
(2019) 10 DEL CK 0443

Delhi High Court

Case No: Civil Suits (OS) No. 541 Of 2014

Rakesh Kumar Verma
And Ors

APPELLANT

Vs

Radha Krishan Verma
And Ors

RESPONDENT

Date of Decision: Oct. 10, 2019

Acts Referred:

- Transfer Of Property Act, 1882 - Section 19
- Indian Succession Act, 1925 - Section 119, 147
- Code Of Civil Procedure, 1908 - Section 38

Hon'ble Judges: Prathiba M. Singh, J

Bench: Single Bench

Advocate: Hemant Payak, Ashok Mahipal

Judgement

Prathiba M. Singh, J

I.A. 4573/2019

1. This is an application by the Plaintiffs seeking modification of the judgment and decree dated 30th November, 2015 and for taking on record the

amended Memo of parties.

2. The background of the present suit is that the Plaintiffs and the Defendants are the legal heirs of Late Shri Raghunath Prasad Verma, who was the

absolute owner of property bearing No. C-35, Rajouri Garden, New Delhi, admeasuring 1066 sq. yards (hereinafter, "suit property"). The suit for

partition and permanent injunction was filed by three sons and one daughter of Late Shri Raghunath Prasad Verma against their three sisters, their

brother - Late Shri Radha Krishan Verma and his son. The family tree is as under:-

3. In the suit, vide order dated 24th February, 2014, an interim injunction was passed directing status quo to be maintained in respect of the suit

property. On 11th September, 2014, the Will of Late Shri Raghunath Prasad Verma, dated 21st August, 1993, was produced in Court along with the

original title deeds of the suit property. It was agreed by all the parties that the said Will is the last Will of Late Shri Raghunath Prasad Verma.

Accordingly, a preliminary decree was passed by this Court on 11th September, 2014, in the following terms: -

“All the parties are present in Court today. It is pointed out that the Original Will of late Sh. Raghunath Prasad Verma is in custody of Sh. Kailash

Raghunandan Verma, who is also present in Court today. He has produced the Original Will dated 21.8.1993 of late Sh. Raghunandan Verma (late

Sh. Raghunath Prasad Verma sic). Original title deeds of the suit property have been brought to Court.

As agreed, let the Original Will dated 21.8.1993 of late Sh. Raghunath Prasad Verma and the Original title deeds of the suit property be deposited with

the Joint Registrar (Original) of this Court today, to be kept in safe custody. The documents shall be kept in safe custody until further order passed by

this Court. The Will has been read out in Court today. All the parties admit that the Will dated 21.8.1993 is the last Will of their father and they shall

abide by the same. As per the Will, the suit property is to be divided between the parties (four plaintiffs and defendant no.1). It is however, clarified

that the sister, Ms. Meena Verma (plaintiff no.4 herein) has a life interest in the suit property. It is agreed that a preliminary decree may be passed,

defining the shares of the parties (four plaintiffs and defendant no.1) as 1/5th each with the condition that on the demise of Ms. Meena Verma, her

share will be equally divided amongst plaintiff No.1 to 3 and defendant no.1.

Accordingly, a preliminary decree is passed. The shares of the parties are defined as under:

Plaintiff No.1: 1/5th share

Plaintiff No.2: 1/5th share

Plaintiff No.3: 1/5th share

Plaintiff No.4: 1/5th share

Defendant No.1: 1/5th share

Mr. Raj Malhotra, Advocate (Cell No.9811158979), is appointed as a Local Commissioner to divide the suit property by metes and bounds between

the all the four brothers and sister in equal share. The fees of the Local Commissioner is fixed at Rs.80,000/-, which shall be borne by the four

brothers equally. Local Commissioner shall submit the report before the next date of hearing.

List on 5.12.2014.

IA No. 12082/2014

This application already stands disposed of. Registry is directed not to list the disposed of applications in the Cause List. -16-

4. A local commissioner was appointed to divide the property by metes and bounds. Proceedings before the Local Commissioner continued and parties

were permitted to suggest modes of partition for dividing the property. Defendant Nos.1 and 5 took the stand that there were already five dwelling

units in existence and hence, there was no need for suggesting modes of partition. The said position was disputed by the others. From the orders

passed by this Court, it is seen that all the Plaintiffs had objection to the participation of Defendant No. 1. As a result, Defendant No. 5 - Shri Kapil

Verma, in the process of partition.

