(2008) 12 DEL CK 0088

In the Delhi High Court

Case No : Regular First Appeal 49 of 2004

Savitri Nagrath and Others APPELLANT

Vs

Bikramjit Nagrath and Others RESPONDENT

Date of Decision : 10-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 23 Rule 3
Partnership Act, 1932 — Section 48

Citation : (2009) 3 ILR Delhi 219

Hon'ble Judges : Pradeep Nandrajog, J;J.R. Midha, J

Bench : Division Bench

Advocate : Rahul Gupta, in RFA No. 72/2004, Arun Bhardwaj, Manish Sharma, Amit Bhardwaj, Vishal Malhotra and Rohan Sharma, in RFA No. 49/2004, for the Appellant; Rahul Gupta, in RFA No. 49/2004, Arun Bhardwaj Manish Sharma, Amit Bhardwaj, Vishal Malhotra, Rohan Sharma, Respondents Nos. 4 and 5 in RFA No. 72/2004, P.V. Kapur and Jeevesh Nagrath, for Respondents Nos. 1 to 3 in RFA Nos. 49 and 72/2004, for the Respondent

Judgement

Pradeep Nandrajog

1. On 18th November 2008 arguments were heard on the issue whether the above captioned appeals require to be heard on merits or whether the appellants of the two appeals consented to the sale of the subject property by inter se bidding, thereby giving up the challenge on merits to the impugned judgment and decree dated 13.1.2004.

2. The backdrop facts of the litigation may be noted.

3. Late Ralya Ram and Mela Ram were brothers. To the good fortune of the litigating parties the two were industrious, hard-working and hence prosperous. They joined hands and formed a partnership firm M/s. Ralya Ram Mela Ram in the year 1924. In June 1932 the partnership firm acquired perpetual lease-hold rights in the land bearing Municipal No. 2, Tolstoy Marg, New Delhi. Ralya Ram died on 8.7.1964. Mela Ram died in July 1971.

4. Ralya Ram was blessed with one son Inderjit Nagrath. Mela Ram was blessed with two sons, namely, B.J. Nagrath and J.D. Nagrath.

5. Since Ralya Ram and Mela Ram had 50% share each in the partnership firm M/s. Ralya Ram Mela Ram, on their death, their heirs inherited their respective share in the partnership. The partnership was reconstituted from time to time.

6. For sake of convenience it may be recorded that three distinct groups; being the family members of Late Inderjit Nagrath son of Ralya Ram; B.J. Nagrath son of Mela Ram; and J.D. Nagrath son of Mela Ram became the partners of the firm and hence we would be referring to the various partners of the firm as comprising: (a) Inderjit Nagrath group, having 50% share; (b) B.J. Nagrath group, having 25% share; and (c) J.D. Nagrath group, having 25% share.

7. The appellants of RFA No. 49/2004 are Inderjit Nagrath group. The appellants of RFA No. 72/2004 are J.D. Nagrath group. Both groups are fighting an identical battle with the B.J. Nagrath group.

8. The property at 2 Tolstoy Marg, New Delhi is a prime property in the city of Delhi. Its current value appears to be anywhere between Rs. 80 crores (Rupees Eighty Crores) to Rs. 110 crores (Rupees One Hundred and Ten Crores). A building stands constructed thereon having two identical units. One unit is in possession of Inderjit Nagrath group and the other unit is in possession of J.D. Nagrath group. B.J. Nagrath group is in possession of none.

9. A suit was filed by B.J. Nagrath group on or around 18th October 1994 alleging facts pertaining to the constitution of the partnership firm; acquisition of perpetual lease hold rights by the firm in the land bearing Municipal No. 2 Tolstoy Marg; construction of a building thereon by the partnership firm; reconstitution of the partnership firm from time to time; last reconstitution being effected on 30.9.1978; the shares of the partners in the profits and losses and assets of the partnership firm being 50% in the hands of Inderjit Nagrath group, 25% each in the hands of B.J. Nagrath and J.D. Nagrath group. Pleading that the partnership firm had entered into an agreement on 29.9.1978 with M/s. Skipper Construction Co. Pvt. Ltd. for construction of a multi-storeyed commercial complex on the land, it was stated that the contract with M/s. Skipper Construction Co. Pvt. Ltd. got aborted. Stating that since 1978 the partnership firm had been carrying on no business it was prayed the firm be dissolved and its assets distributed amongst the partners as per the deed of partnership dated 30.9.1978 as per the provisions of Section 48 of the Indian Partnership Act 1932.

10. J.D. Nagrath group filed a written statement alleging that the partnership firm had conducted no business since September 1978 and that the accounts had been settled. It was asserted that the partnership firm had no assets whatsoever. It was pleaded that the perpetual lease-hold rights in the plot of land bearing Municipal No. 2, Tolstoy Marg, New Delhi were acquired in the individual names of Shri Ralya Ram and Shri Mela Ram; both having equal share therein. It was pleaded that in the partnership deed executed on 30.9.1978 the reference to the

property as the asset of the partnership firm was to facilitate the development of the property with M/s. Skipper Constructions Co. Pvt. Ltd. It was pleaded that B.J. Nagrath group have sold their interest in the property to one Mr. M.L. Talwar. Prayer made in the written statement was to dismiss the suit.

11. Inderjit Nagrath group also filed a written statement peri materia with the stand taken by J.D. Nagrath group.

12. B.J. Nagrath group felt confident of obtaining a decree on admission in view of the fact that the perpetual lease deed where under the Governor General Council had conveyed the perpetual lease-hold rights in favour of Ralya Ram Mela Ram and the last reconstituted deed of partnership dated 30th September 1978 were not in dispute; in fact were admitted. The group filed an application under Order 12 Rule 6 of the CPC praying for a preliminary decree to be passed on the admissions contained in the pleadings of the parties declaring that Inderjit Nagrath group had 50% share in the assets of the partnership firm and B.J. Nagrath group and J.D. Nagrath group had 25% share each in the assets of the partnership firm; and that steps be taken to liquidate the only asset of the partnership firm, namely, the land and the building bearing Municipal No. 2, Tolstoy Marg, New Delhi and distribute the sale proceeds as per the share of the respective groups after deducting the expenses incurred for the sale.

