Judgment Dated: 13-11-2026
WBCHCA0005322026

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISION JURISDICTION
APPELLATE SIDE

CORAM: THE HON'BLE JUSTICE OM NARAYAN RAI

C.O. 41 OF 2026
WITH
CAN 1 OF 2026

MAHESH KAUMAR KEJRIWAL **.....PETITIONER**

-VERSUS-

DR. VIJAY KUMAR KEJRIWAL & OTHERS **.....OPPOSITE PARTIES**

Appearance:

For the Petitioner	:	Mr. Jishnu Saha, Sr. Adv. Mr. Aniruddha Mitra, Sr. Adv. Mr. Debdut Mukherjee, Adv. Mr. Ishaan Saha, Adv. Mr. Kaushik Banerjee, Adv. Ms. Rashmita Sen, Adv.
For the Opposite Party Nos.1, 2 & 4	:	Mr. Jishnu Choudhury, Sr. Adv. Mr. Shuvasish Sengupta, Adv. Mr. Suvrojyoti Mukherjee, Adv. Mr. Anurag Bagaria, Adv. Mr. Andolan Sarkar, Adv.
Reserved on	:	September 14, 2026
Judgment on	:	November 13, 2026

OM NARAYAN RAI, J.:-

1. This revisional application under Article 227 of the Constitution of India is directed against an order dated December 22, 2025 passed by the learned Civil Judge (Senior Division), 2nd Court at Alipore, South 24 Parganas, in Title Suit No. 27 of 2023, whereby the petitioner's application under Section 151 of the Code of Civil Procedure, 1908[1] was rejected.

[1] **Hereafter 'the Code'**

FACTUAL MATRIX:

2. Shorn of meticulous details, the facts relevant for adjudication of the present revisional application, as may be gathered from the material on record, are as follows:-

a. The opposite party no. 1 has instituted Title Suit No. 2778 of 2010 before the learned Civil Judge (Senior Division), 5th Court at Alipore, praying *inter alia* for a decree for partition, permanent injunction and accounts in respect of the properties mentioned in the First Schedule of the plaint. Subsequently, on the prayer of the opposite party no. 1, the opposite party no. 2 was also added as a plaintiff since the opposite party no.1 had transferred his entire share in respect of the First Schedule properties in favour of the opposite party no. 2 by two registered deeds of gift dated June 24, 2022 and June 28, 2022. The said suit was subsequently re-numbered as Title Suit No. 27 of 2023.

b. The petitioner before this Court has been arrayed as the defendant no. 2 in the suit. The petitioner contested the suit by filing a written statement denying all the material allegations of the plaint and averring that the First Schedule properties were mortgaged to the Punjab National Bank (erstwhile Bank of India) and as such the same could not be partitioned unless the mortgage debts were paid.

c. Subsequently, the petitioner filed an additional written statement thereby contending that while flat no. 3A was mortgaged with Punjab National Bank, flat no. 3B stood mortgaged with Indian Bank to secure the credit facilities obtained from them. It was also averred therein that the petitioner had deposited certain amounts pursuant to orders passed by the Debts Recovery Tribunal and the Debts Recovery Appellate Tribunal to prevent the said flats from being sold by the Banks in order to recover their debts.

d. Evidence was adduced by the plaintiff as well as the defendant nos. 1 and 2 and ultimately, the suit was decreed in preliminary form on March 24, 2025. The said decree was challenged before this Court by filing separate appeals by the plaintiff/opposite party no. 1, the defendant no. 3/opposite party no. 4 and the defendant no. 4/opposite party no. 5.

e. All the said three appeals were heard and disposed of by the Hon'ble Division Bench of this Court by a common judgment and order dated September 10, 2025, thereby modifying the preliminary decree to the extent that "*the existence of the share declared in favour of the plaintiffs shall be in respect of both the flat*

nos. 3A and 3B". The Hon'ble Division Bench directed that as only preliminary decree had been passed, the suit would revive and survive till the passing of the final decree. The parties were granted liberty to apply for appointment of an Advocate Commissioner as settlement appeared to have failed.

f. Thereafter, the opposite party no. 2 filed an application praying for appointment of a partition Commissioner for partitioning the suit property by metes and bounds in accordance with the modified preliminary decree. Such application was allowed by the learned Trial Court by an order dated November 10, 2025, by appointing an Advocate Commissioner.

g. Subsequently, the petitioner took out an application under Section 151 of the Code praying for determination and adjudication of the amounts due and payable by the plaintiffs to the petitioner prior to the division of the suit properties by metes and bounds, in accordance with the modified preliminary decree and also for a direction on the parties to pay to the banks and the financial institutions such further or other sum that might be required to be paid to such banks or financial institutions in the event it was found that any further sum was required to be paid to such banks or financial institutions.

h. In the said application, the petitioner has asserted that he had paid substantial amounts for preservation of the suit properties and also to ensure that the suit properties were not sold off in recovery proceedings initiated by the Banks. It is the petitioner's case that as the petitioner has paid substantial sums to redeem the mortgage of the suit properties, mortgaged with the Bank and/or financial institutions and as such, the petitioner has stepped into the shoes of the mortgagee Bank and is entitled to receive such amount proportionately on the basis of the shares of the parties in the suit properties as declared by the learned Trial Court by the judgment dated March 24, 2025, and subsequently modified by this Court on September 10, 2025.

