

Kanak Jain and Ors vs.chakresh Kumar Jain

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Court : Delhi

Decided On : Apr-15-2019

Appellant : Kanak Jain and Ors

Respondent : Chakresh Kumar Jain

Advocate for Def. : Mr. O.P. Aggarwal

Advocate for Pet/Ap. : Mr. Kanwal Chaudhary

Judgement :

* % + IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

15. h April 2019 CS(OS) No.1599/2008 & CC No.25/2009. KANAK JAIN AND ORS. Plaintiffs Through: Mr. Kanwal Chaudhary, Adv. Versus CHAKRESH KUMAR JAIN ...Defendant Through: Mr. O.P. Aggarwal, Adv. CORAM: HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW1 The four plaintiffs, namely (i) Kanak Jain; (ii) Abhay Kumar Jain; (iii) Rekha Jain; and, (iv) Ektaa Jain, being the widow, son and two daughters of late Shri Suresh Chand Jain, have instituted this suit for partition and rendition of accounts with respect to Property No.1734-A and 1734, Dariba Kalan, Delhi - 110 006, against Chakresh Kumar Jain, being the younger brother of said Suresh Chand Jain.

2. The suit was entertained and summons thereof ordered to be issued and vide ex parte ad interim order dated 12th August, 2018 parties directed to maintain status quo regarding the aforesaid properties. The defendant, besides filing his

written statement has also filed a Counter Claim seeking declaration that the interference of the plaintiffs in the peaceful possession of Shop No.1734/2, Dariba Kalan, Delhi is illegal and unauthorised and the plaintiffs have no right or claim to Shop No.1734/2, Dariba Kalan, Delhi. Vide consent order dated 24th May, 2011, the plaintiffs were permitted to take out eviction proceedings against M/s. Mehtab Singh Jain & Sons and the defendant agreed to co-operate in the same. CS(OS) No.1599/2008 & CC NO.25/2009 Page 1 of 24 3. It is the case of the plaintiffs in the plaint, (i) that Suresh Chand Jain, and the defendant jointly purchased Property No.173

- 1735, Dariba Kalan, Delhi - 110 006 vide registered Sale Deed dated 20th July, 1972; (ii) after the demise of Suresh Chand Jain, other portions of the said property, apart from two shops bearing No.1734-A which was under the tenancy of M/s. Mehtab Singh Jain & Sons and Shop No.1734 which was under the tenancy of M/s. Ranjit Singh Jain Jewellers were sold; (iii) Shop No.1734- A continues to be in occupation of M/s. Mehtab Singh Jain & Sons; however Shop No.1734 was lying locked for more than twenty years prior to November, 2005, when the defendant unauthorisedly and without the consent of the plaintiffs occupied the same and commenced his own business activities therein; (iv) the request of the plaintiffs to the defendant to partition by metes and bounds Shop No.1734 did not meet with any success; (v) finally the plaintiffs got issued a Legal Notice dated 10th June, 2008 on the defendant calling upon the defendant to partition the said property and the defendant in his response dated 17th June, 2008 thereto denied the share of the plaintiffs in Shop No.1734 on the ground of a mutual oral settlement of the year 1997 whereunder the Shop No.1734 had fallen to the share of the defendant and Shop No.1734-A had fallen to the share of the plaintiffs; and, (vi) no such settlement had ever taken place between the parties.

4. Needless to state, the defendant contested the suit of the plaintiffs on the same plea as taken in response to the legal notice i.e., of oral partition, whereunder Shop No.1734-A in occupation of M/s. Mehtab Singh Jain & Sons as a tenant having fallen to the share of the plaintiffs and Shop No.1734 which was vacant, having fallen to the share of the defendant, and CS(OS) No.1599/2008 & CC NO.25/2009 Page 2 of 24 further pleading (i) that M/s. Mehtab Singh Jain & Sons was a tenant in Shop No.1734-A at a rent of Rs.92/- per month and M/s. Ranjit

Singh Jain Jewellers was a tenant in Shop No.1734, also at a rent of Rs.92/ per month; (ii) that on the death of Ranjit Singh Jain, the proprietor of M/s. Ranjit Singh Jain Jewellers, there were seven partners of M/s. Ranjit Singh Jain Jewellers and who dissolved their partnership in the year 1997; (iii) thereafter it was mutually settled that the Shop No.1734 which was in the tenancy of M/s. Ranjit Singh Jain Jewellers will be the property of the defendant and Shop No.1734-A which was in the tenancy of M/s. Mehtab Singh Jain & Sons would be the property of the plaintiffs; (iv) in the said Family Settlement it was further settled that in Shop No.307, Dariba Kalan, Delhi, which was also the joint property of the parties, the defendant would relinquish his share and the said shop was in possession and occupation of the plaintiffs and remaining legal heirs of Ranjit Singh Jain except the defendant; (v) hence, the defendant orally relinquished his share from Shop No.307, Dariba Kalan, Delhi; (vi) the shop in possession of the defendant bears no.173