13. There being no creditors of the partnership firm and there being no other assets of the partnership firm; Shri M.L. Sharma, the stated person to whom B.J. Nagrath group was alleged to have assigned their 25% share not having filed any claim against the said group, much less having staked a claim in the property, 2 Tolstoy Marg, New Delhi, much less 25% share therein; vide impugned judgment and decree dated 13.1.2004 learned Trial Judge has held that case was made out to pass a decree on admission. A preliminary decree for dissolution of the partnership firm has been passed with the following directions:

(a) It is declared that the plaintiff No. 1 to 3 have 25% share in the firm M/s. Ralya Ram Mela Ram.

(b) It is further declared that the defendant No. 1(a) and (b) together hold 25% shares in the firm.

(c) It is also declared that defendant No. 1 (c, d & e) together hold 50% share in the said firm.

(d) The plaintiffs and the defendants shall share their assets and liability in terms of their share stated above.

(e) It is further directed that receiver shall be appointed by the court to take possession of the property 2, Tolstoy Marg, New Delhi and dispose off the same by sale/auction.

(f) The receiver shall exercise the power and function as provided in the schedule. Appendix D, Form 21 CPC for realization and disposal and distribution of the assets and liability of the firm.

(g) It is further directed that the defendant shall refer the accounts of the business to receiver.

14. Inderjit Nagrath group and J.D. Nagrath group came rushing to this Court and filed the instant appeals.

15. The impugned judgment and decree dated 13.1.2004 has been challenged principally on two grounds. Firstly, that having transferred its 25% share to M.L. Talwar, B.J. Nagrath group could not stake any claim in the property and secondly that the property was under the co-ownership of the respective groups and not a partnership asset; thus it is stated that steps have to be taken by the stake-holders who want to separate by filing a suit for partition and that the property could not be sold as an asset of the partnership firm post dissolution thereof.

16. The two appeals have chartered the same route save and except that on some dates the two appeals got de-linked and a few orders have been passed only in one appeal; but Learned Counsel for the parties did not dispute that the said order(s) has to be read as applicable in the other appeal as well

17. Both the appeals were listed before a Bench comprising Hon''ble the Chief Justice and Hon''ble Mr. Justice Badar Durrez Ahmed on 5th July 2004. Following order was passed on said date in both the appeals:

Present : Mr. Arun Mohan, Senior Advocate with

Mr. Arvind Bhatt and Mr. Rakesh Tikku with

Ms. Anshu Bhanat for the appellants.

Mr. P.V. Kapur, Senior Advocate with Mr. Jeenesh

Nagrath for the respondents.

RFA Nos. 49 and 72 of 2004

After the matter was heard for some time and in view of the fact that the dispute is between brothers, a suggestion was made that there should be inter-se auction of the property. However, to find out the modalities, time was sought by the Learned Counsel for the parties.

List on 12.7.2004.

18. On the next date of hearing i.e. 12.7.2004 the following order was passed by the said Bench:

Present: Mr. Arun Mohan, Sr. Advocate with

Mr. Rakesh Tiku and Mr. Arvind Bhatt for the

appellants.

Mr. P.V. Kapur, Sr. Advocate with Mr. Jeevesh

Mogra for the respondent Nos. 1 and 2.

Mr. L.R. Gupta, Sr. Advocate with Mr. Manish

Vashisht for respondent No. 3.

RFA Nos. 49/2004 and 72/2004

The Counsel for the parties as per the earlier statement to have inter se auction, further stated that on the next date, they will come with the offer and in the meantime, it is stated by all the Counsel for the parties that they shall maintain the status quo.

Mr. Kapur, Learned Counsel appearing for the respondent Nos. 1 and 2 states that the title deeds are with him and titles are clear.

List on 25th September, 2004.

19. With the change of Roster the two appeals got listed before a Bench comprising Hon''ble Dr.Justice M.K.Sharma and Hon''ble Ms. Justice Geeta Mittal. Said Bench passed an order on 25.9.2004 as under:

Present: Mr. Arun Mohan, Sr. Advocate with Mr. Rajeev

Shakdher & Mr. Arun Bhardwaj, Advocates.

Mr. P.V. Kapur, Sr. Advocate with Mr. Jeevesh

Nagrath for R-1 and R-2.

Mr. L.R. Gupta, Sr. Advocate with Mr. Manish

Vashisht for R-3.

RFA 49/2004

Heard the Learned Counsel appearing for the parties. We have been taken through the orders which were passed by this Court on 5th July, 2004 and 12th July, 2004. On going through the same, it transpires that the parties agreed for an inter se auction of the property in question and also agreed to come with an offer for participating in the said inter se auction. Time was accordingly granted. The parties also agreed that they would maintain status quo in respect of the property. The parties also took time from the court to find out modalities for the auction which is to take place. Pursuant to the above modalities of inter party bidding is also given by the appellant herein as also by the respondents. There appears to be dispute in respect of some of the terms of modalities which have been given. Hon''ble Mr. Justice K. Ramamoorthy (Retd.) was appointed by the trial court as a receiver in this matter. This Court by order passed today appoints him as a Commissioner/Officer of the Court to discuss with the parties the modalities which have been submitted before them court and thereafter finalize the modalities for holding the inter se auction between the parties in terms of the order which is recorded on 12th July 2004. It shall also be open to the learned commissioner/officer of the court to conduct inter se auction between the parties and thereafter submit a report to this Court for passing necessary and consequential orders, if any. It shall be open to the learned commissioner, who is appointed by this Court, to fix his own remuneration which shall be shared equally by the parties. It is also recorded that the parties may make an endeavor to come to a settlement through out of court negotiations, which could be conducted even by the Commissioner. In case any settlement is arrived at, it shall be open to the parties to file an application under Order 23 Rule 3 CPC. The matter shall be placed before the learned commissioner, appointed by this Court, on 8th October, 2004. The report shall be submitted by the learned commissioner within four weeks thereafter before this Court i.e. on or before 5th November, 2004.