i. The petitioner claimed to have a right of subrogation and sought to enforce the said right. The petitioner claimed that sums of Rs. 1,29,75,510/- had been paid by way of demand draft in favour of the Bank or the Debt Recovery Tribunal and neither the plaintiff no. 1 nor the defendant no. 3 had paid any amount to the Bank to save the suit property.

j. The petitioner alleged that although the entirety of the dues had been paid by the petitioner, the Bank did not issue the no objection certificate and as such the property still remained mortgaged. The petitioner has thus claimed that the learned Trial Court should determine and adjudicate the amounts that are

payable by the plaintiff and the defendant no. 3 to the petitioner on account of redemption of mortgage and on account of charge that the petitioner has over the suit properties.

k. The plaintiffs/opposite party nos. 1 and 2 opposed the said application by filing a written objection indicating therein the dilatory tactics adopted by the petitioner/defendant no. 2 to prolong the litigation. The opposite party nos. 1 and 2 asserted that repayment to the Bank was done using the borrower firm's resources and that even if the petitioner's case is taken as correct, the petitioner has only discharged his own liabilities for which he alone was responsible. It was asserted that had the family's dwelling house been sold to liquidate the defendant no. 2's liabilities it would have been incumbent upon the defendant no. 2 and his firms to compensate the plaintiffs and defendant no. 3 and that being so the question of claiming anything from the plaintiffs or the defendant no. 3 could not arise. It was further asserted that the application filed by the petitioner is in the nature of a counter-claim which cannot be made at this stage inasmuch as the same would be beyond the written statement and the pleadings. It was asserted that claims relating to property tax, electricity charges and maintenance charges detailed in paragraph 11A to 11D of the application from subject matter of dispute in C.S 377 of 2013 filed by the defendant no. 2 before this Court and claims relating to Arcil, Punjab National Bank, Indian Bank and legal expenses detailed in paragraph 11E to 11H of the said application from the subject matter of dispute in claim filed by the defendant no. 2 in the proceeding before the arbitrator appointed by this Court by an order dated June 13, 2014 passed in APO 381 of 2011.

l. The learned Trial Court considered the material on record and the submissions made by the parties and thereafter, by an order dated December 22, 2025 rejected the petitioner's application under Section 151 of the Code. Feeling aggrieved thereby, the petitioner has approached this Court by way of the present revisional application.

SUBMISSIONS ON BEHALF OF THE PETITIONER:

3. A brief summary of the submissions made by Mr. Saha, learned Senior Advocate appearing for the petitioner (both orally as well as by way of written notes), is as follows:-

a. The petitioner's application was dismissed by the impugned order on essentially two grounds - (a) the petitioner/defendant no. 2 had already

approached this Hon'ble High Court to get relief pertaining to the claim of financial expenditures incurred towards redemption of mortgage of the suit property; and (b) the question had not been raised by the petitioner in the appeal preferred before this Hon'ble Court against the preliminary decree.

b. The instant revisional application has been filed as - (i) the earlier approach to this Hon'ble Court referred to in the impugned order does not concern the redemption of mortgage of the suit flats as will be evident from the plaint filed in the C.S. No. 377 of 2013, being confined to the failure of the defendant no. 1 in the suit to pay 50% of the expenses in terms of a family settlement entered into between the parties in respect of municipal rates and taxes, electricity expenses, expenses for internal maintenance of flats and towards annual subscription payable for the same to the ownership association; and (ii) the appeal preferred against the preliminary decree before this Hon'ble Court did not concern the matter of subrogation at all and was confined only to the question as to whether the preliminary decree should be confined to one flat or should extend to both flats.

c. The petitioner had, in the additional written statement filed in the suit asserted that he had redeemed the mortgage of the suit flats by paying the bank's dues.

d. Accordingly, this issue was taken up for consideration at the time of passing of the preliminary decree and was postponed for being decided at the final decree stage, as will appear from the judgment and decree itself.

e. This apart, as the entire dues of the bank has been paid, the petitioner has filed an application being M.A. 25 of 2018 before the Debts Recovery Tribunal seeking return of the title deeds of the mortgaged flat.

f. The following judgements of the Hon'ble Supreme Court were relied on to contend that - (i) a redeeming co-mortgagor discharging the entire mortgage debt, which was the joint and several liability of himself and his co-mortgagor, was in equity entitled to be subrogated to the rights of the mortgage redeemed and to treat the non-redeeming co-mortgagor as his mortgagor to the extent of the latter's portion or share of the hypotheca and to hold that portion or share as security for the excess payment made by him. (ii) Such equitable right of the redeeming co-mortgagor stems from the doctrine that he was a principal debtor in respect of his own share only, and his liability in respect of his co-debtor's share of the mortgage debt was only that of a surety; and when the surety had discharged the entire mortgage debt, he was entitled to be subrogated to the securities held by the creditor, to the extent of getting himself reimbursed for

the amount paid by him over and above his share to discharge the common mortgage debt.

i) ***Ganeshi Lal vs. Joti Pershad***[2]);

ii) ***Valliamma Champaka Pillai vs. Sivathanu Pillai & Others***[3]; and

iii) ***Krishna Pillai Rajasekharan Nair (Dead) by LRS. vs. Padmanabha Pillai (Dead) by LRS. & Others***[4]

g. There is no prior proceeding between the parties concerning the petitioner's right of subrogation following his discharge of the mortgage debt.

h. C.S. No. 377 of 2013 is confined to the failure of the defendant no. 1 in the suit to pay 50% of the expenses in terms of a family settlement entered into between the parties in respect of municipal rates and taxes, electricity expenses, expenses for internal maintenance of flats and towards annual subscription payable for the same to the ownership association.

SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES:

4. A brief summary of the submissions made by Mr. Choudhury, learned Senior Advocate, appearing for the opposite parties, is as follows:-

a. The family residence of the Kejriwal Family was at Flat Nos. 3A and 3B at 57G, Ballygunge Circular Road, Kolkata 700 019. Due to disputes, the opposite party nos.1, 2 and 4 were compelled to leave the family residence. The opposite party no. 1 subsequently filed a suit for partition, in view of the fact that the suit premises had been jointly acquired.

b. The suit for partition is not on the basis of the suit premises being a joint family property, but on the basis that the property had been jointly acquired by purchase. This is an admitted position between the parties and also forms basis of the preliminary decree which has since been affirmed by the Hon'ble High Court and has attained finality.

c. There was also a final conclusive family settlement dated September 29, 2002. Arising out of this family settlement, there were several litigations pending between the parties.

d. In the present suit for partition, a preliminary decree declaring the shares of the parties was passed. The appellate decree upheld the same. A conjoint reading of the Trial and Appeal Court decrees entitle the parties to apply for

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[2] (1952) 2 SCC 373
[3] (1979) 4 SCC 429
[4] (2004) 12 SCC 754

appointment of Commissioner of Partition, if issues relating to partition after preliminary decree are not settled within a time frame.

e. The contentions raised in the Section 151 application had also been argued at the time of passing of preliminary decree dated March 24, 2025. The preliminary decree defers the question for adjudication at the stage of passing of final decree.

f. Since partition could not be affected amicably, an application for appointment of Commissioner of Partition was made and Commissioner of Partition was appointed on November 10, 2025. Commissioner of Partition has prepared and submitted his final report. The parties are having the question of acceptance of the final report and passing of final decree adjourned in view of the pendency of the present proceeding.

g. The petitioner had preferred an application under Section 151 of the Code praying, *inter alia*, for determination of the amount which is due and payable by the plaintiff and defendant no.3 to the petitioner prior to the division of the suit properties. The application is on the basis that- (a) The petitioner has been incurring expenditure in relation to the flat, including for maintenance charges to the maintenance society, corporation rates and taxes, electricity dues, etc. (b) The suit premises was mortgaged with Punjab National Bank and Indian Bank and the petitioner claims to have "redeemed" the mortgage after making payment of the amounts due to the banks. The petitioner relies upon Section 92 of Transfer of Property Act, 1882[5] and claims to have stepped into the shoes of the banks and is entitled to exercise right of mortgagee by subrogation. On this basis, the petitioner is claiming to be entitled to resist passing of final decree. (c) It was therefore the principal contention that the final decree must take into account the rights of alleged "subrogation" of the petitioner in the suit properties. Secondly, the petitioner claims that he is entitled to recover monies, on account of the expenditure incurred. (d) The question of whether the petitioner can resist passing of final decree on the above basis, was raised in an application under Section 151 of the Code.

h. Written objection was filed to such application by opposite party no. 2 at page 5 of supplementary affidavit affirmed on August 12, 2026.

i. The learned Trial Court, after consideration of the application, the documents annexed thereto, as well as the written objection filed on behalf of the defendant no. 2 in the learned Trial Court below, had come to the conclusion

[5] **Hereafter 'the 1882 Act'**

that the prayers made in the Section 151 application cannot be acceded to, and the said application was dismissed vide order dated December 22, 2025.

j. The petitioner's Case on alleged "redemption" of mortgage is beyond his pleadings, and is in fact, contrary to his own pleadings in the suit.

k. In the written statement and in the additional written statement filed by the petitioner, it is nowhere mentioned or alleged that there has been redemption of the mortgages created in favour of the two banks. However, to the contrary, it is always admitted and pleaded that proceedings are pending and no redemption has occurred. This will be evident from the petitioner's written statement where, the petitioner has taken a stand that the flats in question are mortgaged properties and they cannot be partitioned unless mortgage debts are paid. Further, in paragraphs 7(d) and (e) of the additional written statement, the petitioner has stated that appeals were pending before the DRAT from orders directing deposits to be made.

l. In evidence on affidavit filed by the petitioner in the suit, it would be evident that the DRT and DRAT proceedings were pending. In paragraph 8(i), the petitioner has admitted that *'first schedule property being mortgaged'*. This is an admission that the mortgage was continuing.

m. In supplementary evidence of the petitioner, it is alleged that title deeds are with the bank and NOC has not been issued despite entire dues being allegedly paid off. Again, the petitioner is alleging that he has allegedly paid off the dues but is further admitting that redemption of mortgage has not happened.

n. In Section 151 application, the petitioner has also factually admitted that the mortgage continues. While in paragraph 18 of the Section 151 application, the petitioner has stated that the mortgage has been redeemed, in paragraph 26 thereof, the petitioner has stated that the entire dues have been paid but no objection certificate is not issued, and that the property still stands mortgaged.

o. Further in paragraph 26 of the Section 151 application the following statement has been made:-