5. An appeal, i.e., RFA (OS) 155/14, titled Radha Krishan Verma & Anr. v. Rakesh Kumar Verma & Ors., filed by Defendant Nos. 1 and 5 against

the order dated 11th September, 2014, was dismissed as withdrawn on 3rd December, 2014 with liberty to seek a review of the order dated 11th

September, 2014. An application was filed seeking review of the preliminary decree dated 11th September, 2014. The same was disposed of vide

order dated 20th February, 2015 as under: -

“

Review Petition No.21/2015

Review petitioner/defendant no.1 seeks to review the order dated 11.9.2014 passed by this Court.

Mr. Nigam, learned counsel for the review petitioner, submits that the necessity for filing this review petition has arisen on account of the fact that as

per the Will of late Sh. Raghunath Prasad Verma, the suit property is to be divided equally amongst the four brothers whereas this Court has passed a

preliminary decree defining the shares of all the parties as 1/5th each.

I have heard learned counsel for the parties. The order dated 11.9.2014 is a consent order. It may be noticed that as per the Will the wife and

daughter of the deceased was given a life interest. The order dated 11.9.2014 has taken into account the wishes of the testator and it has been

clarified that upon the demise of Ms. Meena Verma, her share will be divided equally amongst all the four brothers.

At this stage, Mr. Nigam submits that he will give a proposal to the Local Commissioner suggesting modes of partition in such a manner that after the

demise of Ms. Meena Verma, her share falls equally amongst the four brothers without any structural changes. Learned counsel for the remaining

parties have no objection.

All parties to give a proposal to the Local Commissioner, who will consider the proposals and thereafter file his report.

Accordingly, review petition stands disposed of.

”

6. Thus, considering that life interest was given to Plaintiff No.4 " Ms. Meena Verma, it had been agreed between the parties that she would be

given a share in the suit property and upon her demise, her share would be divided equally between Plaintiff Nos. 1 to 3 and Defendant No.1. The

preliminary decree, as also the dismissal of the review, was challenged before a Id. Division Bench of this Court in RFA (OS) 75/2015. On 5th

August, 2015, the Id. Division Bench observed that the preliminary decree is in consonance with the Will of the testator and dismissed the appeal with

the following observations: -

"

13. The consent given by the parties which has resulted in the preliminary decree is in harmony with aforesaid understanding of the will by the parties

and the appellants cannot resile from the consent given.

14. We need to highlight that the appellants have a stake in continuing with the litigation because a perusal of the plaint would show that they are the

ones who are occupying an area more than their entitlement and have even encroached upon common areas.

15. There is no merit in the appeal which is dismissed. And since the appeal is dismissed in limine without notice to the respondents, we do not impose

any costs."

Thus, the Id. Division Bench observed that the appellants i.e., Defendant Nos. 1 and 5 - Shri Radha Krishan Verma and his son, had a vested interest

in perpetuating litigation as they occupied a larger area of the suit property than what they were entitled to.

7. The Local Commissioner submitted his report on 2nd November, 2015. The Local Commissioner's Report suggested demolition of the suit

property and a horizontal division thereafter. Even at that stage, Defendant Nos. 1 and 5 had created impediments and not submitted any proposal

suggesting modes of partition. In the order dated 6th November, 2015, the conduct of Defendant Nos. 1 and 5 has been noticed and is set out below: -

Ã¢â‚¬Å“Ã¢â‚¬Å“Ã¢â‚¬Å“

CS (OS) No.541/2014

The report of the Local Commissioner has been placed on record. Let a copy of the same be made to the learned counsel for the parties.

