HIGH COURT OF DELHI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

Date of Decision: 11th March 2024

RFA 830/2010

SANTOSH BHASIN ..... Appellant

versus

UMARI MALHOTRA DECD THR LRS ..... Respondents

Legislation:

Section 151, 152, Order 47, Order 20 Rule 18, Order 26 Rule 13 & 14 of the Code of Civil Procedure 1908 (CPC)

Subject: Application for clarification and consequential action following the High Court's judgment dated 10.01.2024 in a property partition matter involving the property at C-316, Defence Colony, New Delhi.

Headnotes:

Civil Procedure – Partition of Property – Appointment of Local Commissioner – The High Court clarified the judgment dated 10.01.2024, providing detailed directions for the partition of property between the appellant and respondents. A local commissioner is appointed to oversee the partition, with the assistance of an experienced architect, ensuring equal distribution of the subject property. [Para 46-49]

Interpretation of Preliminary Decree – Decree in Suit for Partition – The Court held that the judgment dated 10.01.2024 constituted a preliminary decree for partition. It declared the shares of the parties in the subject property and directed the drawing up of a preliminary decree, if not already done, with amendments reflecting the shares of the parties as determined. [Para 47-48]

Judicial Function and Ministerial Act – Distinguishing Between Preliminary and Final Decree – The judgment clarified the roles of judicial function in determining the shares in a partition suit and the ministerial act of dividing the property by metes and bounds. The Court emphasized the need to issue a final decree following a preliminary decree to make the partition effective. [Para 31-33, 35-37]

Maintainability of Application under Section 151 CPC – Correcting Omissions in Judgment – Addressing the respondents' objection, the Court allowed the application under Section 151 CPC, stating that procedural misnomenclature should not hinder justice. It emphasized that the application aims to correct

an inadvertent omission to effectuate the preliminary decree, fitting within the ambit of Section 152 CPC. [Para 39-42]

Application Allowed – Appellant's application under Section 151 CPC is granted, and the appeal (RFA No. 830/2010) is restored for further consideration for issuing consequential directions regarding partition. [Paras 43-49]

Referred Cases:

- Shankar Balwant Lokhande (dead) by L.Rs vs. Chandrakant Shankar Lokhande & Anr. (1995) 3 SCC 413
- Kattukandi Edathil Krishnan vs. Kattukandi Edathil Valsan 2022 SCC OnLine SC 737
- N. Mani vs. Sangeetha Theatre & Ors., (2004) 12 SCC 278, paras 8-9
- Kiran Girhotra & Ors. vs. Raj Kumar& Ors., 2009 SCC OnLine Del 3589, paras 62-64
- Food Craft Instt. vs. Rameshwar Sharma& Anr. 2006 SCC OnLine Del 505, paras 62-66
- Jagdish Balwantrao Abhyankar vs. State of Maharashtra& Ors. (1993) Mh. L.J. 958, para 21
- President, Chaturbhuj Sharma Sikshan Sansthan Mahavidyalaya Samiti, Orai & Ors. vs. Awadh Bihari Tiwari& Ors. 2006 SCC OnLine All 347, para 5
- Uma Devi Deceased Thr. LRs. vs. Shivraj Krishan Gupta SCC OnLine Del 6938, paras 1-2, 4-7, 9
- Gangadharan vs. James Joseph. SCC OnLine Ker 103, para 11
- Ghantesher Gosh vs. Madan Mohan Gosh. (1996) 11 SCC 446, paras 8 and 10
- Shub Karan Bubna vs. Sita Saran Bubna & Ors. (2009) 9 SCC 689
- State Bank of India & Ors. vs. S.N.Goyal. (2008) 8 SCC 92, para 28
- Dwarka Das vs. State of M.P. and Anr. (1999) 3 SCC 500, para 6
- Bijay Kumar Saraogi vs. State of Jharkhand (2005) 7 SCC 748, para 3
- Supertech Limited vs. Emerald Court Owner Resident Welfare Association and Ors. (2023) 10 SCC 817, paras 13-14
- Venkata Reddy and Ors. vs. Pethi Reddy National Institute of Mental Health & Neuro AIR 1963 SC 992, para 5
- Sciences vs. C. Parameshwara (2005) 2 SCC 256, para 12
- State of Punjab vs. Darshan Singh (2004) 1 SCC 328
- Sambhaji & Ors. vs. Gangabai & Ors (2008) 16 SCR 469
- N. Mani vs. Sangeetha Theatre & Ors. (2004) 12 SCC 278 at para 9