> *"That the entire dues had been paid by the petitioner but the bank did not issue 'no objection certificate' and as such the suit property still stands mortgaged in favour of the bank. The title deed of the suit property is still lying with the bank."*

p. Therefore, the case of the petitioner in the Section 151 application is that the property still stands mortgaged with the bank. Clear statement has been made by the petitioner. This is the foundation of the petitioner's case in the Section 151 application from which the petitioner is not permitted to deviate. The

petitioner cannot therefore argue or contend, having regard to his admission, that the mortgage has been redeemed. A judgment of the Hon'ble Supreme Court in the case of ***Bachhaj Nahar vs. Nilima Mandal***[6] was relied on for such purpose.

q. The petitioner in written statement/additional written statement/affidavit of evidence/additional affidavit of evidence, makes out a case that it has allegedly made payment of all dues to the bank but the bank has not issued NOC, and that the mortgage subsists and proceedings in connection therewith are still pending adjudication. If NOC has not been issued, mortgage has not been redeemed. This is also inconsistent with the stand taken in Section 151 application and the petitioner goes on to state that the suit property still stands mortgaged in favour of the bank.

r. The petitioner is therefore estopped from arguing contrary to its pleaded case and/or cannot contend that the mortgage has been redeemed.

s. Not a single document has been produced in the suit or in the Section 151 application or in the present petition to show that there has been redemption of mortgage by the banks. Title deeds being with the petitioner, is also not mentioned, which would have been the position if mortgage had been redeemed.

t. The order dated July 02, 2014 passed by the Learned DRAT relied on by the petitioner at page 195 of the Section 151 application does not record that the debt has been re-paid. On the contrary, it records that further sums are required to be paid and the debt remains unpaid even after payment of a sum of rupees one crore by the petitioner.

u. Therefore, the petitioner cannot claim any right under Section 92 of the 1882 Act. It cannot claim to be mortgagee or having stepped into the shoes of mortgagee. Whether entire dues of banks have been repaid remains a disputed question before learned DRT and this Hon'ble Court in revisional applications filed by the petitioner being C.O. No. 2620/2014, C.O. No. 2635/2014, C.O. No. 2636/2014, and C.O. 2637/2014.

v. The petitioner claims to have made payments to the bank, but has not obtained redemption of mortgage. In such situation, the question that arises is what right would the petitioner have?

w. At best, the petitioner may be entitled to make a money claim under applicable law. The petitioner would have an entitlement, after having paid the banks for

[6] **(2008) 17 SCC 491**

release of mortgage, to recover this amount from other co-mortgagers. This must also be read in conjunction with the petitioner's statement that under the family settlement, the liability was to be jointly paid by the two groups. This position is however disputed by the opposite parties, who say that the petitioner has to pay entirety of the sums and/or in terms of the family settlement of September 29, 2002. The petitioner's right to money claim is also thus not clear and would require adjudication.

x. In any event, for this money claim, the petitioner cannot prevent passing of final decree. Even in the Section 151 application, the petitioner has proceeded on his money claim. A money claim of the petitioner cannot prevent decree for partition being passed.

y. In any event, the alleged money claim of the petitioner cannot be made in this suit since the very same money claim has been made in prior proceedings:-

- **i.** CS No. 377 of 2013 filed before this Hon'ble Court;
- **ii.** Arbitration proceedings before Mr. Ranjan Bachawat, Learned Senior Advocate, Learned Sole Arbitrator.

z. In the suit being CS No. 377 of 2013, the petitioner has claimed refund of all expenses concerning the property, for example, maintenance expenses, electricity expenses, corporation rates and taxes, etc. The same claims as contained in the said letter are to be found at paragraph 19-22 of the plaint in CS 377 of 2013.

aa. The prayer in the plaint is for the same amount along with a claim for future expenses. The heads of claims are similar to those found in paragraph 11(a) to (d) of the Section 151 application (page 190). Heads of claims are identical. The figures are not identical but that is natural because the suit has been filed in the year 2013 with a prayer for future claims. Section 151 application has been filed in 2026. The said suit is pending and this claim cannot be re-agitated in this proceeding.

bb. In the arbitration proceedings, claims have been made on account of alleged payments made to banks.

cc. The heads of claims are similar to those found in paragraph 11(e) to (h) of the Section 151 application. This proceeding is pending but has been abandoned. If at all further claims on account of further payments made to Banks are to be included, it would have to be included in this arbitration proceeding.

dd. A chart showing that the claims made in the Section 151 application were identical to the claims made in the suit and the arbitration proceedings was also appended to the written note. The same is as follows:-

Sl. No.	Claims made in Section 151 Application [page 190-191]	Claims made in other proceedings	Reference to other Proceedings
1.	Para 11 (a) Property tax for flat no. 3A	Property tax for Flat No. 3A	See Schedule A annexed to CS 377/2013 [page 86 of Supplementary Affidavit of opposite party no. 2 affirmed on 12 August 2026]
2.	Para 11(b) Property tax for flat no. 3B	Property tax for flat no. 3B	
3.	Para 11 ©- Electricity charges for Flat No. 3A and 3B	Electricity charges for Flat No. 3A and 3B	
4.	Para 11 (d) Maintenance charges payable to Radhika Apartment Owners' Association	Maintenance payable charges to Radhika Apartment Owners' Association	
5.	Para 11 (e) Sum of Rs. 20,00,000/- paid to Indian Bank	Para 18 (c) – Sum of Rs. 20,00,000/- paid to Indian Bank	
6.	Para 11 (f) Sum of Rs. 9,77,510/ paid to Indian Bank	Para 18(d) Sum of Rs. 9,75,510/- paid to Indian Bank	
7.	Para 11 (g) Money paid to mortgagee bank / financial institution	Para 18(a) & 18(b) Money paid to mortgagee bank/ financial institution	
8.	Para 11 (h) Legal expenses incurred	Para 18 (e) Legal expenses incurred	

ee. Money claim cannot be made or urged in the present proceeding or in any other proceeding by the petitioner.

