

Before Rajbir Sehrawat, J.

GARJA SINGH—*Petitioner*

versus

**ORCHID SPACE DESIGN LLP THROUGH ITS PARTNER AND
OTHERS**—*Respondents*

CR No. 543 of 2022 (O&M)

February 22, 2022

Constitution of India, 1950—Arts. 226 and 227—Code of Civil Procedure, 1908 O.20 and 26—Mode of Partition—Local Commissioner had suggested the mode of partition and share of the petitioner—Appointment of fresh Local Commissioner to re-determine share of properties to be partitioned—Held, re-opening the issue of ownership quo the properties to the partition, i.e. to determine the share or creating a separate parcel of land—Disallowed—The defendants/respondents had never prayed before the Court below for either determination of their share or for separation of their parcel so as to get separate possession of land—They must file fresh suit for partition if so desired—There is no absolute law that the possession of one co-sharer cannot be disturbed for handing over the possession to the other co-sharers in partition proceedings.

Held that, the respondent No.1 is no exception. He never made any prayer before the Court for either determination of his share or for separation of his parcel so as to get separate possession of the land of his alleged entitlement, unlike the petitioner. Accordingly, the preliminary decree has been passed by the trial Court; only qua the separation of the share of the petitioner-plaintiff by holding him entitled to 55 Kanal 16 Marla of land, while granting liberty to the defendants to file fresh suit for partition as and when they so desired. Therefore, the exercise of carving out separate parcel of the land in the proceedings for preparation of final decree has to be restricted only to handing over the separate possession to the petitioner. Since, none of the other defendants ever came forward to either establish their shares or to claim separate possession, therefore, there is no scope for determining either share or the separate parcel of land of any other co-sharer while preparing final decree in this suit. This is also clear from the fact that while passing the preliminary decree, the trial Court has

already said that respondent No.1 may resort to separate suit seeking partition, if he wants to get his share determined. The fact remains that in the present suit the respondent No.1 has neither established his title, nor his share as such. Nor has the respondent No.1 ever claimed his separate possession. Not only this, even till today there is no assertion in anyone of the pleadings or anyone of the prayers made before the trial Court or before this Court that his alleged share should be separately carved out and the possession be handed over to respondent No.1. Hence, in the present proceedings, the respondent No.1, as such, cannot place any hurdle in the way of the petitioner; qua preparation of the final decree by carving out the separate parcel of the land for the petitioner.

(Para 5)

Further held that, otherwise also, even presuming the respondent No.1 to be in possession of the part of the property, the same cannot be taken to be his exclusive possession. By the fiction of law; that has to be taken as joint possession of all the co-sharers, which shall, obviously, include the petitioner as well. Moreover, while adjusting the shares, it is bound to happen that the possession from one co-sharer is taken away and the same is handed over to another co-sharer; so as to make good the share of the latter. Therefore, there is no absolute law that the possession of one co-sharer cannot be disturbed for handing over the possession to the other co-sharer in partition proceedings.

(Para 7)

Further held that, the trial Court cannot reopen the issue of determination of ownership shares or the possession thereof by way of adversarial adjudication. It can call for report from the Commissioner appointed by the Court. There can be also some objections qua the report, if there is one; regarding the measurements, or having anything else to do with the share of the petitioner. But for the purpose of reopening the entire exercise, the process of adjudication afresh could not have been initiated by the Court below.

(Para 8)

Ashwani Kumar Chopra, Senior Advocate with
Vidul Kapoor, Advocate,
for the petitioner.

Gaurav Chopra, Senior Advocate with
Reshabh Bajaj, Meghna Nagpal, Dhruv Sood and

Vardhan Seth, Advocates,
for caveator/respondent No.1.

RAJBIR SEHRAWAT, J. (Oral)

(1) This is a revision petition filed under Article 227 of the Constitution of India for setting aside the order dated 03.01.2022 (Annexure P-9) passed by the Additional Civil Judge (Senior Division), Kharar (for short, the trial Court), on the objections dated 01.11.2021 (Annexure P-6), filed by respondent No.2700 against the report of the Local Commissioner dated 09.12.2019 (Annexure P-4) providing for the mode of partition as per the order dated 09.10.2019 (Annexure P-3) of the trial Court and also on the application dated 01.12.2021 (Annexure P- 8) filed by the same respondent for appointment of fresh Local Commissioner, whereby the trial Court has framed a fresh issue and fixed the case for evidence of the objector on merits, and further, illegally and erroneously has discarded the report of the Local Commissioner dated 09.12.2019 (Annexure P-4) and ordered for a fresh Local Commissioner to be appointed after disposal of the issue framed therein.

