any particulars of any ancestral property alleging left out. I submit that the plea of partial partition is wrong and the plea of partial partition is only of defendants 1 to 8 (defendant no.9 has filed, no written statement). I submit that it will be open to any party to file any suit for partition if so desired or advised in respect of any property which, according to them has been left out. When Shib Sahai died in 1938, the agricultural land left by him was measuring 129 Kanals and 10 Marlas (73 bighas) in the revenue estate of Kosli. In 1966 agricultural land measuring 113 kanals and 10Marlas was sold in public auction after attachment in execution of a compromise decree dated 25.5.1964 in suit no.254 of 1963 passed by the court of Shri. P.C. Saini, Sub Judge Ist Class, Delhi. A certified copy of said decree is already on record. The same has been admitted by the parties and has been exhibited as D3/A. This compromise was Entered into Shri Surender Kumar i.e. the predecessor-in-interest of defendants 5 to 9. Similarly, Shyam Bai, Satish Chandra, Sushila Yadav and Saroj Nalini i.e. defendants 1 to 4 were also parties, to the. said compromise decree, in which the land measuring 113 Kanals and 10 Marias was sold leaving only 16 Kanals i.e. 2 acres which has been duly shown in schedule 'B' to the plaint. The agricultural land measuring 113 Kanals and 10 Marlas already sold before institution of the suit in the manner indicated above cannot be the subject matter of the present partition suit. Although I was exparte and ignorant of the said compromise. I do not want to challenge the said compromise and the sale of the ancestral agricultural land made in the execution of the decree passed in the said suit. The land measuring 115 Kanals and 10 Marlas was sold in the public auction in favour of Shri Jagdish singh son of Shri Chander Singh and Shri Sultan Singh son of Shri Gopal in the ratio of 2/3rd and 1/3rd each respectively and the same was mutated in the revenue records in their names. This fact stands duly confirmed in the statement of Shri. Tej Bhan Patwari of HalQa Kosli, Tehsil Jhajjar, District Rohtak who appeared as D2W6 in suit no.577 of 1966 (Smt. Kamla Devi Yadav Vs. Col. Gaj Singh*

> *and others). Certified copy of the statement of the Patwari is already on record and the same has been admitted by the parties Ex. D13/B Shri. Gopal Narain Agarwal; Advocate, appeared for defendants 1, 2, 3 and 4 in the said suit and it was his suggestion to the said witness that all the agricultural land was sold in public auction except land measuring 16 kanals. This witness appeared on behalf of defendants no. 1, 2, 3 and 4. This fact completely belies the assertion of the defendants 1 to 8 that there was any agricultural land other than 16 Kanals (2 acres) available for partition at the time of institution of the suit or even thereafter. Much after the said public auction, I acquired 2/3rd share of Shri. Jagdish Singh and his 2/3rd share was mutated, in my favour in the revenue records. This is my self-acquired and separate property."*

133. However, the appellants unequivocally consented to the preliminary decree, passed in the form of a consent decree and did not challenge the same on the ground of fraud till the passing of the final decree. In the meantime, the appellants filed various interim applications seeking inclusion of the said property within the present suit, however, the same were either withdrawn by the appellants or rejected by the concerned courts. An application under Order 20 Rule 18 of CPC, seeking inclusion of allegedly excluded 80 bighas of agricultural land at Village Kosli, was dismissed with costs by the learned trial court *vide* order dated 03.02.2017, wherein, it was noted as under:

> *"27. Subsequently, after about 15 years of passing of the preliminary decree on 19.4.1989, on 10.03.2004, Defendant no. 2 (i) to 2(vi) filed an application under Order 6 Rule 17 CPC seeking amendment of the preliminary decree for inclusion of agricultural land of 80 bighas and also sought amendment of the pleadings and schedule B of the plaint to the effect that the agricultural land at Village Kosli, Rohtak, Haryana was 80 bigbas and not 16 canals as mentioned therein. Similarly, other applications under section 151 CPC were filed on 24.09.2005 and 26.08.2008. The said applications were withdrawn on 20.08.2016*

seeking liberty to file fresh application under Order 20 Rule 18 CPC. Accordingly, the present application was filed by the Plaintiff.

28. From the aforestated it is evident that the fact that the stand that the agricultural land was not 16 canals but 70 bighas has already been agitated by the Defendants in the written statement and an issue was also framed thereon. The Defendants chose not to prefer an appeal at the stage when the issue of partial partition was dropped on 05.08.1988 nor after the preliminary decree was passed in the matter in the year 1989. It can thus be safely concluded that the issue of partial partition was given up by the Defendants.

29. The Applicant therefore by way of the applications filed in the year 2004, 2005, 2008 and now the instant application is only trying to re-agitate the issue which has attained finality. The said action of Defendants is an abuse of process of the court. The stand of the Applicant that it is merely seeking rectification of preliminary decree under section 151 and 152 CPC is entirely misconceived in as much as the instant application is not a simplicitor application seeking inclusion of the properties which have been left out at the stage of preliminary decree but are those properties as regards which the court and the Defendants have already applied their mind and taken a stand. The Defendants having consciously taken a stand and chosen not to pursue the issue of partial partition despite being mindful of the same even at the stage of filing the written statement in the year 1976 and at all stages of the suit till the passing of the preliminary decree on 19.4.1989, cannot now be permitted to re-agitate the same, the said issue having attained finality. The instant application is accordingly barred by principles of res judicata in as much as the issue of the partial partition cannot be reagitated at a subsequent stage of the same suit when the said issue has already attained finality. The application filed by the Applicant is entirely misconceived. Such conduct of the Applicant in delaying the passing of the final decree by filing such applications when it was conscious of the position taken in the matter as regards the agricultural land, ought to be deprecated.

***

31. The said case is clearly distinguishable from the facts in the instant case where at the stage of filing of the written statement in the year 1976 itself, the predecessor interest of the Applicant was aware of the position as regards the agricultural land and continued with the proceedings after without preferring an appeal

at various stages including the stage when the issue of partial partition was dropped in 1988 and thereafter after passing the preliminary decree on 19.04.1989. Accordingly, the Applicant cannot agitate the issue as regards the agricultural land after 15 years by filing an applications for amendment of the written statement/preliminary decree and subsequently withdrawing the same and filing the instant application.

32. In view of the aforestated, the instant application filed under Order 20 Rule 18 and order 8 Rule (1) (A) read with section 151 and 152 CPC is hereby dismissed. The instant application being an abuse of process of the court, cost of Rs. 20,000/- are also imposed upon the Applicant to be deposited with Prime Minister's Relief Fund. It is ordered accordingly.

134. The aforesaid order was challenged in CRP No.96/2017, whereby, this court *vide* judgment dated 26.04.2018 rejected the prayer of the appellants to include the allegedly excluded property and held as under:

"13. Having heard both sides, at length, and having gone through the record with the assistance of the learned senior counsel for the parties, this court finds no error or infirmity in the order passed by the learned additional district judge. Though there was no specific order passed by the court at any stage striking off the issue framed on the objection of the petitioners as to the maintainability of the suit for reason, per their submissions, it was a suit for "partial partition", it is clear from the proceedings that came to be recorded on various dates leading to the preliminary decree being granted that the petitioners had abandoned the said objection. The preliminary decree in fact was passed with consent of both sides. The court had indicated, more than once, that only three issues arose, each of which was duly addressed. The issue of partial partition was not pressed and, therefore, by implication such issue which had been framed earlier will have to be treated as struck off.

14. It is not fair on the part of the petitioner, after elapse of such a long period of time, to make an attempt to put the clock back and revive the proceedings and to re-agitate that it is a case of partial partition. They became aware of the explanation offered by Gaj Singh Yadav as to the status of the remainder land at village Kosli when his affidavit in evidence had come on recording January, 1988. If they had it a case to the contrary to be brought as to seek adjudication,

> *they had ample opportunity to do so by joining issues. The fact that they did not pursue that course and instead agreed to the consent preliminary decree being passed, the recourse to the process of amendment first by moving an application respecting plaint under Order VI Rule 17 CPC presented in the year 2004, it having been kept pending for almost fourteen years, followed by the application respecting preliminary decree on the decision from which the present petition arises, is nothing but a gross abuse of the judicial process, as rightly concluded by the court below.*
>
> *15. The preliminary decree has become final and binding and there is no reason why it should be re-opened, particularly in the manner sought to be done, more so when there was no opportunity to the other side, especially the plaintiff, to give answer to the pleadings of the petitioners with reference to remainder land to which the petitioners seek to lay a claim, no issues having been pressed and no inquiry worth the name into such issues having been held at any stage.*
>
> *16. For the above reasons, the petition and the application filed therewith are dismissed with costs of Rs.2,00,000/-, to be deposited with Delhi High Court Legal Service Committee within 30 days."*

135. It is, thus, seen that the appellants herein, after abandoning the objections, have time and again reagitated the same, stalling the efficient administration of justice. In fact, the present appellate proceedings are not only inimical to the solemn purpose of a consent decree, rather it a classic example of subversion and dismantling of the foundational objectives sought to be achieved by compromise decrees.