Representing Advocates:

Mr. P.V. Kapur, Sr. Advocate with Mr. Jatin Sehgal, Ms. Devna Soni, Mr. Adhirath Singh, Mr. Pareesh Virmani, Mr. Sidhant Kapur, Mrs. Kaveri Kapur, Mr. Dhananjay Sahai & Mr. Shiv Raj Syal for the Appellant.

Mr. Rohit Kumar for the Respondents.

JUDGEMENT

CM APPL. 5722/2024

By way of the present application filed under section 151 of the Code of Civil Procedure 1908 („CPC"), the appellant-plaintiff/Santosh Bhasin seeks clarification of judgement dated 10.01.2024 rendered by this court, whereby this court had allowed the present appeal, thereby setting-aside judgment and decree dated 20.09.2010 passed by the learned Additional District Judge („ADJ') in CS No. 382/09/95. Since the judgement and decree had been set-aside, the cross-objections filed on behalf of the respondents-defendants, by which they had impugned certain observations made in that judgement, were also disposed-of requiring no orders.

2. By way of the present application, the appellant makes the following prayers :

> "*a. Allow the present application, clarify the judgment dated 10.01.2024 passed by this Hon'ble Court and appoint a local commissioner to divide and demarcate the entire terrace floor including the construction thereon of the property bearing no. C- 316, Defence Colony, New Delhi by metes and bounds and handover vacant and physical possession of the Appellants share to the Appellant;*
>
> *"b. Authorize and permit the local commissioner to take the assistance of an expert i.e. an architect, having at least 15 years of experience for the purpose of carrying out equal division of the terrace floor including the constructed area in the property bearing no. C-316, Defence Colony, New Delhi; and "c. Any other relief that this Hon'ble Court may deem fit and proper in the facts and circumstances of the instant case."*

3. Notice on this application was issued on 06.02.2024; whereupon reply dated 16.02.2024 has been filed by the respondents.

4. The court has heard Mr. P.V. Kapur, learned senior counsel appearing for the appellant and Mr. Rohit Kumar, learned counsel appearing for the respondents.

5. Counsel have also filed their respective written synopses of their submissions on the application.

APPELLANT"S SUBMISSIONS

6. Mr. Kapur submits, that since by way of judgement dated 10.01.2024, this court has held that the appellant has equal rights over the *barsati* room and terrace atop the first floor of property bearing No. C-316, Defence Colony, New Delhi („subject property"), this court may also pass a consequential order of appointing a Local Commissioner to partition the subject property by metes and bounds, which was one of the prayers made in the suit filed before the learned ADJ.

7. It is pointed-out that the claims in the suit were as follows :

"(a) Decree for partition of the Barsati and the Roof Terrace situate on the second floor of premises No. C-316, Defence Colony, New Delhi between the plaintiff and the defendant by metes and bounds in equal shares.

"(b) Decree for declaration of plaintiff's rights and titles and interests of the Barsati and roof terrace of the second floor in equal shares.

"(c) Appointment of a commissioner of Partition for making division and partition of the said Barsati and roof terrace by metes and bounds between the Plaintiff and the defendant in equal shares and for framing a scheme for convenient use and enjoyment of the respective allotments.

"(d) Costs.

"(e) Such further or other reliefs as this Hon'ble Court might deem fit and proper."