The order of status quo in terms of the order dated 12th July, 2004 would continue to operate until further orders of this Court. Mr. Kapur, Counsel appearing for the respondents on 12th July, 2004 had stated that the title deeds are with the respondents No. 1 and 2 and that titles are clear. The same shall be preserved and kept with the respondents No. 1 and 2 but, if required, the same shall be produced before the learned commissioner.

Renotify for 10th November, 2004.

A copy of this order be given dasti to the Counsel appearing for the parties.

20. 8.10.2004 was the date notified by the learned local commissioner for conducting inter se auction as per his mandate under the orders passed by the court if parties could not enter into a settlement. Inderjit Nagrath group sought to stall the process of inter se auction. They filed various applications in RFA No. 49/2004, two of which being RA No. 358/2004 and CM No. 12581/2004 were listed on 8th October 2004. Following order was passed:

RFA 49/2004

Present : Mr. Arun Bhardwaj with Mr. Rajeev

Shakdher, Advocates.

Mr. L.R. Gupta, Sr. Advocate with

Mr. Jeevesh Nagrath, Advocate.

RA No. 358/2004

This is an application filed by the son of the appellant No. 2 praying for review of the order passed by this Court on 25th September, 2004. Issue notice to the non-applicants through Counsel for 5th November, 2004. Reply, if any, shall be filed within two weeks. Rejoinder, if any, could be filed before the next date.

Renotify for 5th November, 2004 when the matter is coming up otherwise in this

Court.

CM No. 12580/2004

Exemption allowed subject to just exceptions.

CM No. 12581/2004

We have heard the Learned Counsel appearing for the parties on this application. On 25th September, 2004, this Court appointed an officer of the court to discuss with the parties the modalities which were submitted before this Court and thereafter to finalise the modalities for holding the inter se auction between the parties in terms of the order which was recorded on 12th July, 2004. We also allowed the learned commissioner/officer of the court to conduct inter se auction between the parties and thereafter submit a report to this Court for passing necessary and consequential orders, if any.

We are informed that the learned commissioner has also passed an order for conducting an inter se auction between the parties for which he has directed the parties to submit their proposals in sealed cover. This process shall be continued by the learned commissioner. The applicant is given the liberty to request the learned commissioner for acceptance of its proposals to be submitted in a sealed envelope even now. This request be considered by the Learned Commissioner and could be accepted, if a case for acceptance is made out. We direct that the parties shall discuss and assist the learned commissioner in finalizing the modalities for inter se auction.

In the order passed by this Court it was also intended that there shall be negotiation between the parties through mediation by the learned commissioner to arrive at a negotiated settlement. This process shall also be given effect to by the learned commissioner and in case such settlement is not possible, inter se auction shall be held in accordance with law and as directed.

In terms of the aforesaid order, the aforesaid application stands disposed of.

A copy of this order be given dasti to the Counsel appearing for the parties under the signatures of the Court Master.

Renotify on 10th November, 2004, the date already fixed.

21. On 15.10.2004, J.D. Nagrath group filed an application in RFA No. 72/2004 which was registered as CM No. 13379/2004. It was stated in the application that pertaining to certain dues owed by B.J. Nagrath group to the Bank of India, attachment notice was issued by the recovery officer of the Debt Recovery Tribunal at Allahabad. It was prayed that proceedings before the learned Commissioner as per order dated 25.9.2004 be stayed.

22. Inderjit Nagrath group filed another application being CM No. 13224/2004 in RFA No. 49/2004. Stay of proceedings before the learned Local Commissioner was sought. The application was dismissed vide order dated 15.10.2004 which

reads as under:

RFA 49/2004

Present: Mr. Arun Bhardwaj, Adv. for appellant No. 2.

Mr. Rajiv Shakdher, Adv. for appellants No. 1 & 3.

Mr. L.R. Gupta, Sr. Adv. With

Mr. Jeevesh Nagrath, Adv. for R-1.

Mr. V.K. Nagrath, respondent No. 2 in person.

Mr. Rahul Gupta, Adv. for R-4 & 5.

CM No. 13224/2004

This is an application filed on behalf of Mr. Aman Nagrath seeking for stay of the proceedings before the commissioner and also to restrain outsiders/professional builders, who trade on disputed properties from participating in the proceedings before the learned local commissioner. It is also submitted in the application that the applicant never agreed for inter se auction.

We have heard the Learned Counsel appearing for the parties on this application. This court on 25th September, 2004 appointed the Commissioner/Officer of the Court to conduct the inter se auction between the parties and thereafter to submit a report to this Court. The said order was reiterated on 8th October, 2004 and certain clarifications were issued on the said date.

Counsel appearing for the applicant herein has drawn our attention to the order passed by the learned commissioner on 8th October, 2004. According to the Learned Counsel for the applicant the said order was passed by the learned Commissioner without due consideration of the observations made by this Court on the last date.

We have noted the aforesaid submission of the counsel. It is the submission of the Counsel appearing for the appellant that the applicant did not agree to inter se auction. The aforesaid submission, however, is belied when a reference is made to the order dated 12th July, 2004. The said order clearly indicates that the Counsel for the parties agreed that there shall be an inter se auction as per the earlier statements and that the parties would come with the offer on the next day and till then there shall be status quo in respect of the property in question. The said order is admittedly final and binding. We, therefore, do not agree with the submission that the parties had not agreed for inter se auction. In fact, time was taken only to bring the offers.

It is also submitted today that no opportunity is given to the applicant by the learned commissioner for arriving at a negotiated settlement or to have the property divided by metes and bounds.