136. The appellants *inter alia*, have also contended that this court, while exercising its inherent jurisdiction, can set aside the final decree as fraud vitiates every solemn act. The appellants, besides contending that they consented to the consent decree only on the alleged misrepresentation of the excluded property on the pretext that it was sold in the execution proceedings, have failed to raise any other

ground to manifest that the preliminary decree was obtained on the basis of fraud, much less a fraud played upon the court.

137. There exists a striking distinction between a fraud played upon the court and a fraud played upon the parties. While the court can exercise its inherent jurisdiction to investigate the former, greater restraint and caution are expected to invoke the inherent powers in the latter case. The decision of the Hon'ble Supreme Court in the case of ***Dadu Dayal Mahasabha v. Sukhdev Arya***[54]**,** succinctly encapsulates the meaning of both the phrases, which read as under:

> *"7. Let us consider the cases in which consent decrees are challenged.* ***If a party makes an application before the court for setting aside the decree on the ground that he did not give his consent, the court has the power and duty to investigate the matter and to set aside the decree if it is satisfied that the consent as a fact was lacking and the court was induced to pass the decree on a fraudulent representation made to it that the party had actually consented to it. However, if the case of the party challenging the decree is that he was in fact a party to the compromise petition filed in the case but his consent has been procured by fraud, the court cannot investigate the matter in the exercise of its inherent power, and the only remedy to the party is to institute a suit. It was succinctly summed up in the aforementioned case that the factum of the consent can be investigated in summary proceedings, but the reality of the consent cannot be so investigated****. The principle has been followed in this country for more than a century. In Vilakathala Raman v. Vayalil Pachu [27 Mad LJ 172 : 25 IC 213(1)] , the trial court had vacated its previous order regarding satisfaction of decree on the ground that the same was obtained by the judgment debtor's fraud on the court. The High Court, while confirming the order, said that in the exercise of inherent power under Section 151 of the Code of Civil Procedure a court can vacate an order obtained by fraud on it. Reliance had been placed on an old decision of Bombay High Court of 1882 and a Madras decision of 1880. In Basangowda Hanmantgowda Patil v. Churchigirigowda*

[54] (1990) 1 SCC 189

> *Yogangowda [ILR 34 Bom 408 : 12 Bom LR 223] , the defendant applied to the court to set aside a compromise decree on the ground that he had not engaged the lawyer claiming to be representing him and had not authorised him to compromise the suit. The court accepted his plea and ruled that it is the inherent power of every court to correct its own proceedings when it has been misled. Similar was the view of the Calcutta High Court in several decisions mentioned in Sadho Saran case [AIR 1923 Pat 483 : ILR 2 Pat 731] . The ratio has been later followed in a string of decisions of several High Courts. The same principle applies where a suit is permitted to be withdrawn on the basis of a prayer purported to have been made on behalf of the plaintiff. The courts below were, therefore, not right in holding that the application of the appellant invoking the inherent jurisdiction of the court was not maintainable. If the appellant's case is factually correct that Hari Narain Swami was not its elected Secretary and was, therefore, not authorised to withdraw the suit, the prayer for withdrawing the suit was not made on behalf of the appellant at all and the impugned order was passed as a result of the court being misled. Such an order cannot bind the appellant and has to be vacated. The trial court was thus clearly wrong in dismissing the appellant's application as not maintainable, and the High Court should have intervened in its revisional power on the ground that the trial court had failed to exercise a jurisdiction vested in it by law."*
>
> *[Emphasis supplied]*

138. Recently, in the case of ***My Palace Mutually Aided Coop. Society v. B. Mahesh & Ors.***[55], the Hon'ble Supreme Court has deprecated the exercise of inherent powers under Section 151 of CPC in cases where an alternate remedy exists or a fraud has been allegedly played upon the parties. The relevant paragraphs of the said decision read as under:

> *"33. The subsequent judgment of this Court in Ram Prakash Agarwal v. Gopi Krishan, (2013) 11 SCC 296 further clarifies the law on the use of the power under Section 151 of the CPC by the Court in cases of fraud and holds as follows:*

[55] 2022 SCC OnLine SC 1063

> *"13. Section 151 CPC is not a substantive provision that confers the right to get any relief of any kind. It is a mere procedural provision which enables a party to have the proceedings of a pending suit conducted in a manner that is consistent with justice and equity. The court can do justice between the parties before it. Similarly, inherent powers cannot be used to re-open settled matters. The inherent powers of the Court must, to that extent, be regarded as abrogated by the legislature. A provision barring the exercise of inherent power need not be express, it may even be implied. Inherent power cannot be used to restrain the execution of a decree at the instance of one who was not a party to suit. Such power is absolutely essential for securing the ends of justice, and to overcome the failure of justice. The Court under Section 151 CPC may adopt any procedure to do justice, unless the same is expressly prohibited.*
>
> ***
>
> ***19. In view of the above, the law on this issue stands crystallised to the effect that the inherent powers enshrined under Section 151 CPC can be exercised only where no remedy has been provided for in any other provision of CPC****. In the event that a party has obtained a decree or order by playing a fraud upon the court, or where an order has been passed by a mistake of the court, the court may be justified in rectifying such mistake, either by recalling the said order, or by passing any other appropriate order.* ***However, inherent powers cannot be used in conflict of any other existing provision, or in case a remedy has been provided for by any other provision of CPC. Moreover, in the event that a fraud has been played upon a party, the same may not be a case where inherent powers can be exercised****."*

34. The High Court, relying upon the above judgments of this Court which recognizes the power to recall, seems to have lost sight of the restrictions imposed while exercising jurisdiction under Section 151 of the CPC, which were elaborately discussed by this Court in the above referred judgment about exercising of the power under Section 151 of the CPC being only in circumstances where alternate remedies do not exist.

35. Therefore, we are of the firm opinion that recalling a final decree in such circumstances cannot be countenanced under Section 151 of the CPC. The High Court erred in exercising its

> *jurisdiction under Section 151 of the CPC, to hear and pass a detailed judgment recalling its earlier final decree dated 19.09.2013, rather than directing the respondents to pursue the effective alternate remedies under law**. Having said the above, we must clarify that we are not, in any way, doubting the proposition of law that fraud nullifies all proceedings, or that the Court has power to recall an order which was passed due to a fraud played on the Court. However, while exercising the power under Section 151 CPC for setting aside the final judgment and decree, the Division Bench should have taken into consideration the restriction which was observed by this Court in the captioned judgment.** Once we have come to the irresistible conclusion that exercising power under Section 151 CPC in the facts and circumstances of the case is bad, we are not inclined to go into further issues that were extensively argued."*
>
> *[Emphasis supplied]*

139. Admittedly, in the instant case, it has not been disputed by the appellants at any point of time that the consent was not provided by them, rather their case rests on the premise that the consent was obtained on the basis of fraud or misrepresentation by suppression of certain facts. There is no quarrel about the question of consent, rather, the quarrel pertains to the consent being a product of fraud upon a party. Furthermore, the fraud, as alleged, is not directed towards the court and is directed towards the parties. Therefore, considering the settled principle of law discussed above that courts must not exercise their inherent authority in the event of fraud alleged upon the party, this court is not inclined to accept the prayer of the appellants.

140. Even otherwise also, except the bland assertion of exclusion of the self-acquired property, there is no cogent material to suggest that any fraud has been committed upon the appellants. Also, the decision relied upon by the appellants in the case of ***Ram Chandra Singh***

(supra) is distinguishable on the aspect that unlike the present case, it deals with the fraud upon the court. Furthermore, this court cannot lose sight of the fact that the allegation of fraud was agitated at a belated stage, despite effective knowledge of the facts and circumstances and could very well be an afterthought.

141. In any case, if there exists any grievance with respect to the alleged exclusion of the concerned property in the instant case, the same can be raised in a separate proceeding, in accordance with law.

142. Also, the argument raised by appellant nos.3 to 5 regarding the exclusion of agricultural land from the sale is devoid of merit. The learned trial court has rightly held that the same shall be governed by Section 111 read with Section 158 of the Punjab Land Revenue Act, 1887, as applicable to the State of Haryana. Therefore, there is no reason to include the said property in the final decree for sale.