8. Attention is also drawn to the prayers in the present appeal, which were as follows :

"a. Set-aside the Impugned Judgment dated 20.09.2010 passed by the Ld. Trial Court in suit no. 382/09/95;

"b. Decree the suit filed by the Appellant and grant the reliefs as prayed for by the Appellant in the suit, which has been dismissed by the Impugned Judgement dated 20.09.2010;

"c. Pass such other and further order(s) as this Hon'ble Court may deem fit and property in the facts and circumstances of the present case in favour of the Appellant and against the Respondents."

9. It is submitted that once this court has held that the appellant and the respondents are entitled to a 50:50 share each in the subject property, it is imperative that a Local Commissioner be appointed to undertake division of the subject property by metes and bounds as per their respective shares, who may also be granted permission to seek the assistance of a reasonably senior architect for demarcating and dividing the subject property, including the construction comprised therein, so as to enable the parties to enjoy their equal shares in the subject property.

10. Mr. Kapur submits, that since by way of judgement dated 10.01.2024, this court has set-aside the judgement rendered by the learned ADJ, and declared that the plaintiff and the respondents are entitled to a 50:50 share in the subject property, the sequitur to that would be to pass a preliminary decree for partition, whereafter it would be necessary for this court to issue commission for physical partitioning of the immovable property.

11. Mr. Kapur draws attention to the provisions of Order 20 Rule 18 CPC and Order 26 Rule 13 & 14 CPC, which read as under :

Order 20 Rule 18 CPC

18. Decree in suit for partition of property or separate possession of a share therein.—Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

* * * * * Order 26 Rules 13&14 CPC

Commissions to make partitions

13. Commission to make partition of immovable property.—Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by Section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

14. Procedure of Commissioner.—(1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorised thereto by the said order, award sums to be paid for the purpose of equalising the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied;

but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

12. Mr. Kapur also places reliance upon the decision of the Supreme Court in ***Shankar Balwant Lokhande (dead) by L.Rs vs. Chandrakant Shankar Lokhande & Anr.*** in which verdict it has been held as follows :

"4. Order 20, Rule 18 envisages passing of a decree for partition of property or for separate possession of a share therein. Sub-rule (2) is material which provides that "if and insofar as such decree relates to any other immovable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required". (emphasis ours) Thus, it could be seen that where the decree relates to any immovable property and the partition or separation cannot be conveniently made without further inquiry, then the court is required to pass a preliminary decree declaring the rights of several parties interested in the property. The court is also empowered to give such further directions as may be required in this behalf. A preliminary decree in a partition action, is a step in the suit which continues until the final decree is passed …..

* * * * *

"8. It has been seen that after passing of preliminary decree for partition, the decree cannot be made effective without a final decree. …..

* * * * *

"10. As found earlier, no executable final decree has been drawn working out the rights of the parties dividing the properties in terms of the shares declared in the preliminary decree. The preliminary decree had only declared the shares of the parties and properties were liable to be partitioned in accordance with those shares by a Commissioner to be appointed in this behalf. Admittedly, no Commissioner was appointed and no final decree had been passed relating to all."

(emphasis supplied)

13. Learned senior counsel has also cited the more recent decision of the Supreme Court in ***Kattukandi Edathil Krishnan vs. Kattukandi Edathil Valsan***, the relevant portions whereof read as follows :

"30. It is clear from the above that a preliminary decree declares the rights or shares of the parties to the partition. Once the shares have been declared and a further inquiry still remains to be done for actually partitioning the property and placing the parties in separate possession of the divided property, then such inquiry shall be held and pursuant to the result of further inquiry, a final decree shall be passed. Thus, fundamentally, the distinction between preliminary and final decree is that: - a preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in preliminary decree and

*after the inquiry having been conducted and rights of the parties being finally determined, a final decree incorporating such determination needs to be drawn up. * * * * **

*"33. **We are of the view that once a preliminary decree is passed by the Trial Court, the court should proceed with the case for drawing up the final decree suo motu**. After passing of the preliminary decree, the Trial Court has to list the matter for taking steps under Order XX Rule 18 of the CPC. The courts should not adjourn the matter sine die, as has been done in the instant case. There is also no need to file a separate final decree proceedings. In the same suit, the court should allow the concerned party to file an appropriate application for drawing up the final decree. Needless to state that the suit comes to an end only when a final decree is drawn. … … …"*

(emphasis supplied)

14. Mr. Kapur accordingly argues, that it would appear that the observation in judgement dated 10.01.2024 to the effect that a decree sheet be drawn-up is in fact a reference to be *preliminary decree* of partition, which needs to culminate in a final decree, so as to make it effective, which can be done after a Local Commissioner is appointed to carry-out the partitioning of the subject property by metes and bounds, with the assistance of an architect.