We have considered the aforesaid documents. When the matter was referred to the learned commissioner, the intention of the court was made clear. It was also observed that it would be open to the learned Commissioner to find out if any negotiated settlement is possible. In that regard, an order has been passed by the learned commissioner recording that the learned Commissioner had a long discussion with the parties over the subject matter. It is observed by the learned Commissioner that there is no possibility of any settlement being arrived at, when he held that it would be futile and time consuming.

It was also sought to be submitted that an attachment order has been issued by the bank in respect of the property in question and that an advertisement has been made in respect of the same by the Debt Recovery Tribunal, Allahabad. The said order, as is disclosed from the said advertisement, is dated 7th October, 2004 and is subsequent to the orders passed by this Court. The said order, therefore, cannot have precedence over what was observed and ordered by this Court. It cannot be disputed that the particular property in respect of which inter se auction is being carried out, was not a mortgaged property.

We have given the liberty to the learned Commissioner to proceed in the matter in accordance with law in the best interest of all the parties and to see that best price is available through the aforesaid inter se auction. Learned Counsel appearing for respondent No. 1 and respondents No. 4 and 5 have stated today before us that they have no objection even if it is decided by the learned Commissioner that the best recourse open would be to go for an open auction. Such a recourse could be resorted to by the learned Commissioner. The interest is to have the best price of the property so that the parties herein get the best returns for their investments made in the said property. In such even appropriate variation in the modalities be effected.

In view of the aforesaid position, we are of the considered opinion that the process, which is initiated by the learned Commissioner, should continue. It shall be open to all the parties to submit their options and suggestions, in any manner, before the learned Commissioner, which shall be considered by the learned Commissioner and thereafter he shall complete the proceedings in terms of the observations and the directions made in our earlier order. It is also indicated that as and when a report is filed by the learned commissioner, copy of the same shall be given to the parties so as to enable the parties to file any objection before this Court, if so advised. It is also made clear that this order, which is passed today is subject to further orders to be passed by this Court.

We are also informed that one of the applicants has offered an amount of Rs. 21 crores as the reserve price of the property in question. The respondents in this modalities have offered an amount of Rs. 30 crores as reserve price of the said property. It shall be open to the learned commissioner to fix the reserve price considering the reserve price, which are offered by all the parties herein.

So far as the allegation relating to outsiders participating in the proceedings before the learned Commissioner is concerned, we are sure that all the orders passed by this Court shall be given effect to in their true spirit. Inter se auction does not preclude financial assistance from outsiders. In any case, all proceedings conducted by the learned commissioner are subject to the orders by this Court. Any agreement between the parties and their financial backers would be outside the realm of scrutiny or objection by the other side so long as parties are having inter se auction. However, the matter changes colour if it is deposited to proceed by public auction.

Since the parties have been approaching this Court and orders are being passed, therefore, the time for completing the process and filing the report is required to be extended. The process of auction shall be completed by 15th November 2004 and a report shall be submitted by 20th November, 2004. The date of 10th November, 2004 already fixed in the matter stands cancelled. The matter shall be now listed before this Court on 30th November, 2004.

In view of the aforesaid order this application, along with CM 13223/2004, stands disposed of. Copy of this order be given Dasti to the Counsel appearing for the parties under the signatures of the Court Master.

23. The learned local commissioner proceeded ahead and recorded two orders on 17.10.2004 and 15.11.2004 that Inderjit Nagrath group as also J.D. Nagrath group were not cooperating.

24. Aggrieved by the order dated 15.10.2004, Inderjit Nagrath group filed a Petition for Special Leave to Appeal before the Hon''ble Supreme Court which was registered as SLP(C) No. 23069/2004. Notice was issued in the said petition on 22.11.2004. Proceedings before the learned Local Commissioner were stayed.

25. Thus, nothing of significance happened thereafter in the two appeals till Hon''ble Supreme Court dismissed the Petition for Special Leave to Appeal afore-noted on 21.4.2005

26. On 12.5.2005 following order was passed in RFA No. 49/2004:

12.5.2005

Present: Mr. Arun Bhardwaj, Advocate and Mr. Rajiv

Shakdher, Advocate for the appellants.

Mr. P.V. Kapur, Sr. Advocate with Mr. Jeevesh

Nagrath, Advocate for the respondent No. 1.

Mr. Rahul Gupta, Advocate with Mr. Rakesh

Mahjan, Ad. For respondent No. 4 -5.

RFA No. 49/2004 & CM No. 6297/2005

This Court earlier passed orders on 25th September 2004 and 15th October,

2004. By order dated 25th September, 2004, this Court appointed Justice K. Ramamoorthy (Retd.) as a Court Commissioner.

However, subsequent thereto an application registered as CM No. 12581/2004 was filed by Aman Nagrath, S/o Late Shri Ranjit Nagrath seeking for modification and clarification of the order dated 25th September, 2004. This Court considered the application and in terms of the order recorded on 8th October, 2004 it was disposed of issuing certain clarifications as recorded therein. Even thereafter another application being CM No. 13224/2004 was filed again by Aman Nagrath, which was taken up for consideration by this Court and an order was passed on 15th October, 2004. The said order dated 15th October, 2004 was challenged before the Supreme Court by Aman Nagrath. Another application being CM No. 13223/2004 was filed by Ms. Rashmi Nagrath. The said application also was to the same effect as that of CM No. 13224/2004.

Being aggrieved by the aforesaid order dated 15th October, 2004 a SLP was filed in the Supreme Court whereupon an interim order was passed by the Supreme Court staying the proceedings before the court commissioner appointed by this Court. Accordingly, the said proceedings remained stayed and the present appeal was also adjourned from time to time in view of the pendency of the SLP in the Supreme Court. It is now pointed out that the Supreme Court has since disposed of the SLP filed as against the order dated 15th October, 2004. A copy of the said order passed by the Supreme Court on 21st April, 2005 in SLP(Civil) No. 23069/2004 has been placed before us. The said SLP(Civil) No. 23069/2004 filed by Rashmi Nagrath was dismissed. While dismissing the said petition, it was observed by the Supreme Court as under:

Heard Learned Counsel for the parties.