ff. In fact, the learned Court below at internal pages 3 and 4 of the impugned order took note of the abovementioned suit and arbitration proceeding on identical claims and on this ground rejected the petitioner's Section 151

application. Arbitration proceeding, since abandoned, closes the petitioner's right. Anyhow, that is for the petitioner to contend elsewhere.

gg. In any event in terms of Section 92 of the 1882 Act, there is no right to subrogation when the alleged "payment" is not in full satisfaction of the debt. Therefore, there cannot be any subrogation on any "partial" repayment of debt. Reliance was placed on the judgment of ***Gurdeo Singh & Others vs. Chandrikah Singh & Others***[7] .

hh. Assuming without admitting that the petitioner had "redeemed" the mortgage, he would have not become a mortgagee by subrogation but would have occupied position akin to mortgagee. He has the rights "as a mortgagee", not rights "of mortgagee".

ii. For such purpose the judgment in the case of ***Variavan Saraswathi & Another vs. Eachampi Thevi & Others***[8] was relied on. Same right as mortgagee would entitle the petitioner to sue for foreclosure and sale. No suit for foreclosure or sale has been filed. Therefore, the petitioner cannot claim any right in the suit property. Thus, even on such assumptions the petitioner cannot prevent a final decree from being passed.

jj. The Section 151 application was the 27th application filed in the suit. Several orders were passed by various Courts for expeditious disposal of the partition suit, after taking into account the dilatory tactics of the petitioner. Various orders passed by this Court as well as an order of the Hon'ble Supreme Court were referred to assert that the petitioner's conduct has been reprehensible. In particular, the following orders were referred to:-

i. Contempt order dated August 13, 2024 directing petitioner along with his lawyer to pay cost of Rs. 50,000/- and render written apologies for their conduct before the learned Trial Court;

ii. The Hon'ble Supreme Court order dated December 09, 2024;

iii. This Court orders – directing expeditious disposal being order dated July 10, 2015 , order dated January 13, 2023, order dated July 07, 2023, order dated July 16, 2024, order dated August 13, 2024 and order dated September 11, 2024

kk. Article 227 proceeding is not the same as appellate proceeding for correction of error. The supervisory jurisdiction is not available to correct mere errors of fact

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[7] **(1907) 5 CLJ 611**

[8] **1993 Supp (2) SCC 201**

or of law. A judgment of the Hon'ble Apex Court in the case of ***Surya Dev Rai vs. Ram Chander Rai & Others***[9] was relied on for such purpose.

ll. No case of material irregularity or lack of jurisdiction of the learned Court below or perversity exists in the facts of the case have been argued.

REJOINDER SUBMISSIONS ON BEHALF OF THE PETITIONER:

5. Mr. Saha, learned Senior Advocate appearing for the petitioner has been re-joined as follows:-

a. The opposite parties have, however, sought to oppose the instant revisional application on the following grounds - (a) the petitioner's case of redemption was beyond the pleadings and was not a subject matter of consideration in the suit; (b) the petitioner had given no evidence of redemption of the mortgage; (c) in any event, as the mortgage had not been redeemed in full the petitioner was not entitled to the benefit of Sections 92 and 95 of the 1882 Act; (d) even assuming that the petitioner had become entitled to the benefit of subrogation, he would only have the same rights as the mortgagee, and consequently would only be entitled to file a suit for foreclosure, which the petitioner had not done; (e) there were separate prior proceedings between the parties concerning the same subject matter and as such there could be no scope for the petitioner to raise the issue in the partition suit.

b. There is no clearly no basis for the contention that the petitioner's case of redemption was beyond the pleadings is clearly borne out from the Additional Written Statement filed by the petitioner in the partition suit.

c. There is also no basis for the contention that the petitioner had given no evidence of redemption of the mortgage as the opposite parties have himself clearly admitted that the entire dues of the bank have been paid. As such, the mere fact that the bank has not yet returned the title documents of the property can be of no consequence whatsoever. That the entire dues of the bank have been paid, has been admitted by the opposite parties in (i) the written objection filed to the application under Section 151 of the Code (at para 7); (ii) a Gift Deed dated June 24, 2022 and (iii) a Gift Deed dated July 03, 2025.

d. The opposite parties are accordingly estopped from contending and in any event are not entitled to contend that the mortgage had not been redeemed in

[9] (2003) 6 SCC 675

full or that the petitioner is not entitled to the benefit of Sections 92 and 95 of the 1882 Act.

e. The contention of the opposite parties that even assuming that the petitioner had become entitled to the benefit of subrogation, he would only have the same rights as the mortgagee, and consequently would only be entitled to file a suit for foreclosure, which the petitioner had not done, is also clearly without merit. The judgments of the Supreme Court relied on earlier were reiterated.