143. In view of the aforesaid discussion, the final decree is not liable to be set aside on the ground that the preliminary decree was obtained on the basis of suppression of facts by the original plaintiffs.

Issue II

144. Respondent no.9 *vide* cross-objection raised in *CM APPL. 1447/2020* contends that the order for sale of the partition property is *dehors* the provisions of the Act of 1893 and the same must be set aside. Therefore, to examine whether the direction for sale of the properties is in consonance with the Act of 1893, it is pertinent to refer

to Section 2 of the Act of 1893, which according to respondent no.9 mandates for making an application seeking sale of Schedule properties of the suit by a shareholder with one moiety or upwards before the learned trial court. It is contended by respondent no.9 that in absence of any such application, the learned trial court did not have the requisite jurisdiction to order for sale instead of division by metes and bounds.

145. For the sake of convenience, Section 2 of the Act of 1893 is extracted as under:

> *"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."*

146. A plain reading of Section 2 of the Act of 1893 would suggest that it stipulates certain conditions which need to be fulfilled before directing for sale when the division of property cannot be conveniently made. The court may, upon an application preferred by such shareholders collectively or individually to the extent of one moiety or upwards, direct for sale of the property if it thinks fit that it is more beneficial for all the shareholders of the concerned property.

147. If the mandate of Section 2 of the Act of 1893 is construed in its strict sense, it seemingly disentitles the court from directing for sale in absence of an application in accordance with the conditions envisaged in Section 2 of the said Act. However, it is contended by respondent no.11 that the said section does not hold any relevance in the present case, as the same is applicable in the suits for partition which were initiated before the commencement of the Act. There can be no denying that Section 2 of the Act of 1893 is couched in such a language which would *prima facie* give the same impression as has been stated by respondent no.11. On this aspect, it is pertinent to embark upon the aids of interpretation to safely conclude the true intent and applicability of the said provision. Recommendation no. 5.20 of the 86th report of Law Commission of India on the Act of 1893, as pointed out by the learned counsel for respondent no.9, shall act as an external aid of interpretation, which reads as under:

> *"5.20. We have also certain comments to offer as to the opening words of section 2 which read-*
>
> *"In any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made."*
>
> *The wording is not very happy. Presumably, the object underlying these words seems to be this. The legislature was legislating only for cases where a right to partition is available under the general law. This pre-supposes that certain conditions should be satisfied. For example, there must be concurrent interests in the property in dispute, and the property must not, by reason of any statutory or other legal prohibition, be impartible.*
>
> *In other words, if by the general law, there is no right to claim partition, then a party cannot invoke the provisions of the Act as*

> *to sale. This seems to be the dominant idea. But this intention is expressed in words which appear to be somewhat confusing. The reader is mentally taken back to the period before the passing of the Act and gets the impression-inaccurate though it may be-that he is expected to conduct research into the law of partition as it existed in 1893. Such, however, could not be the intention. The dominant idea (as explained above) is that there must be a right to claim partition. This idea could, and should, be expressed in better language. Accordingly, we would recommend that the portion of section 2 in question should be suitably revised. The re-draft of section 2 which follows later will indicate concretely what we have in mind."*

148. It can be inferred from the aforesaid recommendation that though the dominant idea of right to claim partition is not appropriately articulated and should have been expressed more coherently, however, the intention of the legislature cannot be construed to make the provision enforceable only in cases where the suits were initiated prior to the commencement of the Act of 1893.

149. The said report of the Law Commission of India on the Act of 1893, also recognises the conflicting opinions on the applicability of Section 2 of the Act of 1893 and enumerates the divergent views emanating from the judicial pronouncements in the following words:

> *"5.4. Since the requirement that there must be an application by persons holding a moiety has, in practice, been found to be rather harsh, attempts have from time to time been made to take the stand that the Court can order the sale even apart from the provisions of section 2. Rulings on the subject are conflicting, and, an analysis would show that the following views have been taken on the question:*
>
> *(i) The Court can order sale of the property independently of the Act and such a sale can be ordered not only among the co-sharers but also (to the public) by public auction.*

(ii) Such a power exists to a limited extent-sale must be limited only amongst the co-sharers.

(iii) The sale can be ordered by the Court only with the consent of all the co-sharers.

(iv) No such power exists, and a sale cannot be ordered apart from section 2, either by public auction or among the co-sharers.

This particular question has not yet been decided by the Supreme Court, though it has recognised the power of the Court to effect partition by such equitable means as may be appropriate.

Case law which supports one or other above may now be examined of the four possible views stated."

150. The aforesaid report also endeavours to make the following recommendations *qua* the sale of properties in a partition suit:

"5.17. Our recommendation in this context is twofold:

(i) In the first place any shareholder should have a right to demand sale if the other conditions are satisfied. The law should not (as at pre- sent) insist on the application of shareholders of at least a moiety. Of course, the other conditions given in the section must be satisfied. Once that is established, any shareholder should have the right to demand sale.

(ii) Secondly, a discretion should be given to the Court to order a sale of the property in a partition suit, even of its own motion, where, because of the nature of the property or other considerations already mentioned in the section, a partition would not be convenient and a sale would be more beneficial."

151. The Division Bench of the High Court of Andhra Pradesh in the case of ***Rebbapragada Ramaprasada Rao v. Rebbapragada Subbaramaiah***[56]**,** has held that the provisions of the Act of 1893 cannot be read to be exhaustive of the authority of the Court to direct

[56] 1957 SCC OnLine AP 77

for sale or to obstruct and retard the process of the partition itself. The relevant paragraphs of the said decision read as under:

> *"24. The court in directing a sale and dividing the proceeds between the sharers, does nothing more than carry out its duty to divide the properties equitably between the members of the family.* ***Where, in a particular contingency, a property is indivisible, or, by the partition, it loses its inherent worth, or, it cannot be equitably divided between the members, the court for the purpose of equitable distribution sells the said property, so that the proceeds which represent the property can be divided between the members. The power of sale for realising the proceeds is inherent in the process of partition and is only exercised in aid of partition.***
>
> ***
>
> *27. The question is whether the Act is intended to exhaust the power of the Court to direct the sale of the property where, for one reason or other, the said property cannot be divided by metes and bounds. As we have already stated, the exercise of the power of the court to direct the sale of a property which cannot be divided in specie is inherent in the process of Partition. The Partition Act, for the first time, conferred a right on anger sharer to request the court to sell the property subject to the correlative right of the smaller sharer to insist upon the larger share being sold to him at the valuation fixed by the court. The Act was designed only to meet a particular contingency and did not, in any way, affect the power of the court to make an equitable distribution of the properties. Before the Act, the Court could refuse to sell the property, even if the conditions laid down in Section 3 were fully satisfied. The Court, instead of selling the property, could have allotted the property not capable of equitable division to one of the sharers whether he is a smaller or larger sharer, and direct compensation to be paid to the other. But, after the Act, if the conditions laid down therein are satisfied, the court has no option but to direct the sale. Therefore, the power of the court to sell the property under the different circumstances is consistent with the right of the party to insist upon a sale under specified conditions. When the right under Section 2 or 3 is exercised, the court cannot exercise its power in derogation of that right.* ***On the other hand, if the provisions of the Act are construed to be exhaustive of the powers of the court to sell a property, the court would be powerless to make an equitable***

distribution of the properties when one are other of the properties could not be equitably partitioned or all the parties colluding together could create a dead-lock. The Act which was intended to protect the smaller sharers in the family, should not be so read as to obstruct and retard the process of the partition itself. We, therefore, hold that the Partition Act is not inconsistent with the general power of the court to sell any item of property for its equitable distribution.