We do not find any ground to interfere with the impugned. The SLP is, accordingly, dismissed.

In view of the aforesaid position and the development in the proceedings, an application is filed by respondent No. 2 praying for a direction to the Court Commissioner to proceed with the proceedings in terms of the orders passed by this Court, particularly, in the light of the order passed on 15th October, 2004, which has become final and binding. Yet another application is filed by Aman Nagrath contending, inter alia, that the said appellant is ready and willing to buy out the share of Bikramjit Nagrath, who allegedly held 25% shares in the property. An offer is also made in the stay application for buying out the aforesaid share for a value of Rs. 7.5 crores. Mr. Kapur, Senior Advocate states that similar offer was made on behalf of the same appellant to buy out the shares when the matter was pending before the Supreme Court but his client did not accept the said offer.

Be that as it may, we have heard the Learned Counsel appearing for the parties on both these applications. The order dated 15th October, 2004, which, in view of the above decision of the Supreme Court, has become final and binding is explicit and clear and it records the detailed modalities that are to be followed by the Court Commissioner in the matter of inter se auction. It was specifically observed therein that it would be open to the learned Commissioner to consider the reserved price which is offered by all the parties herein. The said order also records the observation of this Court that the commissioner would have the liberty to proceed in the matter in accordance with law in the best interest of all the parties and to see that the best price for the property is available and obtained through the aforesaid inter se auction. The offer of the appellant given through the application may be given before the learned Commissioner, which could be considered by the concerned parties and the court commissioner in terms of the orders of this Court passed on 15th October, 2004. Since a detailed order is already passed in the matter pertaining to the mode and manner of inter se auction which is recorded in the order dated 15th October, 2004, the learned commissioner shall continue with the proceedings and process in accordance with the proceedings and observations recorded therein. He shall complete the entire process and shall submit his report within a period of two months from today.

In terms of the aforesaid order, the application stands disposed of.

The matter shall again be listed before the Court on 8th August, 2005. The date i.e. 19th May, 2005 stands cancelled in view of the order passed today.

A copy of this order be given dasti to Counsel appearing for the parties.

27. A few orders passed thereafter were simply adjourning the matter and reference may be made to an order dated 17.8.2005 wherein the Division Bench comprising Hon''ble Mr. Justice Vijender Jain and Hon''ble Ms. Justice Rekha Sharma recorded that the parties could not agree on a settlement. The local commissioner was directed to proceed ahead in terms of the order dated 15.10.2004. Pursuant thereto, on 25.8.2005, the learned local commissioner conducted an inter se auction in which M/s. Taneja Developers and Infrastructure Ltd. submitted the highest bid as nominees of B.J. Nagrath group. Report was filed by the learned commissioner to said effect on 8th September 2005; objections whereto were filed by the Inderjit Nagrath group and J.D. Nagrath group.

28. Both appeals came to be listed before Hon''ble the Chief Justice and Hon''ble Mr. Justice Madan B. Lokur. An identically worded order dated 18th October 2005 was passed in both the appeals. It reads as under:

Present: Mr. Arun Bhardwaj for the appellants.

Mr. P.V. Kapur, Sr. Adv. with Mr. Jeevesh

for R-1 & 2.

Mr. Rahul Gupta for R-4 & 5.

Heard Counsel for the parties. In our opinion this appeal itself should be decided finally at a very early date since respondent No. 1 is said to be 90 years of age.

List on 25th October, 2005 before the Bench presided by HMJ M.K. Sharma.

29. The appeals came to be listed before a Bench comprising Hon''ble Dr. Justice M.K. Sharma and Hon''ble Mr. Justice R.C. Chopra on 25.10.2005 as per the order dated 18.10.2005. In both the appeals an identically worded order was passed on 25.10.2005 which reads as under:

Present : Mr. Arun Bhardwaj, Adv. for appellants.

Mr. P.V. Kapur, Sr. Adv. with Mr. Jeevesh Nagrath,

Adv. for R-1. Mr. Rahul Gupta, Adv. for R-4 and 5.

RFA 49/2004

The Court Commissioner appointed by this Court has submitted his report, which is placed on record. The objections to the said report have been filed by the parties. The said objections are on record. The objections as also the report of the Court Commissioner shall have to be considered in accordance with law. Reply to the objections could be filed before the next date.

Matter shall be listed for consideration on 16th February, 2006.

We are informed that an application is also filed by M/s. Taneja Developers and Builders. The said application shall also be considered on the next date.

Status quo orders dated 14.6.2004 shall be maintained by the parties till the next date.

It is made clear that this matter is not part heard in this Court and shall be placed before the regular bench on the next date.

30. On 19.12.2005, the last working day in the calendar year of this Court, an application seeking review of the order dated 25.10.2004 was filed which came to be registered as RA No. 1/2006. It was prayed in the application that order dated 25.10.2005 be reviewed as it was in conflict with the order dated 18.10.2005 which required the appeals to be heard on merits and that all earlier orders pertaining to appointment of a local commissioner; the process of inter se bidding before him; participatory rights of third parties to be brought in by the contesting parties in the bidding process etc. stood nullified.

31. The two appeals lingered on. They had to, because of deluge of applications filed either by Inderjit Nagrath group or J.D. Nagrath group. The month of May reached. At the post lunch session when hearing was continuing, on 24.5.2006, an order was recorded in RFA No. 49/2004 as under:

24.5.2006

Present : Mr. Arun Bhardwaj, Adv. for the appellant.

Mr. P.V. Kapur, Sr. Adv. with Mr. Jeevesh

Nagrath, Adv. for R-1 and R-2.

Mr. Rahul Gupta and Mr. Rakesh Mukhija for R-4 & 5.

