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

\+ C.R.P.18/2013

% Reserved on: 20th January, 2015
Decided on: 30th January, 2015

UMA DEVI DECEASED THR. LRS. ..... Petitioner
Through: Mr. Arvind Bhatt with Mr. Kuber Giri, Advs.

versus

SHIVRAJ KRISHAN GUPTA & ORS. ..... Respondents
Through: Mr. Sandeep Mittal, Adv. for R-1 to 3 & 8.
Mr. N.K. Kantawala, Adv. for R-5.
Mr. Sanjay Aggarwal, Adv. for R-6 & 7.

Coram:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. The petitioner had filed an application under Sections 151 and 152 CPC for correction of the name in the judgment and appointment of Commissioner to determine quantum of mesne profits in terms of order of this Court dated 24th July, 1998. Though vide impugned order dated 15th October, 2012 corrections in the judgment dated 16th September, 2004 were carried out being typographical errors, however no order was passed regarding the prayer of appointment of Commissioner for mesne profit pendent-lite and interest against defendant No.7 who is respondent No.8 in the present petition.

2. A brief exposition of facts is that the petitioner filed Suit No.754/1979 before this Court on 9th July, 1979 for partition of property bearing No.795 to 809, Joshi Road, Karol Bagh, New Delhi admeasuring 2081 sq.mts. (2489 sq.yds.) constructed upto single storey. Written statement was filed by the defendants/respondents wherein respondent no.8 herein M/s Panna Lal Girdhar Lal Pvt. Ltd. a wholly owned and controlled company of Vimla Devi defendant No.1 in the suit now represented by L.Rs.i.e. respondent Nos. 1 to 4 herein had a tenancy at ₹100/- per month. On 28th April, 1980 a preliminary decree for partition declaring the plaintiff Uma Devi now represented through her L.Rs, i.e. petitioners No.1 and 2, Vimla Devi now represented through respondents 1 to 4, respondent no.5 to 7 holding that each of them had 1/5th share in the suit property. Thereafter the suit proceeded with respect to the alleged tenancy claimed by respondent No.8 herein on the issue i.e. "Whether defendant No.7 is a tenant of one shop, two rooms, common bath room and lavatory?". While dismissing the claim of respondent No.8 herein on 24th July, 1998 this Court vide the judgment dated 24th July, 1998 answered the issue as noted above against respondent no.8 and in favour of plaintiffs/petitioners and held as under:-

> *"10. Under these circumstances, the issue is answered against the 7th defendant and the plaintiff shall be at liberty to apply for passing of a final decree. The plaintiff shall be entitled to pende-lite mesne profits and interest against the 7th defendant. The plaintiff shall be entitled to make appropriate application in this behalf."*

3. Against the order dated 24th July, 1998, the appeal filed by respondent No.8 herein being FAO(OS) 238/98 was dismissed by the Division Bench on 10th January, 2003. In the meantime, plaintiff Uma Devi died on 31st January, 2003 and her L.Rs. who are petitioners No. 1 and 2 were brought on

record. The Special Leave Petition filed by respondent No.8 herein being SLP (Civil) No. 12199/2004 against the order of this Court dated 10th January, 2003 was also dismissed on 3rd September, 2004. In the meantime, the suit was transferred from the original jurisdiction of this Court to the learned Additional District Judge because of the pecuniary jurisdiction and vide order dated 16th September, 2004, a judgment and decree was passed by the learned Additional District Judge after the Local Commissioner was appointed vide order dated 5th December, 2003. Learned Additional District Judge noted the order of this Court while deciding the issue of tenancy of respondent no.8 and noted that this court decided the issue vide judgment dated 24th July, 1998 holding that defendant No.7 failed to prove his tenancy so the claim of defendant No.7 of tenancy in the suit property was rejected and the plaintiff was given liberty to apply for passing of the final decree and that the plaintiff entitled to pendente lite mesne profits and interest against defendant No.7. However, in the judgment finally the learned Additional District Judge noted as under on the basis of which final decree was drawn:

> *" Keeping in view the nature and over all facts and circumstances of the case, I am also of the considered view that the suit property cannot be partitioned by meets and bounds. Keeping in view the nature and position of the property, it cannot be reasonably and conveniently partitioned amongst the 5 co-owners i.e. plaintiff, defendants no.1, 2, 3 and 5 equally. The plaintiff, defendants no.1, 2, 3 and 5 to file court fee of their respective shares on the valuation made of the suit property within 15 days. If any one or more of the defendants no.1, 2, 3 and 5 does not deposit the court fee to his/her share of the property within 15 days from today, the court fee be paid by the plaintiff in respect of that/those defendant(s) within next 15 days and the court fee of such defendant(s) if any, paid by the plaintiff, shall be recoverable first against the sale proceeds of the suit property and the sale proceeds shall be divided amongst the 5 co-*

owners after payment of such court fee to the plaintiff and after payment of the municipal charges pertaining to house tax etc."