28. From the aforesaid discussion of the Hindu Law texts, the case-law and provisions of the Partition Act, the law on the subject may be stated thus: Partition is a legal process by which joint title and possession of co-owners of the entire joint property is converted into separate title and possession of each of the co-owners in respect of specific item or items. The joint property is divided in specie and each one of the erst-while joint owners is put in possession of specific extent of property, which is allotted to his share. But many contingencies may be visualised when in practice the division by metes and bounds of every item of joint family property is not possible. A joint family or joint owners may be possessed of innumerable items of different extents, value, quality and nature. In dividing the properties among the various co-owners, it may not always be possible to divide every item into distinct shares. A property will have to be allotted to one of the sharers and the other has to be compensated with money. This is technically called Welty. Sometimes, the property to be divided may consist of only one item, which cannot conveniently and equitably be divided between the members in which case the Court may allot that item to one co-sharer and direct him to pay the value of the share of the other sharer in money. ***A court may also be confronted with a situation, namely, that the item of property is not capable of physical partition or is such that, if divided, it will lose its intrinsic worth, in such a case, that item is allotted to one and compensation in money value is given to the other and if such a course is not possible it is sold outright and the sale proceeds divided between the joint owners. All the aforesaid and similar other methods are adopted by courts in making an equitable partition of the joint properties either with the consent of the parties or, where such consent is not forth-coming, in exercise of its own discretion.*** *Whatever method is adopted, it is only to implement the process of equitable partition. It would well-nigh be impossible for a court to effectuate a partition on an equitable basis, if it should be held that it is under a legal obligation to divide every item of it joint property in specie. Where properties are susceptible of such division, the court adopts it.*

> *Where it is not, it adopts one or other of the alternative methods narrated above.* ***The provisions of the Partition Act do not, in any way, entrench upon the undoubted power of the court to effectuate a partition between co-owners in one or other of the methods suggested above. Before the Act, a party had no right to insist upon the court to follow a particular course in the process of partition or to insist upon purchasing the share of the other co-owner under certain circumstances."***
>
> *[Emphasis supplied]*

152. The view adopted by the High Court of Andhra Pradesh in ***Rebbapragada (supra)*** has been upheld by the Hon'ble Supreme Court in the case of ***Badri Narain Prasad Choudhary v. Nil Ratan Sarkar***[57], wherein, in terms of paragraph no.19, it was held as under:

> *"19. The suit property, being incapable of division in specie, there is no alternative but to resort to the process called owelty, according to which, the rights and interests of the parties in the property will be separated, only by allowing one of them to retain the whole of the suit property on payment of just compensation to the other.* ***As rightly pointed out by K. Subba Rao, C.J. (speaking for a Division Bench of Andhra High Court in R. Ramaprasada Rao v. R. Subbaramaiah [AIR 1958 AP 647 : 1057 Andh LT 587 : (1957) 2 Andh WR 488 : ILR 1957 AP 566]), in cases not covered by Sections 2 and 3 of the Partition Act, the power of the Court to partition property by any equitable method is not affected by the said Act."***
>
> *[Emphasis supplied]*

153. The exposition of law on effecting partition *dehors* the Act of 1893 has been summarized by the Kerala High Court in the case of ***Sathi Lakshmanan v. Mohandas***[58]**,** wherein it was held as under:

> *"23. The legal position can thus be summed up as follows:*
>
> *(1) In a suit for partition, if it appears to the court for the reasons stated in S. 2 of the Partition Act that a division of the property*

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[57] (1978) 3 SCC 30

[58] 2008 SCC OnLine Ker 534

cannot reasonably and conveniently be made and that a sale of the property would be more beneficial to all the sharers court has to direct sale. The sale so contemplated is definitely a public sale. But the order for sale can be made only on the request of the shareholders interested individually or collectively to the extent of one moiety or upwards.

(2) When such a request is made to the court to direct a sale, any other shareholder or shareholders can apply under S. 3 of the Act for leave of the court to buy the share of the party asking for sale, at a valuation. In such a case court has to order valuation of the share of the party asking for sale.

(3) If such a valuation is made, Court has to offer to sell the share of the party asking for sale to the shareholder applying for leave to buy under sub-s. 2 of S. 3.

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

(5) If no shareholder is willing to buy such share or shares at the price, the application filed under S. 3 of the Act is to be dismissed.

(6) If there is no request as provided under S. 2 of the Act for sale of the property by a shareholder or shareholders interested individually or collectively to the extent of one moiety or upwards, S. 3 cannot have any application.

(7) If Ss. 2 and 3 of the Act has no application, partition is to be effected de hors of the provisions of the Partition Act.

(8) In such a case, if all the shareholders agree or the court finds that suit property is incapable of division in specie, it is for the court to devise the most appropriate and suitable method which is beneficial for all the shareholders for a just and fair division of the property. The court has the inherent power to devise the most suitable means. Court can allot the property to one share with a direction to pay owelty to the other sharers. ***Court can also direct a sale of the property among the sharers or public and divide the sale proceeds among the sharers, depending on the facts and circumstances of each case. It cannot be said that in no case there cannot be a sale of the property among the sharers or a public sale. What is the best mode of division in such a case is to be decided by the court on the facts of that case. Whatever be the course so adopted, it must be the most beneficial to all the sharers. It is not the interest of that shareholder in possession of the property is to be looked into but the interest of all the shareholders."***

[Emphasis supplied]

154. An analysis of the position of law regarding the order for sale by the court in a partition suit, as discussed hereinabove, suggests that there does not exist a complete restraint on the discretion of the court to order for sale of the property. The salient aspect which emerges out of the aforesaid discussion is that the court is competent to order for sale on its own motion, subject to fulfilment of certain conditions, which can broadly be enumerated as follows:

i. Where no application under Section 2 of the Act of 1893 has been preferred by either of the shareholders interested to the extent of one moiety or upwards to attract the provisions of the Act of 1893.

ii. Where compelling circumstances exist which make the property, reasonably or conveniently, indivisible without resorting to sale due to the nature of property, deadlock between parties etc.

155. The second condition is essentially based on necessity. Admittedly, in the instant case, none of the shareholders interested to the extent of one moiety or upwards can be said to have made an application to give effect to partition as per Section 2 of the Act of 1893. As a natural corollary, Section 3 of the Act of 1893 would also not apply to enable any of the shareholders to seek leave of the court to purchase the share of the others.

156. The rationale for resorting to sale instead of division by metes and bounds has been duly recorded by the learned trial court in the

judgment and final decree dated 04.08.2018, wherein, the sale was necessitated on account of lack of any consensus between the parties to accept division by metes and bounds. In paragraph no.25 of the said judgment, detailed reasons have been set out by the learned trial court due to which the final decree partitioning the property by meets and bounds in terms of the reports of the Ld. Commissioner or according to the proposal(s) given by parties or otherwise, could not be passed. Therefore, owing to the prevailing circumstances, the only feasible option to give effect to the decree was to order for sale. The said paragraph reads as under:

> *"25. In view of the above I am of the considered opinion that final decree partitioning the property by metes and bounds in terms of the reports of the Ld. Court Commissioner or in terms of the proposals given by the parties or otherwise cannot be passed because of the following reasons:*
> *(i) The reports of the Ld. Court Commissioner were given in the year 1994 however the final decree could not be passed and more than 23 years have elapsed and much water has flown since then and there has been substantial change in circumstances.*
> *(ii) In a suit for partition the endeavor should be to separate the share of each party and allot the same to such party separately, if so desired by such party, so that there is an end to litigation. The parties to the suit, being the members of the groups constituted by the Ld. Court Commissioner for the purpose of division of the suit properties by metes and bounds, have themselves expressed their desire to separate from such groups and have prayed that they be allotted their share(s) after such separation while, passing the final decree. The unwilling parties therefore cannot be forced to jointly enjoy their shares with others as per the groups constituted by the Ld. Local Commissioner. The fact that earlier they might have agreed for taking the property jointly in groups would not preclude them from demanding their shares separately as final decree has yet not been passed and more over 23 years have elapsed after submission of the report of the Ld. Court Commissioner. In fact the defendants nos. 14 and 16 had contended that they had even made such a request before the Ld.*

Court Commissioner that their portion be separately demarcated. Once that is the position, the partition by metes and bounds by allotment of portions to the. parties jointly as per the groups proposed in terms the reports of the Ld. Court Commissioner cannot be done. Thus the suit property cannot be partitioned by metes and bounds straightway in terms of the reports of the Ld. Court Commissioner.

(iij) The Court had made attempts to find out a suitable plan for inter se division amongst the members of the groups constituted by the Ld. Court Commissioner. Various proposals and plans were filed by the parties. However, the parties have

not been able to arrive at a consensus on such division despite numerous hearings. I have also considered these proposals. Most of the proposals are without adequate justification or are conditional in nature or are not feasible as noted hereinabove. At any rate even as per the said proposals partition of the suit

properties by metes and bounds cannot be conveniently made in such a manner that the parties are allotted portions with exact area or nearly exact area falling within their shares. This was also one of the prime objections of the parties to the Ld. Court Commissioner's reports. Moreover if any specific rooms/ portions are proposed to be allotted to one party the other party has been raising one or the other grievance. With respect to the village properties no proper plans showing specific area to be allotted to the each party have been filed nor proper justification has been given.

(iv) Further the values of the different portions of the suit properties., were never ascertained and thus it is not possible to partition the suit properties having regard to the values of different portions of the suit properties. In such circumstances on the basis of the material available on record it is also not possible to determine the owelty and direct partition the suit properties by metes and bounds with payment of owelty.