Ms. Deepti Rajpal for M/s. Taneja Developers and Infrastructure Ltd.

RFA 49/2004

We have heard the Learned Counsel for the parties at some length. Counsel for the appellant prays for further time to address the court on certain other issues.

Counsel for the parties has conceded before the Court that the share of the parties in the said property is as under:

(a) According to the appellant the property belonged to two brothers Sh. Mela Ram and Sh. Ralya Ram, who had acquired this property.

(b) According to the respondents No. 1, 2 and 3, the property is of the partnership concern, M/s. Mela Ram Ralya Ram; and

(c) According to the respondents No. 4 and 5 owners of the property were two brothers Sh. Mela Ram and Sh. Ralya Ram in their individual capacity and now their legal representatives are the owners of the property jointly.

These statements have been made by the Learned Counsel appearing for the appellants on the instructions of Ms. Rashmi Nagrath and Mr. Ranjit Nagrath and by the Learned Counsel appearing for the respondents No. 4 and 5 on the instructions of Mr. Ajay Nagrath.

With an intent to narrow the controversy arising in the present case, we find it necessary that the statement of the parties under Order 10 of the CPC is recorded. Parties will be present for recording of the statement in the Court on the next date. Counsel for the parties are also at liberty to take necessary instructions.

Renotify for further arguments on 25.5.2006.

32. On the next date i.e. 25.5.2006 the following order was passed:

RFA No. 49/2004

Present : Mr. Arun Bhardwaj for appellants.

Mr. P.V. Kapur, Sr. Adv. with Mr. Jeevesh

Nagrath for R-1 to 3.

Mr. Rahul Gupta for R-4 and 5.

The parties are present in Court. The Learned Counsel appearing for all the concerned parties including the person who had given bid as a nominee of respondents No. 1 to 3 have confirmed from their respective clients who are not present in court that the statements made by the Counsel appearing for the respective parties yesterday in Court are correct and are reiterated by the respective parties. Shares in regard to the property are not in dispute, however, the question of ownership of the property by the Firm is in dispute as far as respondents No. 4 and 5 are concerned.

In the circumstances, arguments on the preliminary question as to whether the appeal should be heard on merits have been concluded. Without prejudice to the rights and contentions of each party, we have decided to hear the matter on merits but we make it clear that hearing on merits would in no way answer the preliminary issue as the appeal stands concluded by the order of the Division Bench and the judgment of the Supreme court and the parties have to only abide by that order for inter se auction between the parties.

We may also notice at this stage that inter se bidding between the parties have failed inasmuch as earlier the nominee of respondents No. 1 to 3 had given a bid, the proceedings had taken place before the local commissioner appointed by the court, however, that could not finally be settled as the said nominee-bidder of respondents No. 1 to 3 filed a separate application before this Court for leave to withdraw the bids and for refund of his money.

However, according to the Counsel for the respondents No. 1 to 3 inter se bidding did not fail as the bid was in fact given by the said respondents and was only financed by their nominee. It is, therefore, immaterial as even if the said nominee does not wish to continue any further that would not affect the rights of the respondents No. 1 to 3 emerging from the said order. This, of course, is not accepted by the Learned Counsel appearing for the other parties. According to them the entire process of inter se bidding stands frustrated.

We also may note here that on the previous dates of hearing of this case, we had asked the parties to give inter se bid in court. According to the respondents No. 1 to 3, the value of the property as of date is nearly Rs. 60 crores of rupees and they are ready to buy or sell in the ratio of the shares of the parties in the property, as the question of shares is not in dispute. It is also stated that in the event he sells his shares, he would accept even Rs. 2 crores less in his share. This offer is given on the condition that it is accepted instantly and the payment is made in one go. However, the Learned Counsel appearing for the appellant stated that this was a very high valuation of the property and the appellants who were to pay Rs. 7? crores in settlement for buying the shares of respondents No. 1 to 3 before the Supreme Court, are now ready to pay Rs. 8 crores as of today. This offer is not acceptable to respondents No. 1 to 3 as according to the Learned Counsel appearing for the said respondents, the appellants had offered to settle the matter by paying a sum of Rs. 10 crores towards the value of the shares of the respondents No. 1 to 3 in July 205. It is further stated that the appellant had violated various orders of this Court. The offer given does not depict correct increase in valuation of the property. They also state that the value of the property has gone up tremendously in the market and that is why they were willing even to pay the value of Rs. 60 crores. However, Mr. Bhardwaj, appearing for the appellant states that this offer was made in peculiar circumstances at that time to settle the matter and it does not carry any binding nature.

As far as the respondents No. 4 and 5 are concerned they are taking the same stand as that of the appellant and even further that they cannot give the valuation of the property as it falls in the domain of the valuators who are involved in such jobs.

In order to adjudicate fully and finally the disputes between the parties as well as to examine the merits of the contentions raised, it was necessary that the Court should place on record the above facts.

Let the arguments proceed.

33. Eschewing reference to orders which were passed thereafter from time to time, which to our mind are not relevant for adjudication of the limited issue being decided by the present order, order dated 4.4.2007 is important to be noted. The same reads as under:

Present: Mr. Manish Sharma with Mr. Vishal Malhotra for

Appellant.

Mr. Jeevesh Nagrath for R-1 & 2.

Mr. Manish Vashisht for R-3.

CM No. 4291/2004 (Exemption) in RFA No. 49/2004

Allowed, subject to just all exceptions.

Certified copies be filed as and when obtained.

Application stands disposed of.

CM No. 1220/2004, CM No. 2228/2004, CM No. 4290/2004, CM No. 5813/2004 & CM No. 6792/2004

Parties shall maintain status quo in respect of the possession of the property. The respondents who have purchased the property and are in possession of the Title Deed in respect thereto shall also not create third party interest during the pendency of the proceedings.

Applications are disposed of with these directions.