ANALYSIS & DECISION:

6. The preliminary decree passed by the learned Trial Court expressly reserved a pool of questions to be decided by the learned Court at the final decree stage. To be specific, the learned Trial Court observed thus:-

> *"I will like to keep it on record that for the present I am not inclined to get involved into the questions whether the suit property was mortgaged with the bank, who mortgaged the property, what was the purpose of mortgaging the suit property, for whose benefit the property was mortgaged, whether any amount has been paid towards liquidation of the said mortgage, who has spent the said money etc. Plaintiffs have come before the court praying for partition of the suit property. At this stage it is the duty of the court to decide whether plaintiffs are entitled to get the decree of partition as prayed for. What will be the consequence of declaring the share in the suit property, how the parties will be affected by the decree of the court if any at all is passed, how the question of liquidation of mortgage with regard to the suit property in the light of the decree will be dealt with, all these questions will be taken up taken care of at the time of passing a final decree considering the evidence lying with the record at the proper stage of trial. For the present the only task of the Court is to declare the share of the plaintiffs as well as of the defendants in the suit property".*

7. It is significant to note that what had been postponed for decision were all questions relating to the mortgage of the suit properties and nothing more. There appears to be reasonable basis for such questions to arise inasmuch as the petitioners pleadings in the written statement and the additional written statement clearly indicate that the First Schedule properties were mortgaged with the lender Banks and that deposits were made by the petitioner under orders of the DRT and DRAT in order to save the mortgaged properties from being sold in recovery proceedings initiated by the lender Banks. There is also evidence adduced by the petitioner in such regard. The relevant pleadings and the evidence may be noticed first.

8. In the written statement filed by the petitioner he indicated that as the properties stood mortgaged with Banks therefore the same were impartible. The relevant pleadings made in the written statement are extracted hereinbelow:-

5. The first schedule property is mortgaged to New Bank of India (now known as Punjab National Bank). Punjab National Bank had filed recovery proceeding before the Debts Recovery Tribunal-III Kolkata, whereupon the Learned Debts Recovery Tribunal-III Kolkata has issued a certificate for recovery of a sum of Rs. 1,25,00,000/- along with interest calculated @ 10.75% per annum from March 31, 1994 until payment of the said sum to the bank. The first schedule property being mortgaged to the bank cannot be partitioned unless the mortgaged debts are paid. The plaintiff is fully aware of the same and despite thereof has filed the above suit only to harass the defendants Nos.1 and 2."

9. In the additional written statement, the petitioner averred that he had deposited sums under orders of the DRT and DRAT in order to save the mortgaged properties from being sold in recovery proceedings initiated by the lender Banks. The relevant sub paragraphs of paragraph 7 the additional written statement are extracted hereinbelow:-

"b) Diverse orders challenged by the defendant no.2 along with his father the original defendant no.1 before the Hon'ble Debt Recovery Tribunal. From the diverse orders passed by the Recovery Officer, DRT it would be evident that the present plaintiff along with the defendant no.3 has not only consented but have left no stone unturned to ensure that not only flat no. 3A, but also the other flat which is not mortgaged with Punjab National Bank is sold in the recovery proceedings. It is only the defendant no.2 and the original defendant no.1 who are all along resisted, opposed, the wrongful and illegal action of the bank and orders but the plaintiff sought to be sold. Some orders passed by the Recovery Officer, DRT are annexed hereto and collectively marked with Annexure "A".

(d) In an appeal filed by the defendant no.2 along with the original defendant no.1 the Hon'ble DRT duly passed an order directing to the appellants therein to deposit a sum of Rs. 65.00 Lakhs. Pursuant to subsequent orders a further sum of Rs. 35.00 Lakhs was directed to be deposited and the sale proceed in respect of the said flats were stayed. I have deposited the said sums pursuant to the said orders. Orders passed by the Hon'ble DART are annexed hereto and collectively marked with Annexure "C"."

10. In paragraph 14 of the affidavit of evidence filed by him he has asserted as follows:-

"14. I have specifically stated in my Additional Written Statement that Flat No 3A was mortgaged to Punjab National Bank and Flat No. 3B was mortgaged with Indian Bank against credit facilities advanced by the Bank. Recovery proceedings were initiated by both the banks in view of failure to pay the Bank dues. Plaintiff no. 1 had on several occasions requested the Bank to sell the residential flat of the Kejriwal family, which is the suit property in the instant partition suit, to pay off the Bank liability, one such is the affidavit dated 22.11.2005 filed by plaintiff No.1 himself. Ramesh Kejriwal had made an affidavit before the DRT granting his consent to Bank to sell the suit property. Ramesh Kejriwal had filed pleadings before Debt Recovery Tribunal in Appeal No.416 of 2013 consenting to Bank selling the suit property to satisfy the debt. I have been served with the said affidavit of Ramesh Kejriwal. This document of Ramesh Kejriwal is also part of probate proceeding before Hon'ble High Court, Calcutta in the Goods of Late Murari Mohan Kejriwal, which is filed by me as the Sole Executor. The same be marked as an Exhibit. In order to save the suit property from being taken over by the Bank and put in auction, I had paid a total sum of Rs. 1,29,75,510.00 to the mortgagee banks. A sum of Rs. 1 Crore was paid to Punjab National Bank or ARCIL and a sum of Rs.29,75,510.00 was paid to Indian Bank. The payments were made by me from my personal bank account or through my

company namely Parijat Vyapar Private Limited. The payments were made by way of Demand Drafts in favour of Banks or DRT. There are several Orders passed by Debts Recovery Tribunal and Debts Recovery Appellate Tribunal recording the payments which have been made by me from time to time amounting to Rs. 1,29,75,510.00. Neither Dr. V. K. Kejriwal nor Ramesh Kejriwal paid any money to the bank to save the suit property. Though the entire dues have been paid off, the Banks did not issue NOC. The title deeds of the suit property are still with bank. All legal expenses, lawyers' fees to contest the banks proceedings before DRT and DRAT have been paid by me alone. Neither Dr. V. K. Kejriwal nor Ramesh Kejriwal paid any money towards Banks debt or towards advocates legal fees. These are all true and correct copies of the original. The photocopies were done in my presence and under my supervision. Ramesh Kejriwal is also a party to such DRT end DRAT proceedings. He is well aware of the money paid by me to Bank to save the suit property. Some of the orders are annexed with my additional written statement. Orders passed by DRT and DRAT and letters issued by my advocate, copies of the Pay Order showing payment of bank debt end bank statements showing payments made by me to bank be marked as Exhibit."