(v) The Inter se division amongst members of various groups, carved out by the Ld. Court Commissioner or otherwise, cannot also be conveniently made as it not possible to allot separate shares to the members of the groups while: taking care of area aspect as per their shares; taking care of value aspect as per their shares; respecting the actual possession of the co-sharers; avoiding division of existing tenancies; providing separate entrances to the portions of each party and maintaining contiguity.

(vi) The defendant no. 4 has expired and a probate case in respect of the Will allegedly executed by defendant no. 4 is pending. -As per the own submissions of the parties if the probate is granted the

share of the defendant no. 4 will devolve upon the defendant no. 3 and in case the probate is not granted the share of the defendant no. 4 will devolve upon the defendants nos. 2, 3, 5, 7, 8 and 9. Thus the dispute with respect to the share of the defendant no. 4 cannot be decided till the probate petition is finally decided and this is again a roadblock to the physical division of the suit properties.

(vii) The suit properties comprise of old constructions and in due course there may be a need to pull down the old constructions and raise new constructions and in such a scenario any division by metes and bounds, as suggested, would be counter productive and would lead to multiplicity of litigation in future. Lot of area is also being wasted as common area in case partition by metes and bounds is allowed.

(viii) The LRs of the defendant no. 2(b) submitted that the possession of one of the Village properties (adjacent to the 'Math' in Village Kosli) was parted with by the defendant no. 11 but no material in this respect was produced. The defendant no. 11 denied the same and submitted that a third party has unlawfully occupied the same. The defendant, no. 11 further, submitte that the as per the Commissioner's report the same fell with the share of the other defendants and it was for the other defendants to have taken steps for protection of the possession, of the same. But the report of the Court Commissioner was suggestive and final division cannot be said to have been effected unless final decree has been passed. Be that as it may the fact of the matter on the basis of the submissions of the parties is that one property in the Village has been occupied/ encroached upon by a third party and therefore none is willing to accept the same in his share during final allotment.

(ix) The parties have not given any proper plans or proposals with Appropriate justification for division of the suit properties de hors the plans submitted by the Ld. Court Commissioners. The suit was filed in the year 1975 and preliminary decree was passed on 19.04.1989 and the matter has been pending since then for passing of the final decree. Keeping in mind that this suit is a one of the oldest cases pending in the. Court it would not be appropriate to appoint any other Court Commissioner and/ or Valuer to suggest afresh any other mode of partition by metes and bounds.

(x) In the opinion of the Court the division of the suit properties by metes and bounds cannot be conveniently made keeping in mind the nature of the suit properties and the large number of parties to the suit and in view of the fact that the same would result in

further litigation in future as the parties are not on the same page and there is huge trust deficit."

157. The learned trial court has relied on the decision of the Full Bench of this court in the case of ***Indu Singh (supra),*** wherein, it was held that the court may resort to Order XX Rule 18(2) of CPC to direct for sale in cases where an impasse is created i.e., there is no possibility of division of the property by metes and bounds. The relevant paragraphs of the said decision read as under:

"16.(i) At this stage it will be extremely relevant to note two important aspects.

(ii) First aspect is that while Sub-Rule (2) of Order XX Rule 18 CPC provides that a court may on account of the facts and circumstances as regards the properties which are subject matter of the suit for partition, find that straightaway a final decree for partition cannot be passed giving physical shares in the joint properties to the joint owners, then therefore in such cases, the court passes only a preliminary decree declaring the shares of the parties, and that after passing of the preliminary decree, a court has; as per the last line and set of words of Sub-Rule (2) of Order XX Rule 18 CPC; powers to pass "such further directions as may be required". These words appearing at the end of the Sub-Rule (2) of Order XX Rule 18 CPC are very important and of great significance because these words in my opinion has removed the shortcoming which had still remained in spite of passing of the Partition Act as regards the situation when moiety or upwards of the shareholders did not want sale of the suit properties. ***With respect to properties which were not subject matter of payment of land revenue to the government, then with respect to such properties which are subject matter of Order XX Rule 18 Sub-Rule (2) CPC, court was given intendedly the power to pass such further directions as may be required, and such a wide expression therefore in my opinion will entitle a civil court to order for sale of the joint property/properties even if moiety or upwards of the shareholders do not want sale of the joint property/properties. This language of the last few words at the end of Order XX Rule 18 Sub-Rule (2) in my opinion becomes very important and relevant in today's age and date because a considerable number of immovable properties which are subject matter of suits for partition are properties which have been constructed many decades earlier and which is the next aspect which is being immediately adverted to hereinafter.***

(iii) The second aspect is that over a period of time in urban areas the covered area of construction which is permissible on a plot has been steadily increasing. For example in Delhi previously on a plot ordinarily a ground floor, first floor and a barsati floor (part second floor) was only allowed to be constructed. Barsati floor means that the entire second floor is not allowed to be covered but the second floor which is called as a barsati floor is allowed to be only partly covered. The municipal law thereafter changed whereby almost the entire second floor was allowed to be covered. Thereafter, the municipal law has further changed and a third floor was allowed to be constructed, besides allowing construction of a basement on a property. Now in addition to a plot having a basement and four floors, in view of the scarcity of parking of vehicles in a city like Delhi on account of the existence of unending number of vehicles, stilt parking is also permitted to be made below the ground floor and above the basement floor. Since the ultimate object and the real intention of the joint properties being partitioned is to give a person his monetary value equivalent of his percentage share in the joint property/properties, and since now additional Floor Area Ratio (FAR)/covered area is permissible, therefore in old constructed properties, simply by physically dividing the existing construction the same does not result in a person getting his monetary value of his percentage share in the joint property/properties. ***Partition therefore really in today's date and age in urban areas is a partition in terms of FAR/covered area, and once that is so, then on such FAR/covered area being available to a co-owner/joint owner then such a person may/would/could want to reconstruct for enjoying more constructed area falling to his share, and which will necessarily require bringing down the old construction and thereafter making fresh construction on the plot of basement plus four floors and stilt parking. Thus in very old constructed properties simply physically partitioning of such joint property/properties is not the answer, and the joint property/properties in many cases have necessarily to be sold so as to give a person his actual monetary share value in the joint property/properties****. At this stage I would hasten to add that with respect to sale of a joint property, the entitlement of a co-owner in terms of Sections 3, 4, 6 and 7 of the Partition Act come in, whereby on an order being passed of sale of a joint property, the sale is not necessarily and firstly by public auction/sale, because firstly in the sale proceedings, one or more co-owners can buy out the other co-owner/co-owners i.e. rights of pre-emption.*

(iv) Therefore in my opinion the words as found in the last line of Sub-Rule (2) of Order XX Rule 18 CPC would result in a position that as of today there no longer exists any gap or shortcoming or failing which would result in a stalemate if joint owner(s), having less than a 50% share, ask

for his/their share by filing a suit for partition of the joint property/properties.

xxx

82. But, situations do arise (as in the case from which the present reference has come) wherein the rights of the parties as to their respective shares have been declared by a preliminary decree, there being no possibility of division of the property by metes and bounds (effort having been made to that end through the commissioner), the conclusion that sale of the property and distribution of the proceeds is the only method for partition having been reached (may be by consensus amongst the parties), it being not possible (or being impermissible or there being no such move) for the parties to have resort to the provisions of the Partition Act, and there is virtually an impasse. The court, in such fact-situation ought not be helpless, not able to grant the decree of partition. ***The inherent jurisdiction of the civil court to do complete justice, coupled with the authority vested in it by the concluding portion of Order XX Rule 18(2) CPC for "giving such further directions as may be required", empowers it to direct sale of the property by the agency of the court and thereafter distribute the proceeds amongst the shareholders in accordance with their percentage shares.*** *This is reinforced by the concluding part of Rule 14(3) of Order XXVI which permits the court rejecting the report of commissioner to "either issue a new commission or make such order as it shall think fit". Such directions, however, would also not, by themselves, bring about the partition, the actual division and severance being merely a possibility in the future. In this view of the matter, in my opinion, the order of the court directing sale, though final, in itself is not an order "effecting a partition" and, therefore, cannot be treated as an "instrument of partition" within the meaning of Indian Stamp Act, 1899."*

[Emphasis supplied]

158. It is seen that the decision in the case of ***Indu Singh (supra)*** recognises the apparent void subsisting in the Act of 1893 which leaves a party to a suit with less than one moiety share vulnerable to successfully claim its share if the division by metes and bounds is not achieved. However, the said decision fills the gap by affirming that the courts must not be helpless in such situations, and they may resort to Order XX Rule 18(2) of CPC, which permits the court to give such

other directions which are necessary for effecting partition, including the sale of properties.