CM No. 7842/2004

Order have already been passed in this application for bringing LRs of appellant No. 2 on record. No further orders are required to be passed. Application stands disposed of.

CM No. 12850/2004

Exemption allowed. Certified copies of the annexures be filed as and when obtained.

Application stands disposed of.

CM No. 12851/2004

Disposed of as infructuous.

CM No. 14079/2004

Dismissed in default.

CM No. 14322/2004

This application is filed by the appellant stating that appellant No. 1 had died on 22.10.2004. LRs are already on record. Name of appellant No. 1 therefore be deleted from the array of parties.

Amended memo of parties shall be filed within one week.

Application stands disposed of.

CM No. 9275/2005

Disposed of as infructuous.

RP No. 358/2004

Since the order of inter-se auction has been upheld by the Hon''ble Supreme Court as well, this application has been rendered infructuous and is dismissed as such.

RFA No. 49/2004

List on 22nd May, 2007.

34. It may be noted that in the interregnum the parties revisited the Hon''ble Supreme Court when B.J. Nagrath group filed Petitions for Special Leave to Appeal No(s). 23011-23012/05 challenging the order dated 18.10.2005 passed in both RFAs directing that the appeals shall be heard on merits. The said petition(s) was dismissed as withdrawn on 21.11.2005. Inderjit Nagrath group revisited the Hon''ble Supreme Court when Review Petition (Civil) No. 1478/2005 was filed seeking review of the order 21.4.2005 whereby SLP(C) No. 23069/2004 was dismissed. The said review petition was dismissed on 7.9.2005.

35. To put it in a nutshell, Shri P.V. Kapur, learned senior Counsel appearing for B.J. Nagrath group urged that order dated 5.7.2004 and the order dated 12.7.2004 lay the genesis of a settlement between the parties to proceed ahead to liquidate the assets in question i.e. property bearing No. 2, Tolstoy Marg, New Delhi by process of inter se bidding and thus challenge on merits to the impugned judgment and decree was given up. Learned senior Counsel urged that order dated 25.9.2004 clearly interprets orders dated 5.7.2004 and 12.7.2004 as recording an agreement between the parties for an inter se auction of the

property evidenced by the second and the third sentence of the said order dated 25.9.2004 wherein it has been recorded: we have been taken through the orders which were passed by this Court on 5th July, 2004 and 12th July, 2004. On going through the same, it transpires that the parties agree for an inter se auction of the property in question and also agreed to come with an offer for participating in the said inter se auction. Counsel urged that the order dated 15.10.2004 disposing of CM No. 13224/04 re-concluded the issue that challenge on merits to the impugned judgment and decree was given up for the reason vide order dated 15.10.2004 the Division Bench reiterated that the order dated 25.9.2004 was conclusive and binding, thus foreclosing any issue on the merits of the impugned order, requiring the parties to be bound by their consent to proceed ahead for the liquidation of the property by process of inter se auction. Learned Counsel urged that referring to its earlier order dated 25.9.2004, the Division Bench categorically recorded that: the said order is admittedly final and binding. We, therefore, do not agree with the submission that the parties had not agreed for inter se auction. Learned senior Counsel urged that challenge before the Hon''ble Supreme Court to the order dated 15.10.2004 failed when SLP(C) No. 23069/2004 was dismissed on 21.4.2005, review whereof sought before the Hon''ble Supreme Court vide Review Petition No. 1478/2005 was repelled when the said review petition was dismissed by the Hon''ble Supreme Court on 7.9.2005. Counsel urged that with the dismissal of RP No. 1/2006, vide order dated 4.4.2007, which sought a review of the order dated 25.10.2004, and simultaneous dismissal of applications challenging the orders of inter se auction, the issue of challenge on merits to the impugned judgment and decree stood foreclosed. Learned senior Counsel urged that consent of parties need not necessarily be in the form of written applications under the signatures of the parties or a deed of compromise. Since the opposite group had urged with reference to the order dated 18.10.2005, that the same having recorded that the appeals shall be heard on merits; which order was never recalled; all earlier orders were of no effect, Counsel submitted that the order dated 18.10.2005 did not recall the earlier orders and that in any case with the dismissal of RP No. 1/2006 and dismissal of all applications challenging the inter se auction vide order dated 4.4.2007, said order not having been challenged and having attained finality; being an order passed after order dated 18.10.2005, prohibits any submissions to be urged on the merits of the impugned judgment and decree.

36. Shri Arun Bhardwaj, learned senior Counsel for Inderjit Nagrath group and Shri Rahul Gupta, Learned Counsel for J.D. Nagrath group urged that the mandate of Order 23 Rule 3 of the CPC 1908 requires every compromise to be in writing and under the signatures of the parties. Learned senior Counsel urged that a compromise has to be spelt out in express terms from the mouth of the parties and not by implication. Counsel urged that by use of the expression ?in writing and signed by the parties'' in Order 23 Rule 3 of the CPC 1908 the legislative intent was clear that unless in writing and signed by the parties no action could be initiated under Order 23 Rule 3 of the CPC 1908. Learned senior

Counsel hinged upon the order dated 18.10.2005 and the fact that the challenge thereto by B.J. Nagrath group before the Hon''ble Supreme Court vide SLP(C) No(s).23011-23012/05 failed vide order dated 21.11.2005.

37. Pertaining to the issue whether a settlement between the parties must necessarily be recorded in writing and if not so recorded, no settlement can be relied upon; no doubt Order 23 Rule 3 of the CPC 1908 uses the expression ?in writing and signed by the parties'', but the said phrase in the rule is immediately followed by the phrase ?or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded''.