In his report dated 11th September, 2014, a Local Commissioner was appointed to suggest division of the suit property by metes and bounds, who

suggested as under:

Ã¢â‚¬Å“The suit property can be divided by metes and bounds only after demolition of the existing built up portion. The division by metes and bounds

would then pertain to the plot in question by horizontally dividing the same through boundary walls as per site plan annexed herewith and marked as

Annexure LC-1. The portions so divided could be then allocated either by draw of lots or mutual decision of as per any other direction by the

HonÃ¢â‚¬Å“ble Court.Ã¢â‚¬Å“

Mr. L.S. Chaudhary, the learned counsel for defendant Nos.1 and 5, would submit that the parties are already occupying respective equitable space in

the suit property comprising 1066 sq. yds. On a query by the Court, the learned counsel states that defendant Nos.1 and 5 are occupying two rooms

only and by no stretch of imagination, can it be said that there is no equitable distribution; he states that the parties are being coerced to live in a

building which was constructed sometime in 1966.

Conversely, the learned counsel for the other parties would suggest that the mode of partition suggested by the Local Commissioner appears to be

equitable since all the parties would get equal access to the property from the front to their equal respective shares running along the length of the land

and it would not put any party to any disadvantage.

Mr. Hemant Payak, the learned counsel for the plaintiff, would submit that the defendantsÃ¢â‚¬Å“ RFA was dismissed on the very first hearing, on 5th

August, 2015. The learned counsel for defendant Nos.1 and 5 would submit that he was not heard by the Division Bench. This Court finds the

aforesaid submission preposterous, untenable and contrary to the records because the Court had recorded the appearance of the counsel who

represented the appellants before the Hon'ble Division Bench. While dismissing the RFA of defendant Nos.1 and 5, the Division Bench had

recorded that the preliminary decree was based upon the consent and the appellants could not resile from the consent given. The earlier RFA, which

was withdrawn by them, was on the ground that they would file a review petition. The review petition resulted in the order dated 20th February, 2015,

where it was open to them to suggest modes of partition. The said defendants have defaulted in making any suggestions as to the manner of partition.

However, Mr. Chaudhary submits that he has been supplied a copy of the report of the Local Commissioner only today in the Court. He seeks time to

obtain instructions and to file his objections in two weeks. Let him do so.

Attention of the Court is drawn to the order of 5th December, 2014, the Court permitted defendant Nos.1 and 5 to give their proposal to the Local

Commissioner to suggest the mode of partition as they had submitted that there are 5 dwelling units in existence and there is no necessity to suggest

the mode of partition of the suit property. No such suggestion or proposal was given to the Local Commissioner. The review petition against the said

order of 5th December, 2014 was disposed off on 20th February, 2015 as under:

“At this stage, Mr. Nigam submits that he will give a proposal to the Local Commissioner suggesting modes of partition in such a manner that after

the demise of Ms. Meena Verma, her share falls equally amongst the four brothers without any structural changes. Learned counsel for the remaining

parties have no objection. All parties to give a proposal to the Local Commissioner, who will consider the proposals and thereafter file his report.”

No suggestion was submitted by the defendants.

Renotify on 30th November, 2015.

8. On 30th November, 2015, no objection was received on behalf of the Defendants to the Local Commissioner's Report. Accordingly, the said

Report was accepted and the suit was finally disposed of with the following observations:

-

“The report of the Local Commissioner stating that since the property cannot be partitioned by metes and bounds as it exists today,

therefore it should be demolished, is accepted. The Court directs that the suit property be demolished and be partitioned in terms of the Local

Commissioner’s report and the plan annexed thereto.

The demolition be done in the next four months. A draw of lots shall be held for determining which party gets which plot.

At this stage, Mr. Chaudhary further submits that the five units shown in the map supplied by him are equal in area and can be distributed amongst the

parties. He seeks some more time to bring his objections on record.

This request is rejected.

He further submits that five parallel lanes running across the property and dividing the plot into five equal areas of 1928.34 sq. ft. each having a

frontage of 153 ft 6 in is an impractical division since a building constructed thereon would leave the parties with only about 12 ft 7 in of width in floor

space.

This Court considers that after the decree had been passed, it was for the defendants themselves to find an equitable solution with respect to their

shares. Having failed to do so, the Court has to see that a fair distribution is made. The plan suggested by the Local Commissioner is considerable.

Mr. Chaudhary further submits that although the Local Commissioner took photographs on his visit to the suit property, he has not annexed the same

to the report nor has he incorporated any of the suggestions given by the said defendants. There is no document on record to suggest this, as has been

noticed earlier by this Court, therefore, this argument is not substantiated and is contrary to the records.