159. Undoubtedly, the decision in ***Indu Singh (supra)*** regarding the direction for sale cannot be inferred to create an unruly horse which would be applicable in all categories of cases, rather it stipulates the expansion of the scope of Order XX Rule 18(2) of CPC to the extent of including the directions for sale in circumstances where the need arises on account of different underlying factors, as already mentioned above. A sound construction of this view would envisage the invocation of this option only when circumstances indicate an impasse, thereby illustrating the necessity to resolve it by ordering for sale. Needless to observe, such necessity must be recorded in the form of reasons in the order. Law recognizes necessity, provided it is in harmony with the acceptable standards of statutory interpretation.

160. Therefore, once it is established that the case for effecting partition is not covered by Sections 2 and 3 of the Act of 1893 and the division of the property cannot be conveniently or reasonably made by metes and bounds, the said Act does not place any fetters on the power of the court to partition property by any equitable method, including public sale. Considering the foregoing, this court does not find any infirmity with the direction for sale by the learned trial court and accordingly, *CM APPL. 1447/2020* is dismissed.

161. It is also seen that respondent no.9 *vide CM APPL. 55873/2023* seeks partial sale and partial partition as per Section 9 of the Act of

1893 as according to the said respondent, it has the largest share of around 42% amongst all the shareholders. It is contended by respondent no.9 that it had acquired the shares of respondent no.10 and 11 by way of a registered relinquishment deed. However, the said position is controverted by respondent no.11 in *CM APPL. 27367/2022*, whereby, the said transaction is assailed by respondent no.11 on the ground of non-fulfilment of requisite monetary consideration between the parties. Be that as it may, till date, the preliminary decree has not been modified, which ought to have been done in light of change in circumstances on account of change in shares, as alleged by respondent no.9.

162. It is also pertinent to note that a separate proceeding with regard to the said dispute has already been initiated by respondent no.11 and the same is registered as CS(OS) No. 662 of 2023 in this court. Therefore, the contention raised by respondent no.9 in *CM APPL. 55873/2023* is devoid of any merit and cannot be allowed due to the reasons stated hereinabove and the fact that the percentage of share claimed by respondent no.9 is disputed by respondent no.11. Hence, in the given circumstances, there does not appear any other suitable method for effecting partition, but to order for sale of the property in Schedule 'A' and Schedule 'B'(b) to 'B'(g), as has been rightly done by the learned trial court.

Issue III

163. The respondent no.6, by way of filing a cross-objection registered as *CM APPL. 34495/2021*, desires for reworking of the shares based on subsequent change in law *viz.*, the Amendment Act. Considering the factual scenario of the present case, the preliminary decree for partition of the properties was passed on 19.04.1989 and consequently, no appeal was preferred against it by any party to the suit. Moreover, the abovementioned preliminary decree was primarily and predominantly based on the unvitiated and free consent of the parties, rather than based on the prevailing law at that instant of time.

164. It is to be noted that respondent no.6 in her Written Statement filed in an answer to Suit No.562 of 1975 of the original Plaintiff, the cross-objector had taken the stand that there was no coparcenary and that the suit properties were not ancestral in character. She had also denied that the original Plaintiff was a family member and had therefore, not acknowledged any joint tenancy. The relevant extract from her Written Statement filed on behalf of respondent no.6 is as follows-

> *"5. Para No. 5 of the plaint is denied. Not only the properties at Delhi but all properties at Kosli also devolved after the death of Ch. Shib Sahai, on his sons, Ch. Surat Singh, Ch. Narain Singh and grandson Ch. Jaswant Singh, son of Shri Nawal Singh. All other averments in the para under reply are denied.*
>
> *6. Para No. 6 of the plaint is denied.* ***It is denied that the properties were ancestral in the hands of the sons of Ch. Shib Sahai. It is also denied that there was any coparcenary.*** *It is denied that the plaintiff is a member of the Hindu Undivided Family. It is submitted that the plaintiff has always been residing*

> *separately. He had never lived in the Hindu Undivided Family nor he was a member of the Hindu Undivided Family. He had already been disinherited by Late Ch. Surat Singh by means of a Will dated 23rd July, 1958 duly registered on 18th August, 1958 with the sub-registrar at Delhi. It is therefore, denied that the plaintiff was a member of the Hindu Undivided Family."*

165. Now at this stage, while challenging the final decree passed on 04.08.2018, respondent no.6 is claiming herself as a coparcener and trying to get the benefit in terms of change in law as per the Amendment Act. In order to support its stand, respondent no.6 has relied upon the judgement of ***Vineeta Sharma (supra)***. Furthermore, in order to support her contention, respondent no.6 has also relied upon the decision of the Hon'ble Apex Court in ***Prasanta Kumar Sahoo (supra),*** wherein the Apex Court set aside the consent decree.

166. It can be seen that reliance placed on the decision of ***Prasanta Kumar Sahoo (supra)*** is misplaced as it relates to an altogether different factual scenario and is not applicable in the instant case. In that case, the settlement agreement i.e., compromise decree was itself set aside because it was not based on free and unvitiated consent, which is not the bone of contention in the present case.

167. Furthermore, the reliance on ***Vineeta Sharma (supra)*** is also misplaced as it relates to the rights of the coparcener, whereas, respondent no.6 herself accepted and maintained this position that she is not a coparcener. Therefore, respondent no.6 should not be allowed to unravel the questions that have already been decided and consequently, based on the consistent stand taken by respondent no.6

that she is not the coparcener. She cannot be allowed to approbate and reprobate at the same time. In any case, all such issues were put to a quietus by working out shares by mutual consensus through preliminary decree.

168. Further, the decision in ***Vineeta Sharma (supra)*** does not entitle any party to agitate the claims at such a belated stage i.e., in appellate proceedings against the final decree. It is seen that the application for the reworking of shares which was dismissed by the learned trial court has not been challenged till date, rather the cross-objectors are seeking prayer for reworking of shares in an appeal against the final decree.

169. It is noteworthy that the impugned decree in question is not based on the vested rights of the parties but rather it is based on the unvitiated and free consent of the contesting parties before this court. It is a well-settled proposition in law that the goal of the consent decree is to put a quietus to unending litigation and is not strictly based upon the legal rights of the parties. At this juncture, it is pertinent to note the observations made by the Hon'ble Supreme Court in the case of ***Ajanta LLP v. Casio Keisanki Kabushiki Kaisha***[59], wherein it was held as under:-

> *"20. Resolving a dispute pertaining to a compromise arrived at between the parties, this Court in* ***Shankar Sitaram Sontakke [Shankar Sitaram Sontakke v. Balkrishna Sitaram Sontakke, AIR 1954 SC 352****] held as under : (AIR p. 353, para 7)*

[59] **(**2022) 5 SCC 449

> *"7. ...* ***If the compromise was arrived at after due consideration by the parties and was not vitiated by fraud, misrepresentation, mistake or misunderstanding committed by the High Court — the finding which was not interfered with by the High Court — it follows that the matter which once concluded between the parties who were dealing with each other at arm's length cannot now be reopened."***
>
> ***21. A judgment by consent is intended to stop litigation between the parties just as much as a judgment resulting from a decision of the Court at the end of a long drawn-out fight. A compromise decree creates an estoppel by judgment*** *[**Byram Pestonji Gariwala v. Union Bank of India, (1992) 1 SCC 31**] . It is relevant to note that in **Byram Pestonji Gariwala [Byram Pestonji Gariwala v. Union Bank of India, (1992) 1 SCC 31**], this Court held that the appellant therein did not raise any doubt as to the validity or genuineness of the compromise nor was a case made out by him to show that the decree was vitiated by fraud or misrepresentation. While stating so, this Court dismissed the appeal."*
>
> *[Emphasis supplied]*

170. It is to be noted that the preliminary decree passed on 19.04.1989 was based on the consent of the parties and took into account various family and commercial considerations, as deemed acceptable to all concerned parties in order to put a quietus to the litigation. The reliance placed on ***Vineeta Sharma (supra)*** is not applicable in the instant case as the decree in question is based on the compromise between the parties, with the sole purpose of ending the litigation and not based on the vested legal rights of parties. Similarly, reliance placed upon the decision of ***P. Dasa Muni (supra),*** which relates to the waiver of rights would not aid the case of cross-objector as the consent decree by its nature itself is based upon mutual compromise instead of an adjudication of legal rights of the parties therein.