15. For completeness it may be noted, that in addition to the judgments referred to above, the appellant has also cited the following decisions in support of the contentions mentioned against the judgments :

15.1. On the point that it is the substance of the application that matters and not the nomenclature or provision mentioned in the application, the appellant cites :

15.1.1. ***N. Mani vs. Sangeetha Theatre & Ors.,***

15.1.2. ***Kiran Girhotra & Ors. vs. Raj Kumar& Ors.,***

15.1.3. ***Food Craft Instt. vs. Rameshwar Sharma& Anr.,***

15.1.4. ***Jagdish Balwantrao Abhyankar vs. State of Maharashtra& Ors.,*** and

15.1.5. ***President, Chaturbhuj Sharma Sikshan Sansthan Mahavidyalaya Samiti, Orai & Ors. vs. Awadh Bihari Tiwari& Ors.***

15.2. [redacted] appellant relies on :

15.2.1. [redacted]

15.2.2. [redacted]

15.3. [redacted]

RESPONDENTS' SUBMISSIONS

16. On the other hand, opposing the present application by way of reply dated 16.02.2024, Mr. Kumar has raised the objection that the appellant could not have filed the present application under section 151 CPC, since, according to the respondents, in the garb of seeking clarification of judgement dated 10.01.2024, the appellant is in fact seeking modification and *addition* to the judgement which is impermissible in law.

17. Mr. Kumar draws attention to Order 20 Rule 3 CPC read with section 152 thereof, which provisions may be noticed below :

Order 20 Rule 3 CPC

3. Judgment to be signed.—The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by Section 152 or on review. * * * * * Section 152 CPC

152. Amendment of judgments, decrees or orders.—Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

(emphasis supplied)

18. It is accordingly argued on behalf of the respondents that the CPC does not permit any additions, alterations or modifications to be made to a judgement, once it has been pronounced, except to the limited extent permissible under section 152 or in review under section 114 read with Order 47 CPC, which provisions are extremely limited in their scope. It is argued that section 152 CPC *only permits correction of clerical and arithmetic mistakes* in a judgement, decree or order; and section 114 permits review only on grounds of some error apparent on the face of a judgement or order, provided no appeal is provided, or has been preferred from such judgment or order.

Counsel has also drawn attention to the provisions of Rule 10 Chapter-I Volume-V of the Delhi High Courts Rules, relating to review, to submit that the grounds available for review do not exist in the present case, nor have they been urged by the appellant as required.

19. Mr. Kumar submits that in the present case, the application has been filed under section 151 CPC and not under section 152 CPC; and no review has been preferred. He stresses that the appellant cannot be permitted to circumvent the provisions of the CPC by filing the present application under section 151.

20. It is Mr. Kumar‟s submission, that in fact, in judgement dated 10.01.2024 this court has nowhere held that the appellant and the respondents would have an equal share in the subject property, or in the land upon which the building is situate. He submits that therefore the judgement is not a judgement towards a preliminary decree of partition.

21. Mr. Kumar also argues that upon pronouncement of judgment dated 10.01.2024, this court became *functus officio*; and therefore, no further orders, muchless an order modifying the judgment, can be passed by this court. This submission is however clearly negatived by the position of law as enunciated in ***Shub Karan Bubna vs. Sita Saran Bubna & Ors.***, where the Supreme Court says that a preliminary decree of partition *does not have the effect of disposing-of the suit*, and a suit *continues to remain pending* until partition by metes and bounds takes place and a final decree is passed. As a result, upon passing the preliminary decree, this court did not become *functus officio* in the present case.