Mr. Chaudhary further submits that although he has proposed to have the property divided into five portions in terms of the map filed by him, which

would give equal portions of the property to the parties, he has yet another proposal in which the ground floor itself can be divided into three portions

instead of two and the first floor also can be divided into three portions and one unit can be converted into a duplex. Yet another proposal is that

ground floor can be divided into three units and first floor can be divided into two and the top floor be retained as it is as a separate unit in itself and

the proposal can be later weighed separately so that the parties get an equal share. These offers made to the Court appear to be mere a game of

snakes and ladders or noodles in a bowl of soup, having no end and no beginning. It cannot be considered equitable or reliable since the offer does not

specify what area is being given to whom. Furthermore, the parties have indicated that they would like to have their clear demarcated shares. The

property should be so divided that it offers equal access from the main road as well as equal easement rights towards air, light and water. The

suggestions of Mr. Chaudhary are vague and quite contrary to the principle of equitable distribution of shares. Besides, they are likely to give rise to

subsequent disputes. Hence, his proposals are rejected.

At this stage, Mr. Chaudhary submits that the property could well be sold off so that the parties can get equitable shares therein.

The learned counsel for the other parties submit that the property has construction only in 75% of the land area and until the suit property is equally

divided there will always be a possibility of dispute regarding the new built area. They insist that therefore the property needs be divided as per the

suggestions of the Local Commissioner.

It is so ordered.

The property shall be demolished in four months from today. The parties shall vacate the premises by 31.12.2015.

A decree sheet be drawn up accordingly.

The suit is disposed off accordingly.

9. A perusal of the above order reveals that the Defendants failed to make any concrete suggestions for partition to the Local Commissioner and even

their conduct before this Court was completely unreasonable and only with a purpose to ensure that status quo is not altered and they continue to

occupy a larger share in the suit property. On 30th November, 2015, a Special Leave Petition arising out of the judgment/decreed dated 5th August,

2015 was dismissed by the Supreme Court. A review petition was thereafter filed against the order dated 30th November, 2015 passed by the Id.

Single Judge. The said review was dismissed on 6th April, 2016.

10. The final disposal of the suit vide order dated 30th November, 2015 was again challenged by means of RFA (OS) 47/2016, titled Radha Krishan

Verma & Ors. v. Rakesh Kumar Verma & Ors., which was dismissed as withdrawn on 23rd February, 2018. An application was filed, seeking recall

of the said order and restoration of the appeal, which was again dismissed on 2nd November, 2018.

11. The present application - I.A. 4573/2019 has now been moved by the Plaintiffs on the ground that the judgment/decreed dated 30th November,

2015 requires to be modified as the concerned Municipal Corporation is unlikely to give permission to divide the property in the manner contained in

the final judgment/decreed dated 30th November, 2015. In the said application, the Plaintiffs aver that in the final judgment, demolition of the property

was to be carried out and the property was to be divided into five portions, as suggested by the Local Commissioner. However, thereafter, the

Plaintiffs made inquiries which revealed that the concerned Municipal Corporation would not permit sub-division of the plot in the manner as suggested

by the Local Commissioner. The prayer in this application is as under: -

“In view of the said facts and circumstances, it is most respectfully prayed that this Hon'ble Court may be pleased to allow the present Application

thereby allowing necessary modifications and accordingly modifying Judgment and Decree dated 30.11.2015 for putting the property bearing No. C-

35, Rajouri Garden, New Delhi - 110027 on sale and dividing the proceeds in equal share amongst the Plaintiffs and deceased Defendant No. 1

(through his LRs.) as has been prayed in the prayer clause (a) of the suit and also allowing placing of amended Memo of Parties on record so that

final decree is correctly prepared and engrossed in accordance with law in the interest of justice;

12. The Plaintiffs also relied on the submissions made on behalf of the Defendants, as recorded in the order dated 30th November, 2015, that the

Defendants have no objection if the property is sold and parties get their equitable share. In view of the practical difficulties involved in the parties

living together, it was submitted that the suit property be allowed to be sold and the shares of the parties be distributed. Notice was issued in the said

application. In the meantime, Shri Radha Krishan Verma passed away on 11th June, 2016. Thus, in IA 4573/2019, the Plaintiffs have also prayed for

the amended Memo of Parties to be taken on record. The same is taken on record.