171. The decision relied upon by respondent no.6 in the case of ***S. Sai Reddy v. S. Narayana Reddy***[60] is distinguishable as unlike the present case, the preliminary decree in ***Sai Reddy (supra)*** was solely based upon the provisions of the Hindu Succession Act, 1956 and therefore, shares could be reworked upon change in law. The decision relied upon by respondent no.6 in the case of ***Prema v. Nanje Gowda***[61] is also distinguishable as the preliminary decree itself was challenged in the said case, which has not been done in the present matter. An extensive reliance has been placed by respondent no.6 in the case of ***Ganduri Koteshwaramma (supra),*** however, it would not be applicable in the present fact scenario as the preliminary decree was an adjudicated decree and not a consent decree.

172. Therefore, the subsequent change in law would not affect the scope of the consent decree which does not deal with the legal rights of parties, rather it is primarily based on the free mutual consent of parties. Admittedly, any reworking of shares at this stage, based on any change in law or supervening circumstances, would defeat the very foundational essence of the consent decree and apparently nullify its effect, inasmuch as it would necessarily dislodge the entire distribution and materially prejudice all the parties to the proceedings. In view of the aforesaid, *CM APPL. 34495/2021* is dismissed.

Issue IV

[60] (1991) 3 SCC 647
[61] (2011) 6 SCC 462

173. The learned trial court *vide* final decree and judgment dated 04.08.2018 has granted an injunction against selling, alienating, transferring and creating any third-party interest in the suit properties till the time the suit properties are sold in execution proceedings and the sale is finalized and acted upon. Respondent no.1 for self and as GPA of respondent no.2, by way of an application in the present appeal i.e., *CM APPL. 44855/2021*, has sought exemption from injunction and permission to transfer their shares to any third party of their choice without permission to exercise pre-emptive rights.

174. An objection has been raised by respondent no.9 against the prayer of respondent no.1 for a direction that no party be permitted or allowed to exercise any pre-emptive rights. It is contended by respondent no.9 that right of pre-emption is a statutorily guaranteed right as per the Act of 1893 and thus, the demand of respondent no.1 to the said extent must be rejected.

175. Therefore, the issue which emerges out of such a prayer for consideration is whether the applicants may be allowed to transfer their undivided but determined shares to any third party during the pendency of the litigation.

176. It is well settled that once the shares of each party in suit properties have been determined and reached its finality, then any transfer thereof would attract the provisions of the Transfer of Property Act, 1882 (hereinafter 'Act of 1882'), specifically hit by the doctrine of *lis pendens* envisaged under Section 52 of the Act of 1882.

The rationale behind the said doctrine is to protect the rights and interests of parties in a lawsuit by preventing the creation of a third-party interest during the pendency of proceedings. It ensures that in cases involving immovable property, any transfer of ownership must correspond to the decision of the court and the transferee is held to be bound by the same.

177. The legal framework governing such situations is encapsulated in Section 52 of the Act of 1882, which reads as under:

> ***"52. Transfer of property pending suit relating thereto.—****During the [pendency] in any Court having authority or established beyond such limits] by [the Central Government] of [any] suit or proceeding [which is not collusive and] in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."*

178. The essential conditions which must be met for this doctrine to take effect are elucidated in the case of ***Dev Raj Dogra v. Gyan Chand Jain***[62], wherein in terms of paragraph no.6, it was held as under:

> *"6. An analysis of Section 52 of the Transfer of Property Act indicates that for application of the said section the following conditions have to be satisfied:*
>
> *(1) A suit or a proceeding in which any right to immovable property must be directly and specifically in question, must be pending.*
>
> *(2) The suit or the proceeding shall not be a collusive one.*
>
> *(3) Such property during the pendency of such a suit or proceeding cannot be transferred or otherwise dealt with by any*

[62] (1981) 2 SCC 675

> *party to the suit or proceeding so as to affect the right of any other party thereto under any decree or order which may be passed therein except under the authority of court. In other words, any transfer of such property or any dealing with such property during the pendency of the suit is prohibited except under the authority of court, if such transfer or otherwise dealing with the property by any party to the suit or proceeding affects the right of any other party to the suit or proceeding under any order or decree which may be passed in the said suit or proceeding."*

179. It can be seen that the mandate of Section 52 of the Act of 1882 prevents any transfer or action which could affect the right(s) of any other party involved in the *lis*, except with the authorization of the court. The said Act, however, carves out an exception, inasmuch as it vests a discretion upon the court to permit any party to transfer the property in a lawsuit, subject to the conditions imposed by the court. In essence, the doctrine of *lis pendens* does not in itself invalidate all transfers or actions taken by a party with respect to the subject property, rather it renders the transfer voidable only if it has the potential to affect the rights of other parties to the lawsuit. In other words, the underlying purpose of the said doctrine is to preserve the sanctity of the subject matter of the suit, so as to prevent the potential rights of any of the parties from being prejudiced on account of transfer or otherwise, in the decree or order which may be passed by the court on the culmination of the lawsuit.

180. In the case of ***K.N. Aswathnarayana Setty v. State of Karnataka***[63], the Hon'ble Supreme Court held that mere pendency of a suit does not prevent one of the parties from dealing with the

[63] (2014) 15 SCC 394

property constituting the subject matter of the suit. The relevant paragraph of the said decision reads as under:

> *"11. The doctrine of lis pendens is based on legal maxim ut lite pendente nihil innovetur (during a litigation nothing new should be introduced). This doctrine stood embodied in Section 52 of the Transfer of Property Act, 1882. The principle of "lis pendens" is in accordance with the equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee pendente lite is bound by the decree just as much as he was a party to the suit. A litigating party is exempted from taking notice of a title acquired during the pendency of the litigation.* ***However, it must be clear that mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The law simply postulates a condition that the alienation will, in no manner, affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court.*** *The transferee cannot deprive the successful plaintiff of the fruits of the decree if he purchased the property pendente lite. (Vide K. Adivi Naidu v. E. Duruvasulu Naidu [K. Adivi Naidu v. E. Duruvasulu Naidu, (1995) 6 SCC 150] , Venkatrao Anantdeo Joshi v. Malatibai [Venkatrao Anantdeo Joshi v. Malatibai, (2003) 1 SCC 722] , Raj Kumar v. Sardari Lal [Raj Kumar v. Sardari Lal, (2004) 2 SCC 601] and Sanjay Verma v. Manik Roy [Sanjay Verma v. Manik Roy, (2006) 13 SCC 608]."*
>
> *[Emphasis supplied]*

181. Further, in the case of ***Hardev Singh v. Gurmail Singh***[64], the Hon'ble Supreme Court has clarified that Section 52 of the Act of 1882 does not declare a transfer made by a party to a pending suit as void or illegal, rather it makes that party bound by the judgment that may be issued.

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[64] (2007) 2 SCC 404

182. The Hon'ble Supreme Court in the case of ***Madhukar Nivrutti Jagtap v. Pramilabai Chandulal Parandekar***[65], has held as under:

> *"14.3. The aforesaid observations in no way lead to the proposition that any transaction on being hit by Section 52 ibid., is illegal or void ab initio, as assumed by the High Court. In Sarvinder Singh [Sarvinder Singh v. Dalip Singh, (1996) 5 SCC 539] , as relied upon by the High Court, the subsequent purchasers sought to come on record as defendants and in that context, this Court referred to Section 52 of the TP Act and pointed out that alienation in their favour would be hit by the doctrine of lis pendens. The said decision is not an authority on the point that every alienation during the pendency of the suit is to be declared illegal or void.* ***The effect of doctrine of lis pendens is not to annul all the transfers effected by the parties to a suit but only to render them subservient to the rights of the parties under the decree or order which may be made in that suit. In other words, its effect is only to make the decree passed in the suit binding on the transferee i.e. the subsequent purchaser. Nevertheless, the transfer remains valid subject, of course, to the result of the suit.*** *In A. Nawab John [A. Nawab John v. V.N. Subramaniyam, (2012) 7 SCC 738 : (2012) 4 SCC (Civ) 324] , this Court has explained the law in this regard, and we may usefully reiterate the same with reference to the following : (SCC p. 746, para 18)*
>
> > *"18. It is settled legal position that the effect of Section 52 is not to render transfers effected during the pendency of a suit by a party to the suit void; but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually, determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit. The pendente lite purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the court."*
>
> *[Emphasis supplied]*

183. A bare perusal of the facts would indicate that none of the parties would be affected upon transfer of interest to the third party as the property has to be ultimately sold in view of the final decree. In

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[65] (2020) 15 SCC 731

light of the effect of the doctrine of *lis pendens* discussed above, the application of respondent no.1 (*CM APPL. 44855/2021)*, is allowed i.e., the undivided but determined shares can be transferred to a third party but the rights of such transferee shall be crystallized subject to the partition of the suit property amongst all the shareholders by way of sale. It is made clear that none of the parties would be allowed to exercise any pre-emptive rights upon any such transfers and their interest would remain subject to the final disposal of the *lis* i.e., when sale is completed alongwith the distribution of proceeds therein to all the shareholders (or their successors in interest) as per the proportionate ratio of shares determined by the final decree.