22. In support of the submissions made on behalf of the respondents, the following judicial precedents have been cited :

22.1. On the point that a judgment is „final‟ and a Judge becomes *functus officio* once a judgment is pronounced, signed and dated and the judgment cannot be modified thereafter, the respondents cite :

22.1.1. ***State Bank of India & Ors. vs. S.N.Goyal.***

22.2. On the point that once a judgment is passed the court cannot vary the terms of the judgment under section 152 CPC except to correct accidental omissions or mistakes; but an omission which goes to the merits of the case cannot be corrected, the respondents cite :

22.2.1. ***Dwarka Das vs. State of M.P. and Anr.***

22.2.2. ***Bijay Kumar Saraogi vs. State of Jharkhand***

22.2.3. ***Supertech Limited vs. Emerald Court Owner***

Resident Welfare Association and Ors.:

22.2.4. ***Venkata Reddy and Ors. vs. Pethi Reddy***

22.2.5. ***National Institute of Mental Health & Neuro Sciences vs. C. Parameshwara***

DISCUSSION & CONCLUSIONS

23. Upon a consideration of the contents of the application and the reply; and based on the submissions made at the Bar, the following inferences arise :

23.1. Clearly, by way of the suit filed before the learned ADJ, the appellant (plaintiff in those proceedings) had sought a preliminary decree of a partition; followed by a direction for appointment of a Local Commissioner to undertake the division of the subject property by metes and bounds; and for separate possession of their respective shares by the parties.

23.2. Judgement and decree dated 20.09.2010 made by the learned ADJ has been set-aside by way of judgement dated 10.01.2024 made by this court in the present proceedings, without however addressing the other claims made in the suit.

23.3. Contrary to what has been submitted on behalf of the respondents, in judgement dated 10.01.2024, this court has held as under :

> *"34.3. Insofar as rights in the land beneath are concerned, those could be taken to have been bequeathed in either of the following two ways. Firstly, by being included in the second para of the Will, which bequeathed all properties and assets of the testator upon his two daughters, without specifying any share in anyone's favour, meaning thereby that rights in the land went equally to both of them. Secondly, it may be said that the testator remained silent in the Will as to the bequest of the land; in which case, the rights in the land would again go equally to his two daughters. However, insofar as the built-up portion was concerned, in the fourth para of the Will, the testator specifically bequeathed the constructed portions in the manner as referred to above.*
>
> *"34.4. Though the barsati room and the terrace atop the first floor existed during the testator's lifetime, he neither referred to those portions in his Will nor did he make any codicil in that regard. The Will is accordingly silent as regards the barsati room/terrace. In which case, the barsati room/terrace would go by intestacy equally to the appellant and the defendant/respondents. This interpretation of the Will also passes muster on the anvil of reason, since it is inconceivable that the testator would have thought that the construction upon the land would remain as-it-was during his lifetime, for all times to come; and that his two daughters would never need, or be permitted, to make any further construction on the property. Such an interpretation must be rejected as being completely counter-intuitive and opposed to common sense and reason."*

(emphasis supplied)

23.4. On a plain reading of the foregoing paragraphs of judgement dated 10.01.2024, it is clear that this court has expressly decided the shares of the appellant (on the one hand) and the respondents (together on the other hand) *both* in the *land* as well as in the *subject property*, holding that each of the said parties has an equal share in both. In view thereof, the respondent‟s contention that judgement dated 10.01.2024 does not decide the shares of the parties in the subject property or in the land, is wholly misconceived and based on ignorance of what precisely has been decided by the judgement. Judgement dated 10.01.2024 is therefore a judgement towards a preliminary decree in the matter.

23.5. A reading of the judgements cited on behalf of the appellant makes it clear that a preliminary decree for partition must be followed by a final decree in order to make the partition effective. It is also settled law that a preliminary decree merely declares the rights of the interested parties in the property, while the final decree gives it an executable form, dividing the property in terms of the shares declared by the preliminary decree. This is the clear enunciation of the law by the Supreme Court in *Shankar Balwant Lokhande* (supra) as reiterated in *Kattukandi Edathil Krishnan* (supra).