13. After notice was issued in this application, on 19th August, 2019, Defendant No.5 - Shri Kapil Verma appeared before this Court. It was noticed

that despite several months, no reply had been filed to the application. Accordingly, submissions were heard and judgment was reserved on 19th

August, 2019 in the following terms:-

“1. On behalf of the Defendants, Mr. Kapil Verma has appeared and submits that he needs more time to file his reply. The order dated 29th May,

2019 was clear that a reply ought to have been filed by 10th July, 2019. No reply has been filed. Mr. Verma submits that his mother is unwell, and

hence he could not file the reply.

2. The initial preliminary decree is of 2015 and the final decree is of 2017 and till date the same have not achieved finality. Accordingly, oral

submissions have been heard on behalf of the parties. Arguments heard and judgment reserved.

3. If parties wish to file their written submissions, they are permitted to do so. In view of the fact that Mr. Kapil Verma had not filed any reply, he is

permitted to file written submissions/reply affidavit, which would be taken into consideration for passing of orders. None has appeared on behalf of

Ms. Manju Verma and Ms. Anjani Verma. If Mr. Kapil Verma is authorized on their behalf, he can file an authority letter along with the written

submissions. The written submissions be filed on or before 30th August, 2019 with advance copy to the Plaintiffs. List on the next date for receipt of

the written submissions. On the said date, if either of the parties has any offer to make to the other parties in respect of purchase of the property, the

same shall be brought in a sealed cover.

4. List on 2nd September, 2019.

14. On 2nd September, 2019, Shri Kapil Verma filed the reply and in the same he has averred that he is duly authorised by his mother and his sister.

He submits that the Court has become functus officio after final judgment was passed and thus, does not have power to modify the decree. It is

further averred that the final decree was challenged in RFA (OS) 47/2016, wherein, on 10th October, 2017, the Plaintiffs' submission that it may

not be possible to divide the plot into five equal areas as the concerned Municipal Corporation is unlikely to give permission was recorded and not

accorded to. The Defendants further object to the application on the ground that sale of the suit property would be contrary to the unequivocal terms of

the Will dated 21st August, 1993, wherein Late Shri Raghunath Prasad Verma's wife and daughter had been given a life interest in the suit

property. Reliance is placed on Section 19 of the Transfer of Property Act, 1882 and Section 119 of the Indian Succession Act, 1925 to argue that the

Defendants have a vested right in the suit property and Section 147 of the Indian Succession Act, 1925 prohibits Plaintiff No.4 from selling it. It is also

submitted that since the preliminary decree has divided the property into 1/5th shares with the share of Plaintiff No. 4 devolving upon Plaintiff Nos. 1

to 3 and Defendant No. 1 upon her demise, if the property is sold and the monetary amount is paid to Plaintiff No. 4, it would not be possible for the

same to be reverted to the other parties upon the death of Plaintiff No. 4. Further, it is submitted that in the order dated 30th November, 2015, though

it has been recorded that the Defendants have no issues with the property being sold off, Defendant Nos.1 and 5 later filed Review Petition No. 91/16

in which it is submitted that the statement was wrongly recorded. The Reply also notes that while Defendant Nos. 1 and 5 filed their objections to the

Local Commissioners' Report on 27th November, 2015, objecting to division by metes and bounds, this objection was not accepted in the order

dated 30th November, 2015. Thus, the preliminary decree would be inequitable and the modification ought not to be permitted.

15. This Court has considered the submissions made on behalf of both parties. As recorded in the order dated 29th May, 2019, Defendant Nos. 2 to 4

have no objection to the prayer sought in the application. Thus, it is only the family of Defendant No. 1 which is objecting to the sale of the suit

property. The history of these proceedings clearly shows that out of the eight children of Late Shri Raghunath Prasad Verma, only Shri Radha

Krishan Verma and his family have been objecting to the partition. Since the time the preliminary decree was passed and the Local Commissioner

was appointed in 2015, Defendant No.1 and his family, including Defendant No. 5, have refused to co-operate and give effect to the preliminary

decree or the final decree. Every order which has been passed in this suit has been challenged by Defendant Nos. 1 and 5 and repeated orders by Id.