and the shop in the tenancy of M/s. Mehtab Singh Jain & Sons and in ownership of the plaintiffs bears no.1734/1; (vii) thus the plaintiffs have no right to Shop No.1734 also known as Shop No.1734/2; (viii) that the suit is bad for non-joinder of the remaining siblings/their heirs, of Suresh Chand Jain and the defendant; (ix) the suit is also bad for non-impleadment of the heirs of Mehtab Singh Jain; (x) the suit is barred by time, having been filed after more than eleven years from the dissolution of the business of M/s. Ranjit Singh Jain Jewellers; the limitation for a suit for partition is of three years; (xi) that the defendant has let out Shop No.1734, also known as Shop No.1734/2, to one Puneet Jain on 9th April, CS(OS) No.1599/2008 & CC NO.25/2009 Page 3 of 24 2005; (xii) that the suit is not properly valued for the purposes of court fees and jurisdiction; (xiii) the plaintiffs have suppressed that the defendant was the owner of 25% share in the business being carried on in and having 1/10th share in Shop No.307 Dariba Kalan, Delhi, which has been orally relinquished by the defendant in favour of the plaintiffs; (xiv) both the shops subject matter of this suit are of the same size and both are on the ground floor and situated towards the main road of Dariba Kalan, Delhi and are of equal value and have been orally partitioned between the parties; and, (xv) the plaintiffs thus have no right to partition or rendition of accounts.

5. The defendant, on the basis of having become the sole owner of Shop No.1734 also known as 1734/2, on account of oral partition, has sought the Counter Claim of declaration as aforesaid.

6. Needless to state that the plaintiffs in the replication to the written statement of the defendant and in the written statement to the Counter Claim of the defendant have denied the oral partition pleaded by the defendant and denied that the defendant has become the sole owner of Shop No.1734 also known as Shop No.1734/2.

7. On the pleadings in this suit and the Counter Claim, the following issues were framed on 5th October, 2009:-

"1. Whether the plaintiffs have any locus standi to maintain the present suit?. OPD2 Whether there was any mutual settlement as regards the suit property?. If so, its effect?. OPD CS(OS) No.1599/2008 & CC NO.25/2009 Page 4 of 24 3. Whether the suit is barred by Order 1 Rule 9 CPC?. OPD4 Whether the suit is barred by limitation?. OPD5 Whether the suit has been properly valued for the purpose of court fee and jurisdiction?. OPD6 Whether the counter claim has been properly valued for the purpose of court fee and jurisdiction?. OPP7 Whether the defendant is entitled to the decree of declaration as sought by way of counter claim?. OPD8 Relief. and the parties relegated to lead evidence.

8. The plaintiffs in their evidence have examined only the plaintiff no.2 Abhay Kumar Jain as PW1 and closed their evidence in affirmative on 8th November, 2012. The defendant in his evidence has examined only himself on 23rd March, 2015 and closed his evidence.

9. Strangely enough, after the conclusion of recording of evidence, the plaintiffs filed IA No.9605/2015 under Order XII Rule 6 of the Code of Civil Procedure, 1908 (CPC) and which remained pending till 29th January, 2016 when it was dismissed and the suit posted for final arguments on 22nd April, 2016.

10. On 22nd April, 2016, after hearing the counsels, the following order was passed:-

"1. This is a suit for partition with respect to two shops referred to in the plaint as shop nos.1734-A & CS(OS) No.1599/2008 & CC NO.25/2009 Page 5 of 24 1734, Dariba Kalan, Delhi. The two shops along with the other portions of the property were purchased by the predecessor-in-interest of the plaintiffs Late Sh. Suresh Chand Jain, along with his brother and who is the defendant Sh. Chakresh Kumar Jain. The two shops and the property was purchased vide registered Sale Deed dated 20.07.1972. The plaintiffs claim that these two shops remained jointly owned and were never partitioned, and hence the present suit for partition.

2. Defendant has filed the written statement to the suit and has also filed a counter claim bearing CC No.25/2009, and both of which pleadings are to the effect that the defendant is the sole owner of the shop no.1734 inasmuch as by virtue of the settlement of the year 1997 shop No.1734-A fell to the share of the plaintiffs and shop No.1734 fell to the share of the defendant. Shop No.1734-A is described by the defendant as shop No.173 and the shop no.1734 is described by the defendant as shop no.1734/2.