23.6. The relief claimed in the present application is restricted to effectuating the preliminary decree for partition of the subject property that was subject matter of para 34.4 of judgement dated 10.01.2024. The provisions of Order 20 Rule 18 and Order 26 Rule 13 CPC set-out the scheme whereby, having passed a preliminary decree of partition, the court is entitled to appoint a Local Commissioner to conduct the requisite enquiry and divide the property into as many shares as may be directed by the court, and to allot such shares to the concerned parties.

24. The observations of the Supreme Court in *Shub Karan Bubna* (supra) are also relevant :

> *“7. In a suit for partition or separation of a share, the prayer is not only for declaration of the plaintiff’s share in the suit properties, but also division of his share by metes and bounds. This involves three issues:*
>
> *(i) whether the person seeking division has a share or interest in the suit property/properties;*
>
> *(ii) whether he is entitled to the relief of division and separate possession; and*
>
> *(iii) how and in what manner, the property/properties should be divided by metes and bounds?*

*In a suit for partition or separation of a share, the court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession. The decision on these two issues is exercise of a **judicial function** and results in first stage decision termed as "decree" under Order 20 Rule 18(1) and termed as "preliminary decree" under Order 20 Rule 18(2) of the Code. The consequential division by metes and bounds, considered to be a **ministerial or administrative act** requiring the physical inspection, measurements, calculations and considering various permutations/combinations/alternatives of division is referred to the Collector under Rule 18(1) and is the subject-matter of the final decree under Rule 18(2).*

* * * * *

"17. Once a court passes a preliminary decree, it is the duty of the court to ensure that the matter is referred to the Collector or a Commissioner for division unless the parties themselves agree as to the manner of division. This duty in the normal course has to be performed by the court itself as a continuation of the preliminary decree. Sometimes either on account of the pendency of an appeal or other circumstances, the court passes the decree under Rule 18(1) or a preliminary decree under Rule 18(2) and the matter goes into storage to be revived only when an application is made by any of the parties, drawing its attention to the pending issue and the need for referring the matter either to the Collector or a Commissioner for actual division of the property. Be that as it may.

* * * * *

"18.2. In regard to immovable properties (other than agricultural lands paying land revenue), that is, buildings, plots, etc. or movable properties:

(i) where the court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds.

(ii) where the division by metes and bounds cannot be made without further inquiry, the court will pass a preliminary decree declaring the rights of the parties interested in the property and give further directions as may be required to effect the division. In such cases, normally a Commissioner is appointed (usually an engineer, draughtsman, architect, or lawyer) to physically examine the property to be divided and suggest the manner of division. The court then hears the parties on the report, and passes a final decree for division by metes and bounds.

The function of making a partition or separation according to the rights declared by the preliminary decree (in regard to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions. When the Commissioner gives his report as to the manner of division, the proposals contained in the report are considered by the court; and after hearing objections to the report, if any, the court passes a final decree whereby the relief sought in the suit is granted by separating the property by metes and bounds. It is also possible that if the property is incapable

of proper division, the court may direct sale thereof and distribution of the proceeds as per the shares declared.

"18.3. As the declaration of rights or shares is only the first stage in a suit for partition, a preliminary decree does not have the effect of disposing of the suit. The suit continues to be pending until partition, that is, division by metes and bounds takes place by passing a final decree. An application requesting the court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under Article 136 of the Limitation Act) nor an application seeking a fresh relief (falling under Article 137 of the Limitation Act). It is only a reminder to the court to do its duty to appoint a Commissioner, get a report, and draw a final decree in the pending suit so that the suit is taken to its logical conclusion.
* * * * *

"20. On the other hand, in a partition suit the preliminary decrees only decide a part of the suit and therefore an application for passing a final decree is only an application in a pending suit, seeking further progress. In partition suits, there can be a preliminary decree followed by a final decree, or there can be a decree which is a combination of preliminary decree and final decree or there can be merely a single decree with certain further steps to be taken by the court. ***In fact, several applications for final decree are permissible in a partition suit. A decree in a partition suit enures to the benefit of all the co-owners and therefore, it is sometimes said that there is really no judgment-debtor in a partition decree****."*

(emphasis supplied)

25. Now, section 152 of the CPC entitles the court, either on its own motion or on application by a party, to correct not just clerical or arithmetical mistakes in judgment, decree or order *but also any error arising from any accidental slip or omission*. The provision says that the court may correct such error at any time.