(2) It is argued by the counsel for the petitioner that the Court below has gone wrong in law in reopening the entire issue of ownership qua the properties to be partitioned. The share of the petitioner, which is to be separated already stood determined by way of preliminary decree. During the partition proceedings, the respondents never made any request for preparation of separate parcels of land to give possession to them qua their alleged shares. Hence, it is only the share of the petitioner which was to be separated and qua which the separate possession was to be given. On order of the trial Court only the Local Commissioner had suggested the mode of partition and share of the petitioner. The counsel has further submitted that the trial Court has, in fact, reopened the entire issue by framing an issue to invite evidence as to the ownership and possession qua respondent No.2700 in the suit, who is respondent No.1 in the present petition. It is further submitted that neither the petitioner is concerned with the alleged ownership of that respondent, nor is he concerned with the possession of the said respondent as such. It was for the said respondent to raise his plea qua ownership, before passing of the preliminary decree, if at all, he had any title to any share in the property. Moreover, even if the respondent No.1 claims to be the owner of any share in the property, he would still be at liberty to file a separate suit for partition and separate possession qua his share. The

petitioner is taking only his share, as per his entitlement which already stands determined through preliminary decree. The share of the petitioner is not even disputed in the impugned order; as such. So far as the possession is concerned, it is submitted by the counsel for the petitioner that if the other co-sharers are already in possession of their respective shares and they have not even sought partition qua their shares, in that situation, if there is any unconstructed area out of the joint holding, the same has to be given to the petitioner as per his entitlement and share; despite some of the co-sharers claiming possession over the same. In adjusting share and separate possession the Court may have to disturb the possession of some other co-sharer. For this limited purpose, even the specific possession of the said co-sharer has to be taken as joint possession with the petitioner, who is also the co-sharer in the same land. Therefore, the question of the respondent No.1 claiming to be in possession over the property is totally irrelevant for the purpose of partitioning the property by metes and bounds. In any case, somebody's possession is bound to be disturbed so as to make the separate parcel for the entitlement of the petitioner; when there are competing claims to the possession. The counsel has further submitted that the Court below has wrongly reopened the issue of determination of share of respondent No.1. The respondent No.1, if at all, was to claim any share in the property; was required to claim and prove the same in accordance with law before the trial Court before passing of the preliminary decree. However, he has not even led any evidence on the aspect as such. He had never proved the lawful title during the proceedings of determination of shares.

(3) The counsel for the petitioner has further submitted that the process of preparation of the final decree is only a ministerial act of identifying the property to be given to the person who is to be provided separate possession by way of partition. The judicial adjudication is not even the scope of process of preparation of the final decree except to the extent of determination of some ancillary issue which may come up during the process for the limited purpose of handing over the possession. The counsel has relied upon the judgment rendered by Hon'ble the Supreme Court in *Shub Karan Bubna @ Shub Karan Prasad Bubna* versus *Sita Saran Bubna and others*, SLP (C) No.17932 of 2009, decided on 21.08.2009. Relying upon Order XXVI Rule 14 of CPC, the counsel has submitted that the partition is to be finalized by the Commissioner appointed by the Court under Order XXVI Rule 13 of CPC. Therefore, the entire exercise undertaken by the Court below; is in negation of the provisions contained in the CPC,

as well as, the observations of Hon'ble the Supreme Court in case of ***Shub Karan Bubna @ Shub Karan Prasad Bubna (supra)***.

(4) On the other hand, the counsel for respondent No.1 has submitted that respondent No.1 had rightly filed the objection before the Court below. The report filed by the Local Commissioner is bad in law because the parties were not even associated at the time of preparation of the said report by the Local Commissioner. Moreover, said Local Commissioner was already Local Commissioner at the earlier stage of the litigation and he had been examined as a witness also. Therefore, he should not have been deputed by the Court below; as Local Commissioner for mode of partition. Accordingly, respondent No.1 had made an application for appointment of another Commissioner. The trial Court has passed the order only in acceptance of the said objection raised by respondent No.1. It is further argued by the counsel for respondent No.1 that respondent No.1 is in possession of the property. He has even constructed the boundary wall of the area which has been shown to be vacant by the Local Commissioner. Even the petitioner has admitted the possession of the respondent No.1 over the property sought to be given to him. Supporting the decision of the Court below; qua framing of the issue, the counsel for respondent No.1 has submitted that even as per the preliminary decree, the entire property was under partition. Therefore, the share of all the share holders should have been decided. Since, that exercise was not carried out during the proceedings of that stage of the suit, therefore, now at the instance of respondent No.1, that exercise has been sought to be carried out through the issue framed by the trial Court. There is nothing wrong or illegal in such exercise. The counsel has further submitted that even after passing of the preliminary decree, the trial Court is not estopped from going into the question of shares of the respective parties because even Order XX Rule 18 (2) of CPC contemplates an enquiry even at the time of actual partition and handing over the possession of the properties. The counsel has relied upon the judgment of the High Court of Delhi in ***Seth Girdhari Lal and others*** versus ***Seth Gaja Nand and others***¹. In the end, the counsel for respondent No.1 has submitted that respondent No.1 is not in possession of more than his share. Even in carrying out the process of partition, the specific possession of the co-sharer has to be protected by the Court. Accordingly, the possession of the respondent No.1 could not have