3. The following facts emerge as per the pleadings in the present case:-

"i. ii. The case of the defendant is that by the settlement, shop no.1734 as per the plaint fell to the share of the defendant. This shop is called as shop no.173 by the defendant in his written statement and the counter claim. Shop No.1734-A which is so called by the plaintiffs, and called as 173 by the defendant, is under the tenancy of M/s Mehtab Singh Jain & Sons. iii. The defendant is admittedly in possession of shop no.1734 (or shop no.173 as per the defendant). the case of CS(OS) No.1599/2008 & CC NO.25/2009 Page 6 of 24 4. There is no documentary evidence evidencing the settlement of the year 1997 so pleaded by the defendant, but even if there is no written document, existence of a settlement can be proved inter alia from the following aspects:-

"a) Whether any of the parties have applied for mutation of their shops in their respective names after settlement of the year 1997 and whether the property tax of such shops was paid by the parties individually and not jointly with the other party. b) Whether the electricity connection existing in the two shops were sought to be changed in the individual names of any of the parties in the present suit on or

after 1997, and which would be another indicator of settlement of the year 1997, assuming that the settlement took place. c) Shop No.1734-A (173 as per the case of the defendant) is under the tenancy of M/s Mehtab Singh Jain & Sons. If there was any settlement in the year 1997, then it is to be seen as to who has been receiving rent after 1997 of the shop from M/s Mehtab Singh Jain & Sons, i.e if the plaintiffs are exclusively found to be taking the rent of the shop no.1734-A from M/s Mehtab Singh Jain & Sons, this would be one strong indicator of settlement having taken place in the year 1997. d) It is possible that the parties would have been Income Tax Returns evidencing the settlement of the year filing CS(OS) No.1599/2008 & CC NO.25/2009 Page 7 of 24 1997 to substantiate that shop no.1734- A (shop no.173 as per the case of the defendant) fell to the share of the plaintiffs and shop no.1734 (shop no.173 as per case of the defendant) fell to the share of the defendant. for facts and inasmuch as learned counsel issues are 5. The aforesaid detailed narrated, the defendant claims that pursuant to the settlement of the year 1997, the defendant got the shop no.1734 or 173 mutated in his name and also paid exclusively property shop. Unfortunately however no evidence is led on behalf of the defendant with respect to the mutation either in the municipal records or in the electricity department or payment of house tax exclusively by the defendant in his name. Learned counsel has thus clearly failed to do complete justice to the case of the defendant. said tax with respect to the 6. The fact that complete justice has not been done by the learned counsel, however it is pertinent that this Court should ensure that complete justice is done and for that purpose this Court seeks to invoke the provision of Section 165 of the Indian Evidence Act, 1872 whereby a court at any stage can allow to call for evidence.

7. Accordingly, the facts of the present case as detailed above show that this Court should for the purpose of ensuring justice, invoke the provision of Section 165 of the Indian Evidence Act. In fact, I may note that even an appellate court under Order 41 Rule 27 CPC has power to call for additional evidence in order to ensure that complete justice is done and when some amount of evidence exists and that certain relevant evidence is left out.

8. I may note that the aforesaid order is passed on the basis of the statement of the learned counsel for the CS(OS) No.1599/2008 & CC NO.25/2009 Page 8 of 24 defendant that the defendant has got mutated in his name shop no.1734 (173 as per the defendant) pursuant to the settlement of the year 1997 and also the electricity connection was got changed in defendants name with respect to this shop. Before I allow evidence to be led to prove the documents with respect to acting upon the settlement of house tax, electricity connection with respect to the shop no.1734 (173

as per the defendant) or income tax returns, it is necessary that the defendant must file such documents inasmuch as if such documents do not exist, there would be no purpose served for invoking Section 165 of the Indian Evidence Act for leading evidence by the parties and cross examination of the witnesses.

9. Let the defendant file documents as stated in this order positively within a period of eight weeks from today, failing which no further opportunity shall be granted to the defendant.

10. List for final arguments at the end of short matters, on 08th August, 2016. 11. The defendant thereafter filed IA No.9136/2016 to prove certain documents already on record and to file deficit documents and which application was disposed of vide order dated 10th August, 2016 as under:-

"filed by 1. This application has been the defendant/applicant in pursuance to the order dated 22nd April, 2016.

2. This Court vide order dated 22nd April, 2016, though observed the need for invoking the powers under Section 165 of the Indian Evidence Act, 1872 but made the same dependent upon the filing by the defendant/applicant of document/s of the alleged family settlement having been acted upon.