Single Judges and Id. Division Benches have held that the wishes of Late Shri Raghunath Prasad Verma be given effect to.

16. The preliminary decree was clear in its terms i.e., that Plaintiff Nos. 1 to 4 and Defendant No. 1 would get 1/5th share each in the suit property.

On this, there is no dispute. Plaintiff No. 4 also merely has a life interest. The manner in which the testator wanted division of the suit property was

captured in the Will dated 21st August, 1993, the relevant extract of which is as under:-

“I, the undersigned, do hereby divide the property of Late Shri Raghunath Prasad Verma among my children as follows:-

After my death my house C- 35, Rajouri Garden, New Delhi will be divided into six equal share. My wife Sarbati Devi, daughter Meena, Radha

Kishan, Rakesh, Anil and Sunil will all live together in this house and no one will have any right to dispossess anyone else and decisions in respect of

all matters will be taken by all of them with unanimity and consensus. All six of them will have equal right in all things of the house. If there is any

income from this house all six that is all the four sons daughter Meena and wife Sarbat Devi shall divide the same equally, no one shall have any right

to authorize any outsider and if need arises they shall do in consultation with each other. After the death of Sarbti Devi there will be five equal shares

Radha Kishan, Rakesh, Anil, Sunil and Meena instead of six shares.

(Sarbati Devi & Meena will not have right to sell this house none of my four sons will have any right to sell this house so long as Sarbati Devi and

Meena are alive).

All my four sons will ensure that after my death my wife and Meena are provided will all comforts and conveniences and respect so that they do not

face any difficulty and they are kept free from all expenses and all the expenses will be met out by my four sons in equal shares and after the death of

Sarbati Devi Meena will be provided in the same way as has been stated herein when Sarbati Devi had been alive and Meena would provided with

the same for her life time because Meena is handicapped. Because she is handicapped of her hands her hands her brothers will take full care other

and keep her free from all expenses.

On Meena's asking the garage in my house may be used for starting some business for Meena so that Meena's free time could be utilized profitably

and she may have some source of income. The passage to the garage and other conveniences will be looked after and Meena will be provided with all

the help necessary. Income generated from the garage will be received exclusively by Meena and there will be no division of the same.~€~

17. Thus, the testator wanted his wife and his one unmarried daughter to have a right of residence and share any income from the suit property. Since

his daughter i.e., Ms. Meena Verma is handicapped, she was to be taken care of during her life time.

18. The preliminary and final decrees were passed keeping this intent in mind. In the final decree, a suggestion was made to divide the suit property

into five portions as per LC-15, attached with the Local Commissioner's Report. The said plan, as per which the property was to be divided,

would have resulted in division of the suit property in the following manner: -

19. This division was challenged by Defendant No. 1 and his family in RFA (OS) 47/2016 which came to be dismissed on 23rd February, 2018. Recall

of the said order was also rejected on 2nd November, 2018. The question as to whether the concerned Municipal Corporation would or would not give

permission for the division of the suit property by metes and bounds, as suggested by the Local Commissioner, was not gone into by the Id. Division

Bench, though the contention was recorded in the order dated 10th October, 2017. Thus, as no adjudication took place on the issue, the first plea of

Defendant Nos. 1 and 5, that the Id. Division Bench has rejected the contention that the concerned Municipal Corporation would not give approval for

the division, is not found tenable.

20. The present application categorically avers that after making enquires it has been revealed that the concerned Municipal Corporation would not

approve the division of the suit property in the manner suggested by the Local Commissioner. The relevant averment in the application is set out

below: -

“1. That the Plaintiffs herein filed Execution Application No. 94/2016 after passing of Final Judgment & Decree on 30.11.2015 in this suit and

during the course of hearing in the said Ex P. No. 94.2016 on 18.12.2018 it transpired that the Judgment and Decree dated 30.11.2015 requires to be

modified on account of the fact that the same was not executable as the enquiries made by the Plaintiffs revealed that it was not possible to divide the

plot into five equal areas as the Municipal Corporation is unlikely to give permission and approval for the same and accordingly the Hon'ble Court was

pleased to close the said execution with the liberty to the Plaintiffs to take steps for such modification in this suit i.e. CS (OS) 541/2014 titled ""Rakesh