26. At this stage, a brief reference may be made to the law on this point.

27. In ***State of Punjab vs. Darshan Singh,*** the Supreme Court says :

"12. Section 152 provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. ***The exercise of this power contemplates the correction of mistakes by the court of its ministerial actions and does not contemplate passing of effective judicial orders after the judgment, decree or order****. The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very court or the tribunal cannot and, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein. The powers under Section 152*

of the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the court concerned under the guise of invoking after the result of the judgment earlier rendered, in its entirety or any portion or part of it. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 as if it is looking into it for the first time, for which the proper remedy for the aggrieved party, if at all, is to file an appeal or revision before the higher forum or review application before the very forum, subject to the limitations in respect of such review. It implies that the section cannot be pressed into service to correct an omission which is intentional, however erroneous that may be. .....

"13. The basis of the provision under Section 152 of the Code is founded on the maxim "actus curiae neminem gravabit" i.e. an act of court shall prejudice no man. The maxim "is founded upon justice and good sense; and affords a safe and certain guide for the administration of the law", said Cresswell, J. in Freeman v. Tranah [12 CB 406 : 138 ER 964] (ER p. 967). ***An unintentional mistake of the court which may prejudice the cause of any party must and alone could be rectified****. ..... "*
(emphasis supplied)

28. It is also important to remind oneself of the very purpose of having legal procedure, which is to advance delivery of justice and not thwart it. In ***Sambhaji & Ors. vs. Gangabai & Ors.,*** this is what the Supreme Court has said :

"9. All the rules of procedure are the handmaids of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

"10. The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

"11. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, processual, as much as substantive. No person has a vested right in any course of procedure.

He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates A the recipient of justice is not to be followed.

"12. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. A Procedural prescription is the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

(emphasis supplied)

29. In the backdrop of the foregoing discussion, clearly, what has transpired in the present case is that this court has, while reversing the judgement of the learned trial court, held that "*… the appeal succeeds …*" and has thereafter proceeded to direct that the suit stands decreed.

30. By judgment dated 10.01.2024, this court has held that the appellant/plaintiff (on the one hand) and the respondents/defendants (on the other hand) are entitled to an equal share in the subject property *viz.*, the *barsati* room and terrace atop the first floor of premises bearing No. C-316, Defence Colony, New Delhi. This decision is the outcome of the *judicial function*, which has decided the substantive rights of the parties and has resulted in a preliminary decree.

31. However, this court has, by inadvertence, omitted to pass the consequential direction as to how the equal shares in the subject property are to be apportioned and how the parties are to be put in possession of their respective apportioned shares, to enable them to enjoy the fruits of the preliminary decree.

32. It is the settled legal position that in a partition suit, the decision that a party is entitled to a share in immovable property in a certain proportion is a *judicial function*; and the consequential division of the property by metes and bounds and putting a party in possession of its divided share is a *ministerial and administrative function*.[6]

33. It is also the settled position that once a court passes a preliminary decree, it is the duty of the court, as a consequence of having passed the preliminary decree, to give further directions as may be required to effect division of the

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Shub Karan Bubna (supra)

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6 at para 7

Shub Karan Bubna (supra) at para 18.3

property. It has been held that a preliminary decree does not have the effect of disposing-of the suit, which continues to remain pending until division by metes and bounds takes place by the court passing a final decree.[21]

34. It has also been observed that, in fact, several applications for a final decree are permissible in a partition suit, *inter-alia* since a partition decree enures to the benefit of all co-owners, and in that sense, there is no real „judgment-debtor" in a partition decree.[7]