4. The judgment of the learned Additional District Judge dated 16th September, 2004 was challenged before this Court in RFA 51/2005 which was dismissed on 26th May, 2008 and thus the same attained finality. Thus, though it was decided in favour of the petitioners that they were entitled to mesne profit and interest from respondent No.8 herein, however, no decree was drawn for the mesne profits and interest pendente lite. In view thereof the petitioners filed an application under Section 151 and 152 Cr.PC where in para 11 they stated as under:-

"11. The second error in the judgment is that the suit is disposed of without appointing a commissioner to ascertain the mesne profits against Df-1 and Df-7 for their illegal occupation of the property during the pendency of the suit. The said judgment has overlooked the order of the Hon'ble High Court dated 24.07.1998 which reads as under:

> *The plaintiff shall be entitled to pendent-lite mesne profits and interest against the 7th defendant. The plaintiff shall be entitled to make appropriate application in this behalf.*

This is also required under Rule 12 of Order 20 CPC."

Thus it was prayed that amendments be incorporated in the judgment before a final decree is prepared, engrossed and sealed by the Court.

5. Learned counsel for the petitioners relies upon the decision in *Ghantesher Ghosh Vs. Madan Mohan Ghosh & Ors. (1996) 11 SCC 446* to contend that in a suit for partition the lis continues till the decree passed by the Court gets fully executed and implemented. It was held –

"8. It is, therefore, well established that the terminology "suing for partition" would not necessarily mean filing of a suit in the first instance by the transferee. If a transferee seeks to execute any final decree for partition in favour of his transferor co-owner, he can be said to have initiated a legal action for redressal of his decretal right as a stranger transferee. Any legal action taken by anyone for getting redressal from a law court and for vindicating his legal right on which such action is based can be said to have sued in a court of law. It cannot, therefore, be said that a purchaser of decretal rights flowing from a final decree for partition while initiating proceedings for execution of that decree against the judgment-debtors who are co-sharers in the property sought to be partitioned by metes and bounds, is not suing for partition by getting the said decree executed through a court of law. If the words "transferee suing for partition" are given a restrictive meaning, namely, that he can be said to be suing for partition only up to the stage of final decree in such a suit for partition then the wide phraseology advisedly employed by the legislature in the section would be deprived of its real laudable object and content. It is trite to observe that till the final decree for partition of a co-ownership property culminates into its full discharge and satisfaction, the lis between the contesting parties cannot be said to have come to a final end. It is also axiomatic that once the partition decree becomes final, the court which passed the decree does not become functus officio for all purposes. On the contrary, its role remains effective till the decree passed by it gets fully executed and implemented. It is for this very purpose that the legislature has provided as per Section 38 of the Civil Procedure Code that a decree may be executed by the court which passed it, or by the court to which it is sent for execution. Therefore, it is the duty of the court which passes the decree to get it executed when called upon to do so with a view to seeing that the rights and obligations flowing from such decree get finally complied with and translated into reality. Till that stage is reached the court which passes the decree does not become totally functus officio and the litigation between parties cannot be said to have ended finally. Under these circumstances, it cannot be said that a decree-holder in a partition suit or his transferee who is armed with the plaintiff's rights pending such suit or even after the passing of the final decree as transferee of decretal

rights when he seeks execution is not suing for partition or is not entreating the court for its assistance to get his right fully vindicated as per the claim in the suit and decree therein. In this connection, it is also profitable to keep in view the legislative intent underlying various provisions of the Code of Civil Procedure which shows that in given circumstances the proceedings in the suit can be treated to include even execution proceedings. Explanation VII to Section 11 of the Civil Procedure Code dealing with res judicata lays down as under:

> *"Explanation VII.—The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree."*

As per Order 22 Rule 10, in case of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved. As per Order 22 Rule 12, nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order meaning thereby that Order 22 Rule 10 will apply to execution proceedings whereby the same scheme regarding devolution of interest of either party in the suit is made applicable even to execution proceedings.

9. Section 52 of the Transfer of Property Act is another illustration on the point dealing with the principle of lis pendens. The explanation to the said section indicates that the pendency of a suit would encompass the stage after the final decree till complete satisfaction and discharge of such decree or order. It is, therefore, obvious that legislature for different contingencies has thought it fit to extend the scope and ambit of the terminology 'suit' even for covering the execution proceedings in connection with decrees passed in such suits. As we have seen earlier, Section 4 of the Act has also advisedly used the terminology "sues for partition" and has not confined it only to suits filed by stranger transferee for applicability of Section 4 of the Act.