¹ ILR (1974) I Delhi

been permitted to be disturbed.

(5) Having heard the counsel for the parties and having perused the case file, this Court finds substance in the argument of the counsel for the petitioner. The record shows that it was the petitioner only, who, as a plaintiff, had come to the Court for seeking his separate possession by way of partition. Although in a suit for partition, legally speaking, there are no plaintiffs and defendants and every defendant could have made a prayer for separation of his share and for carving out his separate parcel of land, however, except the petitioner none of the other co-sharers ever made any request to the Court for carving out their separate parcel of land or qua determination of their separate share. The respondent No.1 is no exception. He never made any prayer before the Court for either determination of his share or for separation of his parcel so as to get separate possession of the land of his alleged entitlement, unlike the petitioner. Accordingly, the preliminary decree has been passed by the trial Court; only qua the separation of the share of the petitioner-plaintiff by holding him entitled to 55 Kanals 16 Marlas of land, while granting liberty to the defendants to file fresh suit for partition as and when they so desired. Therefore, the exercise of carving out separate parcel of the land in the proceedings for preparation of final decree has to be restricted only to handing over the separate possession to the petitioner. Since, none of the other defendants ever came forward to either establish their shares or to claim separate possession, therefore, there is no scope for determining either share or the separate parcel of land of any other co-sharer while preparing final decree in this suit. This is also clear from the fact that while passing the preliminary decree, the trial Court has already said that respondent No.1 may resort to separate suit seeking partition, if he wants to get his share determined. The fact remains that in the present suit the respondent No.1 has neither established his title, nor his share as such. Nor has the respondent No.1 ever claimed his separate possession. Not only this, even till today there is no assertion in anyone of the pleadings or anyone of the prayers made before the trial Court or before this Court that his alleged share should be separately carved out and the possession be handed over to respondent No.1. Hence, in the present proceedings, the respondent No.1, as such, cannot place any hurdle in the way of the petitioner; qua preparation of the final decree by carving out the separate parcel of the land for the petitioner.

(6) As mentioned above, the record shows that the petitioner had started the partition proceedings way back in the year 2005, in the first instance before the Assistant Collector, because at that time the land was shown in the revenue records as agriculture land. However, since numerous constructions had come at place and the area became predominately residential area, therefore, the Assistant Collector had disposed of the said partition proceedings vide order dated 07.07.2011 by observing that at that stage the partition has to be done by the Civil Court. Thereafter the suit in the present case was filed by the petitioner on 26.07.2011. Since then, the petitioner is struggling to get his share separated and to get the possession thereof. So far as the respondent No.1 is concerned, undisputedly, respondent No.1 had, allegedly, purchased the property when the partition proceedings were already pending before the Assistant Collector. He or his predecessor was never given possession of specific partition of land, by any lawful or legal authority. Moreover, the respondent No.1 also got himself impleaded as a respondent in the present suit. Therefore, the respondent No.1 had every opportunity to stake his claim qua the share and to seek separate possession of his share. However, he never chose to make that prayer before either of the Courts till today. In that situation, the effort of the respondent No.1 is only an effort to delay the process of handing over the possession to the petitioner, who has been waiting for the same for the past about 15 years. In view of these facts, this Court finds the reliance of the counsel for the petitioner in the case of *Shub Karan Bubna @ Shub Karan Prasad Bubna (supra)* to be well placed. The litigation for partition cannot be permitted to continue for eternity, just for the luxury of either party to the litigation. The proceedings have come to an end in the best possible manner permitted by law; causing minimum prejudice to anyone of the parties, if at all that is must.