11. Thus the positive case run by the petitioner in the written statement and the additional written statement filed by him was only with respect to the deposits which he allegedly made in order to save the mortgaged property from being sold and he had led evidence in support thereof. It was on such basis that the questions, which were noted by the learned Trial Court while passing the preliminary decree, arose and the learned Trial Court postponed decision thereon to the final decree stage. This Court hastens to add that it is not this Court's conclusion that the petitioner had/has proved his claims as regards deposits being made or mortgage being redeemed. All that is being said is that questions pertaining thereto had arisen for consideration of the Court.

12. However, when the petitioner took out the application under Section 151 of the Code he included within it a multitude of claims extending beyond those that were there in the written statement and the additional written statement. In addition to the claim in respect of mortgage debt allegedly paid by him he sought to assert that he had incurred expenses on account of electricity bills, municipal taxes and maintenance expenses as well. By the said application, the petitioner sought for determination of the amounts payable to him by the plaintiffs and the defendant no.3 upon projecting before the Court, a larger picture of claims than was there in the pleadings.

13. It is, noted that in paragraphs 10, 11, 12 and 13 of the affidavit of evidence filed by the petitioner he has made statements regarding the expenses incurred by him on account of electricity bills, municipal taxes and maintenance but the same, in the considered opinion of the Court, cannot be taken note of in the present proceedings for at least two reasons.

14. Firstly, since there is no pleading either in the written statement or in the additional written statement as regards the expenses incurred by him on account of electricity bills, municipal taxes and maintenance, no evidence on such score can be taken into consideration by the Court. It is well settled that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.[10]

15. Secondly, it needs to be noted that the learned Trial Court is at the final decree stage. While passing the preliminary decree the learned Trial Court left only the questions regarding mortgage and payment of mortgage debt (as already quoted hereinabove) open for adjudication at the final decree stage and nothing else. This clearly denotes that the unpleaded claims were left out of the zone of consideration and adjudication. Since the contours have been drawn by the preliminary decree, there is no scope for the Court to travel beyond the same at the final decree stage.

16. The contesting opposite parties are correct in their submission that most of the claims made in the suit filed before this Court on its original side and the ones stated in the Section 151 application filed before the learned Trial Court overlap but all the claims don't overlap. The learned Trial Court has still, dismissed the petitioner's application by observing thus:-

> *"Upon hearing both sides mindfully and having been gone through all the documents relief and referred by the LD. Advocate for both sides meticulously and on taking note of the admitted position of fact that defendant No.2 has already submitted himself to the original jurisdiction of the Ld. Hon'ble High Court to get relief pertaining to the claim of financial expenditures incurred towards redemption of mortgage of the suit property also with other liabilities so there is no legal scope to knock the door of the Court of law seeking similar nature of reliefs which is in the absence of any other findings as to the contrary is pending for adjudication before the Hon'ble High Court.*
>
> *Moreover this Court is also of the considerable opinion that here in this case nowhere from the materials on record referred and relied upon by defendant No.2 it is being revealed that the matter of such claim as made at the stage preferring Section 151 of CPC application has either been raised before the Hon'ble High Court in appeal or the concerned defendant has obtained liberty to proceed with the instant matter before this Court.*
>
> *Thus, on overall consideration of the entire scenario, this Court is of the considerable opinion that the application preferred on behalf of defendant No.2 is not tenable in the eye of law under the present scenario and in the background facts and circumstances of the case unless liberty is obtained from the Hon'ble High Court to proceed with the matter before this Court where facts remain that the concerned applicant/defendant has already submitted himself to the jurisdiction of the Hon'ble High Court pertaining to the claim in question for adjudication by filing a suit."*

[10] **Bachhaj Nahar vs. Nilima Mandal, (2008) 17 SCC 491**

17. The said observation is not sound. While a portion of the claims made by the petitioner are indeed common to the claims made in the suit filed before this Court, all the claims are not. To be specific, the claim on account of payment of mortgage debt did not overlap with the reliefs claimed in the suit.

18. In the application under Section 151 of the Code, the petitioner has claimed subrogation while alleging that he has redeemed the mortgage. The opposite parties have disputed such claim and have sought to demonstrate that the petitioner has not redeemed the mortgage and for such purpose various statements made by the petitioner to the effect that the property still stands mortgaged, have been relied on. The petitioner, on the other hand, has asserted that the Banks have not released the title deeds despite payment of the mortgage debt. He has relied on two gift deeds executed by the opposite party no.1 in favour of the opposite party no.2 where the former has stated that entire debt of the banks has been paid off.