10. We have also to keep in view the avowed beneficial object underlying the said provision. Section 4 of the Partition Act read with Section 44 of the T.P. Act represents a well-knit legislative scheme for insulating the domestic peace of members of undivided family occupying a common dwelling house from the encroachment of a stranger transferee of the share of one undivided co-owner as the remaining co-owners are presumed to follow similar traditions and mode of life and to be accustomed to identical likes and dislikes and identical family traditions. This legislative scheme seeks to protect them from the onslaught on their peaceful joint family life by stranger-outsider to the family who may obviously be having different outlook and mode of life including food habits and other social and religious customs. Entry of such outsider in the joint family dwelling house is likely to create unnecessary disturbances not germane to the peace and tranquillity not only of the occupants of the dwelling house but also of neighbours residing in the locality and in the near vicinity. With a view to seeing that such homogeneous life of co-owners belonging to the same joint family and residing in the joint family dwelling house is not adversely affected by the entry of a stranger to the family, this statutory right of pre-emption is made available to the co-owners who undertake to buy out such undivided share of the stranger co-owner. If such a right flowing from Section 4 of the Act is restricted in its operation only up to the final decree for partition, the very benevolent object of the section would get frustrated as up to final decree stage, the court would only crystallise the shares of the contesting co-owners but the separation and partition of the shares of respective parties get really affected on spot only by actual division by metes and bounds and delivery of possession of respective shares to respective shareholders. This can be achieved only at the stage when the execution of the final decree takes place and the litigation reaches its terminus for the contesting parties and the curtain drops on the litigation. Only then the court which passed the decree becomes finally functus officio. It is also well-settled rule of interpretation of statute that the court should lean in favour of that interpretation which fructifies the beneficial purpose for which the provision is enacted by the legislature and should not adopt an interpretation which frustrates or unnecessarily truncates it. Maxwell

on The Interpretation of Statutes, Twelfth Edn., has observed in Chapter 4 pertaining to beneficial construction as under:

> *"The fact that a section is clearly designed to afford relief may incline the court to construe it more benevolently than it might a less obviously remedial enactment…."*

Similarly, it has been observed at p. 96 as under:

> *"It is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy. To this end, a certain extension of the letter is not unknown, even in criminal statutes."*

Consequently, on the express language of Section 4 of the Partition Act which is a benevolent provision enacted by the legislature for the welfare and tranquillity of the members of a joint family occupying the dwelling house, we must so construe the provision as to make it available at all the relevant stages of the litigation between the contesting co-owners till the litigation reaches its terminus by way of full and final discharge and satisfaction of the final decree for partition. If a stranger transferee enters the arena of contest at any stage and seeks to get his share separated as far as the subject-matter of the litigation, namely, the dwelling house, is concerned, he can be said to be suing for partition and separate possession of his undivided share to which he has become entitled because of transfer by one of the co-owners. Such a transferee might come on the scene prior to the final decree via Order 22 Rule 10 or he may come on the arena of contest seeking redressal of his right of partition and separation of his undivided share even in execution proceedings as a transferee of the decretal right of erstwhile plaintiff under the final decree either by himself filing the execution proceedings as per Order 21 Rule 16 or may subsequently step in the shoes of the decree-holder who has already filed the execution proceedings via Order 22 Rule 10 read with Order 22 Rule 12. In either eventuality, such a stranger transferee who emerges on the scene of litigation between the contesting co-owners which has not still reached its terminus and who seeks vindication of his transferee-rights in the dwelling house can certainly be said to be suing for partition even at the stage of execution of such final decree for partition."

6. Thus, as held by the Supreme Court that till the final decree for partition of a co-ownership property culminates into its full discharge and satisfaction, the lis between the contesting parties cannot be said to have come to a final end. It is the duty of the Court which passes the decree to get it executed when called upon to do so with a view to seeing that the rights and obligations flowing from such decree get finally complied with and translated into reality. Upto the stage of final decree, the Court only crystallizes the shares of the contesting co-owners but separation and partition of the shares of the respective parties get really effected on spot only by actual division by metes and bounds and delivery of possession of respective shares of the shareholders and only then the Court which passes the decree becomes functus officio.

7. Thus, the learned Trial Court committed an error in not allowing the application of the petitioners to the extent of appointing a local commissioner to determine quantum of pendent-lite mesne profits and interest. The application filed by the petitioners is allowed. The learned Trial Court will appoint a local commissioner to determine the quantum of pendente-lite mesne profits and interest.

8. Petition is disposed off accordingly.

(MUKTA GUPTA)
JUDGE

JANUARY 30, 2015
'v mittal'