38. Thus, the legislative intent is not to restrict evidence of a compromise to be in the form of a written agreement. The legislative intent is that it would be desirable to record a settlement agreement in writing, but the same may even be proved to the satisfaction of the Court by parole evidence. What, if during arguments, parties arrive at a settlement which is recorded by the Court in its order? Can it not be urged that the order of the Court records in writing the settlement between the parties. To read Order 23 Rule 3 of the CPC 1908 to mean that unless a compromise is recorded in writing and signed by the parties it cannot be accepted by the Court, would render otiose the phrase ?or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded''. We may note that in the decision reported as 2005 (1) JCC 83 Mohd. Shamim v. Nahid Begum, the Hon''ble Supreme Court recognized, affirmed and bound the parties to a settlement recorded in a judicial order before a judicial officer of the rank of an Additional Sessions Judge.

39. Aforesaid proceedings chartered in the two appeals show that on 5.7.2004 when the appeals were being heard and Learned Counsel for the parties had addressed arguments for some time a suggestion emanated from the Court if the property could be sold by an auction inter se the parties. On 12.7.2004 Counsel for the parties informed that in respect of the auction to be conducted inter se the parties they would give their offers on the next date. It is obvious that inter se auction could be effected only if challenge to the impugned judgment and decree was given up on merits. This is because of the reason if the appeals had to be heard on merits the question of any inter se auction did not arise. Any doubt qua the orders dated 5.7.2004 and 12.7.2004 evaporate when order dated 25.9.2004 was passed recording: ?On going through the same, it transpires that the parties agreed for an inter se auction of the property in question and also agreed to come with an offer for participating in the said inter se auction.'' The agreement between the parties for an inter se auction could not be recorded with more clarity. The next order passed on 15.10.2004 reinforces the fact that challenge to the impugned decree on merits was given up and the parties were to proceed ahead, as per agreement, on the issue of inter se auction. Each and every subsequent order repels the attempt by Inderjit Nagrath group and J.D.

Nagrath group to wriggle out from their commitment and binds the parties to march ahead for an inter se auction of the property. The issue got concluded when order dated 4.4.2007 was passed, which order has not been challenged till date and has attained finality, to the effect that inter se auction being upheld no further challenge thereto could be made.

40. It is true that in between an order was passed on 18.10.2005 recording that the appeal should be decided finally. The said order does not record that the parties had consented to waive their earlier consent to liquidate the property by process of inter se auction. Needless to state, hearing of the appeal could well be hearing of the issues pending in the appeal. In any case, on 25.10.2005, the very next date, neither party raised an issue of merits of the impugned judgment and decree to be considered. Picking on the threads from the earlier orders, this Court proceeded ahead with the issue of finalizing the matter with respect to the inter se bidding which had been conducted before the learned Local Commissioner.

41. We hold that the issue of proceeding ahead with consent of parties with inter se bidding has attained finality in the form of various orders noted herein above. The said orders have been passed by a coordinate Division Bench of this Court and bind us. Needless to state, this Bench cannot sit in appeal over the said orders.

42. It is true that the dismissal of a Petition of Special Leave to Appeal does not mean that the Supreme Court has imparted its imprimatur to the orders challenged in said petitions, but insofar a coordinate Bench of the same Court is concerned, the said orders would bind the successor coordinate Bench.

43. We hold that challenge to the impugned judgment and decree on merits has been waived by the appellants who have consented to the property being sold by process of an inter se auction.

44. Before concluding we wish to record that the attempt of the appellants is to somehow or the other to prolong the litigation because they are in possession of the entire property. The B.J. Nagrath group is ousted there from and the appellants want to enjoy the fruits of their illegal excessive occupation qua the property. It would not be out of place to record that on 24.5.2006 as also 25.5.2006 Learned Counsel for Inderjit Nagrath group stated that the property belonged to the two brothers Ralya Ram and Mela Ram. According to the B.J. Nagrath group the property was an asset of the partnership firm M/s. Mela Ram Ralya Ram and as per Counsel for J.D. Nagrath group the property was owned by the two brothers, Ralya Ram and Mela Ram. This is the categorical stand of the parties recorded in the order dated 24.5.2006. Thus, whether the asset belonged to the partnership firm or was the asset of the two brothers makes no difference insofar the shares of the parties are concerned for the reason as per the original deed of partnership of M/s. Mela Ram and Ralya Ram, the two partners of M/s. Mela Ram Ralya Ram had 50% share each in the profits and losses as also the

assets of the firm. Share of Ralya Ram, whether as a partner or as a co-owner belongs to Inderjit Nagrath group and share of Mela Ram, whether as a partner or as a co-owner belongs half and half to the B.J. Nagrath group and J.D. Nagrath group i.e. each group has 25% share in the property. Only difference which it would make in law if property has to be treated as belonging to co-owners is to try and ascertain whether the same can be partitioned by metes and bounds, failing which and only then, can the same be sold to satisfy the claims of the co-owners. If the property is treated as the asset of the partnership firm, the mandate of Section 48 of the Indian Partnership Act 1932 would require the asset to be liquidated. It may be noted that order dated 24.5.2006 records in no uncertain terms that neither appellant was questioning the entitlement of B.J. Nagrath group and none raised the issue of M.L. Talwar, the person whose name exists as a ghost in the pleadings and who has never surfaced till date, of having taken over the share of B.J. Nagrath group. We note that the process of inter se bidding is a process recognized to satisfy the claims of the co-owners of a property in a suit seeking partition of the property and thus it cannot be said that the process of inter se bidding is in any manner derogatory to the purported claim of the appellants that the property is under the co- ownership of the parties and not an asset of the partnership firm.

45. Noting that with the passage of time the value of property in Delhi has risen and to be fair and just to the parties we are of the opinion that ends of justice require another opportunity to be granted to the parties to participate in an inter se bidding process for which the parties shall be permitted to nominate a bidder on their behalf. Noting the bitterness between the parties and the past experience of obstacles being put in the functioning of the local commissioner to complete the process of inter se bidding, we direct that the inter se bidding would be conducted before the learned Registrar (Appeals) on 2nd February 2009. Report shall be prepared at the spot by the learned Registrar (Appeals) and shall be in the form of an order passed in the files of the two appeals.

46. List the appeals for directions on 5th February, 2009.