19. It may be so that the mortgage debt has been discharged and yet the banks are not returning the title deeds for some other reason. It may also be so that the mortgage debt has not yet been discharged. The issue as to whether mortgage debt has been paid or not and as to whether the petitioner has paid the same or not would be required to be decided by the learned Trial Court on the basis of the evidence on record. It cannot be left undecided.

20. There is another way to look at the matter. Even if it is assumed that the mortgage has not yet been redeemed I full and only a portion of the mortgage debt has been paid, then also, while the petitioner will not be entitled to subrogation under Section 92 of the Transfer of Property Act, 1882, he is nonetheless entitled in law and equity to a proportionate contribution and equitable adjustment of the amounts paid by him toward the liquidation of the common mortgage debt in respect of the joint property, provided he proves that he has made the payments as he asserts. The issue therefore needs to be gone into by the learned Trial Court. In such context the following observations of the Hon'ble Supreme Court in the case of ***Ganeshi Lal*** (supra) judgment are relevant for the present purpose :-

> *"**12.** To compel the co-debtors or co-mortgagors to pay more than their share of what was paid to the creditor or mortgagee would be to perpetrate an inequity or injustice, as it would mean that the debtor who is in a position to pay and pays up can obtain an advantage for himself over the other joint debtors. Such a result will not be countenanced by equity; the favouritism shown by law to a surety, high as it is, does not extend so far. The surety can ask to be indemnified for his loss : he can invoke the doctrine of subrogation as an aid to his right of contribution. Sheldon says in Section 105 of his book:*
>
> *"The subrogation of a surety will not be carried further than is necessary for his indemnity; if he buys up the security at a discount, or makes his payment in a depreciated*

currency, he can enforce it only for what it cost him. He cannot speculate at the expense of his principal; his only right is to be repaid."

(Emphasis supplied)

21. The observations indicate that a court decreeing partition should to adjust equities so that non-paying co-sharers do not take their shares free of the burden discharged on their behalf.

22. As regards the opposite parties assertions that petitioner's claim cannot be considered at all since he had filed a counter claim in an arbitration proceeding filed by the opposite party no.4, and not proceeded with it, this Court is not satisfied with the same. The arbitration proceedings were abandoned by the claimant. It is well settled that the scheme of the Arbitration and Conciliation Act, 1996 *considers claims and counter-claims to be independent proceedings since the latter is not contingent upon the former*[11]. It was therefore, open to the petitioner to pursue its counter claim independently and abandonment thereof by the petitioner would bar the petitioner from raising the same claims once again in terms of the provisions of Order 23 Rule 1 of the Code. However, the same would not inhibit the present enquiry by the learned Trial Court in a partition suit where ascertainment of mutual accounts is a condition precedent to the division of the joint property and all the more so when the petitioner has asserted a claim for subrogation, which could not have been made in the arbitration proceedings. It is not equivalent to a stand-alone money claim. For the same reason the opposite parties' submission that the petitioner should file separate money claim or money suit is also not acceptable.

23. In ***Krishna Pillai Rajasekharan Nair (Dead) by LRS.*** (supra), it was held that a *property subject to mortgage is available, as between co-mortgagors, for partition, of course, subject to adjustment for the burden on the property.*

24. In the case of ***Valliamma Champaka Pillai*** (supra) it was held that a redeeming co-mortgagor was, in equity, entitled to be subrogated to the rights of the mortgagee and to treat the non-redeeming co-mortgagor as his mortgagor to the extent of the latter's portion or share in the hypotheca and to hold that portion or share as security for the excess payment made by him.

25. In ***Gurdeo Singh & Others*** (supra), this Court has held that in order to redeem the mortgage, the entirety of the mortgage money has to be paid.

[11] **Harshbir Singh Pannu vs. Jaswinder Singh, 2025 SCC OnLine SC 2742**

26. In ***Variavan Saraswathi & Another*** (supra) it was held that a person, who redeems the mortgage, would have rights akin to a mortgagee. He would have the rights "as a mortgagee", not rights "of mortgagee".

27. The aforesaid judgments would be relevant at the time of decision by the learned Trial Court on the issues that it had postponed to be taken up at the final decree stage and not at the present stage when learned Trial Court is yet to adjudicate upon the said issues.

28. ***Surya Dev Rai*** (supra) provides that the High Court would be justified in exercising supervisory jurisdiction when the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby. In the present case the learned Trial Court has by not deciding the questions postponed by it for decision at the final decree stage failed to exercise jurisdiction it had/has. The learned Trial Court has rendered a perverse finding by holding that the petitioner has submitted himself to the original jurisdiction of the High Court to get relief pertaining to the claim of redemption of the mortgage of the suit property.

29. For all the reasons aforesaid, the order impugned is set aside and the matter is remanded for fresh decision by the learned Trial Court only on the questions regarding payment of mortgage debt (as observed by it while passing the preliminary decree), in accordance with law and not on the other aspect regarding expenses on maintenance, property tax and electricity dues. The learned Trial Court is requested to render a decision on the said issues within a month from the date of communication of this order and proceed to pass appropriate final decree, in accordance with law. Both the parties will be at liberty to pray for preponement of the date before the learned Trial Court in case the date is far away.

30. It is clarified that this Court has not expressed any opinion on the merits of the petitioner's claim and the objections of the opposite parties as regards the questions to be decided by the learned Trial Court in terms of the above directions and the decision of the learned Trial Court would be wholly independent.

31. C.O. 41 of 2026 along with application stands disposed of with the above observations. No costs. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties on urgent basis after completion of necessary formalities.

(Om Narayan Rai, J.)