35. Furthermore, section 152 of the CPC permits the passing of consequential orders *provided* these do not involve any substantive adjudication of any matter involving the merits of the case.[8]

36. In fact the Supreme Court has said, that an unintentional mistake of the court which may prejudice the cause of any party must be rectified in exercise of the powers under section 152 CPC.[9]

37. The passing of consequential directions to give effect to the preliminary decree of partition, in order to effectuate it and to ensure that the appellant and the respondents are put in possession of their respective partitioned shares of the subject property, is a mere *ministerial act* and does not involve the passing of any *adjudicatory order* (after judgment dated 10.01.2024 was passed).

38. In fact, not passing such consequential directions would fly in the face of the well-worn principle that rules of procedure are meant to advance the cause of justice and must therefore be subservient to the main goal of the judicial process, namely to dispense justice.[10]

39. To address the objection that the present application is not maintainable under section 151 CPC, without wasting further effort on it, it may only be observed that the mere nomenclature or misnomenclature of an application is of no consequence, *provided the law otherwise empowers a court to grant relief prayed-for by way of an application*. When, on the one hand we say, that legal procedure is meant to advance justice, then to stump the appellant solely on the ground that the application has been filed mentioning a wrong procedural provision, would be to reduce justice dispensation to mockery.[11]

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[7] *Shub Karan Bubna* (supra) at para 20

[8] *Darshan Singh* (supra) at para 12

[9] *Darshan Singh* (supra) at para 13

[10] *Sambhaji* (supra) at paras 9 and 11

[11] *N. Mani vs. Sangeetha Theatre & Ors.* (2004) 12 SCC 278 at para 9

40. This is not a case where the appellant is seeking to re-agitate her rights as already decided by judgment dated 10.01.2024. It is also not the case that the appellant seeks to re-argue any questions of fact and/or law. This is a case where, after this court has declared the rights of the parties by judgment dated 10.01.2024, it has been brought to the notice of this court, that by inadvertence, it has omitted to direct the appointment of a local commissioner to ascertain the feasibility of dividing the subject property by metes and bounds and for further directions in terms of Order 20 Rule 18 and Order 26 Rules 13 and 14 CPC.

41. Therefore, the argument on behalf of the respondents that the application is not maintainable under section 151 CPC, when on point of law, the prayer can be granted under section 152 CPC is to be heard only to be rejected.

42. The vehement objection taken by the respondents as to the nonmaintainability of the application under section 151 CPC, appears to be an effort at obfuscation and delay, with the aim and intent of thwarting the appellant from enjoying the fruits of the verdict in the appeal.

43. The objections raised on behalf of the respondents seem to be facetious and only an attempt to negate the effect of judgement dated 10.01.2024. The objections raised must be viewed in light of the fact that the respondents have been continuing in occupation of the subject property, to the exclusion of the appellant; and it therefore advances their interests to thwart the fruits of judgment dated 10.01.2024.

44. As a sequitur to the above, the application is allowed and stands disposed-of.

RFA 830/2010

45. In view of what has been held above, RFA No. 830/2010 stands restored to its original number and position.

46. Since the subject property comprises the *barsati* room and terrace atop the first floor of premises bearing No. C-316, Defence Colony, New Delhi, in which the appellant (on the one hand) and the respondents (together on the other hand) have been held to be entitled to equal shares, it would appear that partition or separate possession of their respective shares in the subject property cannot be conveniently made without further enquiry.

47. Accordingly, it is clarified that by way of judgment dated 10.01.2024, a preliminary decree has been passed, declaring the shares of the parties as follows :

Appellant	1/2 undivided share in subject property
Respondent No. 1	1/6 undivided share in subject property
Respondent No. 2	1/6 undivided share in subject property
Respondent No. 3	1/6 undivided share in subject property

48. Let a preliminary decree for partition be drawn-up, if not already done so. If a decree has already been drawn-up, let the decree be amended to the above effect.

49. The present appeal will be taken-up for further consideration; and consequential directions would be issued as part of the daily order.