Kumar Verma & Ors. Vs. Radha Krishan Verma & Ors"". Certified copy of Order dated 18.12.2018 is annexed herewith as Document P-1 and

Certified copy of Judgment and Decree dated 30.11.2015 is annexed as Document P-2. Certified copy of Order dated 10.10.2017 passed in RFA

(OS) No. 47/2016 titled ""Radha Krishan Verma & Ors. Vs. Rakesh Kumar Verma & Ors."" is annexed herewith as Document P-3.

21. In fact, the Plaintiffs have brought to the notice of this Court that an execution petition was filed wherein, on 18th December, 2018, the Id. Single

Judge has observed as under: -

1. The counsel for the decree holders (DHs) states that intimation from the Registry of the stamp duty payable on the decree for partition by

metes and bounds was received late and the DHs will, before the next date of hearing, pay the entire stamp duty payable on the decree, including of

the shares of the judgment debtors (JDs), with the right to recover the same from the JDs.

2. On such assurance, time is granted; else, the Execution Petition is liable to be closed.

3. At this stage, the counsel for the DHs states that an application also has to be filed for modification of the decree, from that of partition, by metes

and bounds to that of sale, because the property, as per the Municipal Laws, cannot be divided by metes and bounds, as decreed.

4. Such an application has to be filed in the suit and not in this Execution Petition.

5. In the circumstances, it is deemed appropriate to close this Execution Petition. Of course, the DHs shall have right to apply again.

22. It is pursuant to the above observations that the present application has been filed. It is clear that the Plaintiffs have first approached the executing

Court and thereafter moved an application seeking modification. In response to paragraph 1 of the application, where it is specifically averred by the

Plaintiffs that the concerned Municipal Corporation is unlikely to give permission for sub-division of the suit property, the reply of Defendant Nos. 1

and 5 does not deny this position. The said Defendants do not take a stand as to whether approval for sub-division can be given. Their reply to the

application merely states that no liberty has been given to the Plaintiffs for filing of the present application. The said paragraph is set out below: -

“1. That the contents of Para 1 are denied except to the extent admitted that they are a matter of record. It is admitted that the Plaintiffs filed

an Execution application no. 94/2016 after passing of the final Decree on 30.11.2015. It is further admitted that on 18.12.2018, it was submitted by the

Plaintiffs that the same was not executable as the Municipal Corporation is not likely to give permission and approval and thus, the execution was

closed. It is denied that any liberty was granted to the Plaintiffs by the Execution Court to take steps for such modification in this suit. It is submitted

that though this Hon'ble court has recorded in its order dated 30.11.2015 that at this stage, Mr. Chaudhary submits that the property could

well be sold off so that the parties can get equitable shares therein, however, the Defendant no. 1 filed a review being review petition no. 91 of 2016

against the said order submitting that this statement has been wrongly recorded by the Hon'ble Court in the final decree dated 30.11.2015. It is

denied that the answering Defendants were or are agreeable to disposing off the property and sharing equitably the proceeds thereof.

23. A perusal of the various orders that have been passed and the stand of the parties makes it clear that while the preliminary decree clearly

determines the shares of the parties, the final decree, which directs horizontal division of the plot into five segments, has not worked out as the

Municipal Authorities are unlikely to give permission. The final decree is more than four years old and it is clear that the parties must have made

attempts to give effect to the said decree. Since effect could not be given to the final decree, the present application has been filed. The principle of

functus officio would not apply in the present case inasmuch as in a suit for partition, the Court has to ensure that the shares of each of the parties can

be enjoyed and a mere decree on paper is not passed. In a similar case, i.e., Uma Devi (Deceased thr. LRs) v. Shivraj Krishan Gupta & Ors.

[C.R.P.18/2013, decided on 30th January, 2015], a Id. Single Judge of this Court allowed an application seeking appointment of a Commissioner in

order to determine the quantum of mesne profits in terms of the final decree, by placing reliance on the following extracts of the Hon'ble Supreme

Court's judgment in Ghantesher Ghosh Vs. Madan Mohan Ghosh & Ors. (1996) 11 SCC 446:

“8. 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.”