Issue V

184. The next issue which requires consideration is the appointment of Receiver, as prayed by respondent no.1 in *CM APPL.47866/2023*, for proper and effective management, protection and preservation of the suit property i.e., Schedule 'A' and Schedule 'B'(b) to 'B'(g).

185. It has been alleged that the appellants herein occupy a large portion of the property in question and gross mismanagement of the property has already taken place causing enormous loss to the estate. It is also the case of respondent no.1 that there are various *benami* occupants and tenancies created by the appellants, which has resulted into further creation of third-party interests by adverse parties, who are in physical possession of the property and therefore, it is imperative to appoint a Receiver at this stage.

186. The learned trial court has also recorded in its concluding paragraphs of the final decree and judgment dated 04.08.2018 that the rents/damages already collected, or which are subsequently collected from the tenants/occupants shall be distributed amongst the parties, proportionate to their shares in the preliminary decree. It is also noted that in or around 1985, a Receiver was appointed *qua* Schedule 'A' properties for the purpose of maintenance, collecting rents and carrying out other tasks as were assigned thereto. However, since the demise of the Receiver in the year 2004, there has been no appropriate authority or court appointed person to look after the management affairs of the property.

187. It is seen that Order XL Rule 1 of CPC confers power on the court to appoint a Receiver if it appears just and convenient to the court to appoint such a Receiver. The said provision is extracted hereunder as:

> ***"1. Appointment of receivers.-*** *(1) Where it appears to the Court to be just and convenient, the Court may by order —*
>
> *a) appoint a receiver of any property, whether before or after decree;*
> *b) remove any person from the possession or custody of the property;*
> *c) commit the same to the possession, custody or management of the receiver; and*
> *d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.*

> *(2) Nothing in this rule shall authorise the Court to remove from the possession or custody of property any person whom any party to the suit has not present right so to remove."*

188. The primary objective of the appointment of a Receiver in a pending suit, as has been held by the Hon'ble Supreme Court in the case of ***Sherali Khan Mohamed Manekia v. State of Maharashtra***[66], is to preserve the property by taking possession or otherwise and to keep an account of rent and profits that may be realised by the Receiver and to submit it before the court the *lis* is finally decided.

189. The decision of the High Court of Madras in the case of ***T. Krishnaswamy Chetty v. C. Thangavelu Chetty***[67], has laid down the guiding principles, which have become the settled jurisprudence for the courts exercising jurisdiction in the appointment of receivers. The said principles which were termed as *'panch sadachar'*, are elucidated as under:

> *"17.* ---
> *(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute: it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding: — 'Mathusri v. Mathusri,' 19 Mad 120 (PC) (Z5); — 'Sivagnanathammal v. Arunachallam Pillai', 21 Mad LJ 821 (Z6); — 'Habibullah v. Abtiakallah', AIR 1918 Cal 882 (Z7); — 'Tirath Singh v. Shromani Gurudvvara Prabandhak Committee', AIR 1931 Lah 688 (Z8); — 'Ghanasham v. Moraba', 18 Bom 474 (Z9); — 'Jagat Tarini Dasi v. Nabagopal Chaki', 34 Cal 305 (Z10); — 'Sivaji Raja*

[66] (2015) 12 SCC 192
[67] 1954 SCC OnLine Mad 374

Sahib v. Aiswariyanandaji', AIR 1915 Mad 926 (Z11); — 'Prasanno Moyi Devi v. Beni Madhab Rai', 5 All 556 (Z12); — 'Sidheswari Dabi v. Abhayeswari Dabi', 15 Cal 818 (Z13); — 'Shromani Gurudwara Prabandhak Committee, Amritsar v. Dharam Das', AIR 1925 Lah 349 (Z14); — 'Bhupendra Nath v. Manohar Mukerjee', AIR 1924 Cal 456 (Z15).

(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie; he has very excellent chance of succeeding in the S. suit. — 'Dhumi v. Nawab Sajjad Ali Khan', AIR 1923 Lah 623 (Z16); — 'Firm of Raghubir Singh Jaswant v. Narinjan Singh', AIR 1923 Lah 48 (Z17); — 'Siaram Das v. Mohabir Das', 27 Cal 279 (Z18); — 'Muhammad Kasim v. Nagaraja Moopanar', AIR 1928 Mad 813 (Z19); — 'Banwarilal Chowdhury v. Motilal', AIR 1922 Pat 493 (Z20).

(3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. A Court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm. — 'Manghanmal Tarachand v. Mikanbai', AIR 1933 Sind 231 (Z21); — 'Bidurramji v. Keshoramji', AIR 1939 Oudh 61 (Z22); — 'Sheoambar Ban v. Mohan Ban', AIR 1941 Oudh 328 (Z23).

(4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be 'in medio', that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the

property is more or less 'in medio' is sufficient to vest a Court with jurisdiction to appoint a receiver. — 'Nilambar Das v. Mabal Behari', AIR 1927 Pat 220 (Z24); — 'Alkama Bibi v. Syed Istak Hussain', AIR 1925 Cal 970 (Z25); — 'Mathuria Debya v. Shibdayal Singh', 14 Cal WN 252 (Z26); — 'Bhubaneswar Prasad v. Rajeshwar Prasad', AIR 1948 Pat 195 (Z27). Otherwise a receiver should not be appointed in supersession of a bone fide possessor of property in controversy and bona fides have to be presumed until the contrary is established or can be indubitably inferred.

(5) The Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence etc."

190. It has been contended by respondent no.9 that the said respondent and appellant no.3 be made the Receiver on account of being largest shareholder of the properties in question. According to them, this would reduce the financial burden on the parties from appointment of a third-party Receiver. However, in light of the given facts and circumstances, it would be more appropriate to appoint an independent person as the Receiver for the concerned properties.

191. In view of the aforesaid discussion, it is necessary to appoint Ms. Smridhi Sharma, Advocate, Mobile No. 9958411421, as the Receiver of Schedule 'A' and Schedule 'B'(b) to 'B'(g) property till the sale of the suit property and distribution of proceeds therein to the respective shareholders is carried out. She shall perform the following functions subject to the duties and liabilities of the Receiver enshrined in Rules 3 and 4 of Order XL of CPC:

i. The Receiver shall take possession of the suit properties i.e., Schedule ‘A’ and Schedule ‘B’(b) to ‘B’(g) forthwith;

ii. She shall prepare a list of the occupants, their status and details of recoveries, arrears and rents accumulated over the passage of time. The Receiver shall recover the arrears and rents from the occupants of the suit properties;

iii. Until the auction sale of the suit properties, if any of the suit properties require urgent maintenance work, which cannot await the auction sale, then the Receiver from the funds so generated from the suit properties shall cause such urgent maintenance.

iv. The Receiver shall cause wide publicity in two leading newspapers, one in English and another in vernacular, where the suit properties are situated for the conduct of auction sale of the suit properties. All the parties to the suit would be entitled to be present during the conduction of the auction. The Receiver shall issue a sale certificate in favour of the highest bidder in respect of each auction.

v. The Receiver, in consultation with the parties, may also engage any professional agency for the conduct of the auction. The cost of such engagement, if any, shall be shared equally by all the parties.

vi. After the conduct of auction, the Receiver shall distribute the proceeds of the auction sale and the rents and arrears of the suit properties put together amongst the co-sharers (or their successors

in interest) in accordance with their proportionate share, as decided in the final decree of the learned trial court.

vii. The Receiver shall be at liberty to apply to this court, by way of an application, if any difficulty is faced either in the conduct of the auction or complying with any other direction issued in this order.

192. Additionally, let the keys to the Schedule 'A' properties, which have been received by either of the parties or bailiff during the eviction proceedings or are lying in the learned trial court, be furnished to the Receiver for performing the functions assigned hereinabove. The remuneration of the Receiver is fixed at Rs. 1,50,000/-, to be borne equally by the parties. In case the parties fail to pay the said amount, the same shall be recoverable from the proceeds of the rent or sale.

193. In view of the aforesaid, the appeal stands dismissed. Accordingly, let the final decree be drawn. Pending applications are also disposed of.

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

DECEMBER 22, 2023
nc/p'ma/shs