(7) Much emphasis has been laid down by the counsel for respondent No.1 on the fact that the respondent No.1 is in possession of the property and therefore, the same cannot be given to the petitioner by carving out a separate parcel for him out of that property. However, this Court does not find any substance in the argument of the counsel for respondent No.1. Firstly, the respondent No.1 has not even established so far whether he is, at all, the owner of any share or he has a valid title to the property, which he is claiming to be under his possession. Mere fact that in the impugned order the trial Court has framed an issue qua ownership and possession of respondent No.1 which is sought to be determined now; shows that he has not

established the same so far. Needless to say that even if the respondent No.1 claims to be the purchaser of some share in the property from his other predecessors; who are also the co-sharer in the land and also the parties to the present partition proceedings, then also it can happen that respondent No.1 has been sold the share by his vendor more than his own share. May be his vender was not left with any share in the property when he sold to respondent No.1, as is asserted by the petitioner. In any case, all these issues were required to be established in the original proceedings, if respondent No.1 wanted to establish his title to the property, and therefore, to claim possession over the same. Otherwise also, even presuming the respondent No.1 to be in possession of the part of the property, the same cannot be taken to be his exclusive possession. By the fiction of law; that has to be taken as joint possession of all the co- sharers, which shall, obviously, include the petitioner as well. Moreover, while adjusting the shares, it is bound to happen that the possession from one co-sharer is taken away and the same is handed over to another co- sharer; so as to make good the share of the latter. Therefore, there is no absolute law that the possession of one co-sharer cannot be disturbed for handing over the possession to the other co-sharer in partition proceedings. It is not even the case of respondent No.1 that the petitioner is being handed over the share more than his entitlement. Still further, in view of the fact that right from the time of the order of the Assistant Collector it has come on record that the area is predominantly residential area, this also suggest that most of the area has been brought under construction of buildings. In that situation, if there is some area which is lying unconstructed, though may be surrounded by some boundary wall, alleged to have been constructed by respondent No.1, the same can very well be handed over to the petitioner so as to give him a separate parcel of land. Even if the respondent No.1 had constructed the boundary wall forcibly, that would not give exclusive right to him to have possession of the same. There is nothing on record that anyone of the co-sharer in the land, much less the petitioner; had ever asked or even authorized the respondent No.1 to construct the boundary wall.

(8) Another question is whether the trial Court can at all frame an issue qua ownership and possession at the stage of preparation of the final decree ? The judgment of Hon'ble the Supreme Court rendered in the case of *Shub Karan Bubna @ Shub Karan Prasad Bubna (supra)* suggest to the contrary. Since, the said proceedings have been held to be only in the nature of administrative exercise,

therefore, the trial Court cannot reopen the issue of determination of ownership shares or the possession thereof by way of adversarial adjudication. It can call for report from the Commissioner appointed by the Court. There can be also some objections qua the report, if there is one; regarding the measurements, or having anything else to do with the share of the petitioner. But for the purpose of reopening the entire exercise, the process of adjudication afresh could not have been initiated by the Court below.

(9) Relying upon the same judgment of Hon'ble the Supreme Court in *Shub Karan Bubna @ Shub Karan Prasad Bubna (supra)*, the counsel for respondent No.1 has submitted that even Hon'ble the Supreme Court has held that the Court has to decide as to how the property is to be distributed between the parties and as to how the property is to be divided by metes and bounds. However, this Court does not find that observation supporting to the claim of the respondent No.1 in any manner. This is so in view of the fact that there are no co-sharers, in the present case, except the petitioner who are claiming separation of their shares. It is only the petitioner who has claimed separation of his share. Therefore, the question of any enquiry qua determination of shares or parcels of land of the respective co-sharers does not arise in this case. Otherwise also, the impugned order does not talk about determination of shares of all the co-sharers. It has initiated process only to determine the ownership and possession of respondent No.1. This is despite the fact that even now the respondent No.1 has not sought the separate possession. Even the counsel for respondent No.1 has submitted that he had never prayed before the trial Court for framing of this issue for determination of share and possession of respondent No.1 alone, rather, respondent No.1 had made an application for determination of shares and possessions of all the co-sharers of the land in question. Although the Court below has already gone wrong in law in ordering determination of share and possession of respondent No.1, however, had the prayer of respondent No.1 as made in the application been accepted; that would have had the effect of nullification of the entire proceedings carried out so far and would have started the entire proceedings afresh. Interestingly this would have happened despite the fact that none of the co-sharers, other than the petitioner, has so far claimed his separate possession.

(10) In view of the above, finding the order to be not in conformity with the law, the same is set aside. The present

revision petition is disposed of with a direction to the trial Court to proceed further with the report of the Local Commissioner for the purpose of preparation of the final decree, so as to handover the possession to the petitioner qua his share.

Payel Mehta