24. The preliminary decree dates back to 2014 and the final decree is of 2015. More than five years have passed since the preliminary decree was

pronounced and yet, all the parties are running from pillar to post to be able to enjoy their share in the suit property. As is evident from the records, all

the children of Late Shri Raghunath Prasad Verma are in their 50s and 60s and if no effective decree is passed, status quo would continue and

Defendant No. 1's family, who is enjoying a larger share in the suit property, would continue to enjoy the same at the behest of the other legal

heirs. In a suit for partition, various modes of partition can be explored by the Court and finally, if none of the modes for physical partition are practical

and implementable, the Court can order sale of the property so that the heirs at least get to enjoy the value of their respective shares during their

lifetime.

25. There is no doubt that Plaintiff No. 4 i.e., the daughter of Late Shri Raghunath Prasad Verma, has a right to enjoy the property during her life time

and thereafter, it would devolve upon her brothers i.e., Plaintiff Nos. 1 to 3 and Defendant No. 1 (now his family). Thus, some arrangement would

have to be made by which the orders dated 11th September, 2014, 20th February, 2015 and 30th November, 2015, are give effect to.

26. In view of the above factual and legal position, the following directions are passed: -

(1) It is directed that instead of physical partition as per the Local Commissioner's report, which was accepted in the final decree dated 30th

November, 2015, the suit property shall be now sold within a period of six months.

(2) The sale consideration shall be divided into five equal shares. Three shares should be given to Plaintiff Nos. 1 to 3 each and the fourth share would

go to Defendant No. 1's family. The fifth share of Ms. Meena Verma i.e., Plaintiff No. 4, should be used to purchase an

accommodation/property, for her enjoyment during her life time. After the demise of Plaintiff No.4, the said property should be divided equally

between Plaintiff Nos. 1 to 3 and Defendant No. 1's family. Alternatively, if Plaintiff No. 4 resides with any of her brothers or their families, the

amount falling in her share shall be kept in a fixed deposit, wherein the nominees would be Plaintiff Nos. 1 to 3 and Defendant No. 1's family.

Plaintiff Nos. 1 to 3 would be entitled to 1/4th share of the said amount and Defendant No. 1's family would be entitled to 1/4th share of the said

amount. The said amount shall be retained in a fixed deposit. The interest earned from the said fixed deposit would be available to Ms. Meena Verma

for her every-day expenses and her living. The fixed deposit shall be kept in auto-renewal mode and shall not be allowed to be encashed by any of the

parties. Only upon Plaintiff No.4's demise will the amount be shared equally by Shri Rakesh Kumar Verma (1/4th share), Shri Anil Kumar Verma

(1/4th share), Shri Sunil Verma (1/4th share) and the heirs of Late Shri Radha Krishan Verma (1/4th share).

(3) In order to give effect to the sale of the suit property, Ms. Deepika Marwaha, Advocate (M: 9810046917) is appointed as a Local Commissioner

to publish the auction notice and to sell the suit property to the highest bidder. The fees of the Local Commissioner is fixed at Rs. 50,000/- to be paid

by the four Plaintiffs and Defendant No.1's family in equal share of Rs. 10,000/- each.

(4) The expenses for registration of the sale deed shall be borne by the purchaser exclusively. The sale deed and other documents shall be executed

by the Local Commissioner and shall also be co-signed by all the parties to the present suit. The sale deed and other sale documents shall thereafter

be registered with the concerned Sub-Registrar's office. The sale consideration shall be handed over in five separate demand drafts, to the Local

Commissioner, prior to the signing and registration of the sale documents. Four demand drafts shall be in the names of Plaintiff Nos. 1 to 4 and the

fifth demand draft shall be jointly in the name of Smt. Manju Verma, Shri Kapil Verma and Ms. Anjali Verma. They would be entitled to open a joint

bank account, encash the amount and divide it as per their mutual agreement.

27. The final decree dated 30th November, 2015 shall stand modified in the above terms. I.A. 4573/2019 and any other pending applications are

disposed of. Decree sheet be drawn.