3. The counsel for the defendant/applicant contends that the defendant/applicant has been paying property tax of CS(OS) No.1599/2008 & CC NO.25/2009 Page 9 of 24 one of the shops of which the defendant/applicant is in possession and use and the plaintiffs/non-applicants have been paying the property tax of the other shop which is tenanted and the plaintiffs/non-applicants only have been realising

the rent of the said tenanted shop. It is further stated that the electricity connection of the shop in possession of the defendant/applicant is in the name of the defendant/applicant and on enquiry it is informed that the electricity connection of the other shop is in the name of the tenant. It is yet further stated that the electricity connection of the defendant/applicant was earlier in the name of Ranjit Singh Jain Jewellers, a family firm, but was mutated in the name of the defendant/applicant only. In possession of shop the from the counsel 4. I have enquired the defendant/applicant, whether there is any mutation of the two shops in the exclusive name of the plaintiffs/non- applicants or the defendant/applicant and/or whether there is any document jointly written by the parties to any of family settlement claimed by the defendant/applicant. The municipal authorities submitting for the 5. The counsel for the defendant/applicant fairly states that there is no such document.

6. In the absence thereof, the effect of the documents proved by the defendant/applicant and the evidence led by the defendant/applicant on the aspect of family settlement shall be seen at the final stage and no case for invoking the powers under Section 165 of the Act supra is made out.

7. The application is therefore dismissed. 12. The plaintiffs applied for early hearing and which was allowed and the suit posted for final hearing in the category of After Notice Miscellaneous Matters on 18th September, 2018. CS(OS) No.1599/2008 & CC NO.25/2009 Page 10 of 24 13. The counsel for the defendant/Counter Claimant sought adjournment/did not appear on 18th September, 2018, 13th December, 2018 and 9th April, 2019. On 11th April, 2019, the counsel though appeared stated that he was unwell and sought adjournment.

14. Finding that the counsel for the defendant had been avoiding appearance, the counsel for the plaintiffs and the counsel for the defendant/Counter Claimant, to the extent he argued were heard on 11th April, 2019 and the hearing adjourned to today to enable the counsel for the defendant/Counter Claimant to file written arguments. The counsel for the defendant/Counter Claimant has today handed over the written arguments and which have been considered.

15. My findings on the issues framed are as under Issue No.1. Whether the plaintiffs have any locus standi to maintain the present suit?. OPD16 The said issue has been framed on the plea of the defendant/Counter Claimant of the property having been partitioned and qua which Issue no.2 has been framed. If under Issue no.2 it is found that the property, being Shops No.1734-A & 1734 also known as Shops No.173

& 1734/2, have already been partitioned between the plaintiffs on the one hand and the defendant on the other hand, the plaintiffs would have no locus standi to maintain the suit. However if the finding on Issue no.2 is that there has been no partition, the plaintiffs would certainly have a locus standi to maintain the suit for partition.

17. Thus Issue no.1 is decided accordingly. CS(OS) No.1599/2008 & CC NO.25/2009 Page 11 of 24 Issue No.3. Whether the suit is barred by Order 1 Rule 9 CPC?. OPD18 It is the plea of the defendant that the suit is bad for non-joinder of (i) M/s. Mehtab Singh Jain & Sons being the tenant in Shop No.1734-A also known as 1734/1; (ii) Puneet Jain, being the tenant in Shop No.1734 also known as 1734/2; and, (iii) other siblings of the defendant and the predecessor of the plaintiffs namely Suresh Chand Jain and/or their heirs.

19. However it is not disputed by the defendant/Counter Claimant that as far as the property in which the aforesaid two shops are located is concerned, it was in the joint ownership of the predecessor-in-interest of the plaintiffs namely Suresh Chand Jain and the defendant/Counter Claimant only and none of their other siblings or their heirs had any share therein or right therein. Thus, in a suit for partition of the said shops, the other siblings of the defendant/Counter Claimant and Suresh Chand Jain cannot be necessary or proper party. The defendant/Counter Claimant, while pleading oral partition of the said shops also does not plead that any share in the shops was given to any of the other siblings of the defendant/Counter Claimant and Suresh Chand Jain or their legal heirs. His plea however is that in the oral partition pleaded by him he had given to the plaintiffs his 25% share in the business being carried on in and 1/10th share in the Shop No.307, Dariba Kalan, Delhi (in which other siblings of Suresh Chand Jain and the defendant/Counter Claimant had remaining share). The same also would

not constitute the other siblings or their heirs as a necessary party to the present suit. CS(OS) No.1599/2008 & CC NO.25/2009 Page 12 of 24 20. Similarly, tenants in possession of the two shops for partition of which this suit has been filed, are in law not a necessary or proper party to the suit.

21. Thus Issue no.3 is decided against the defendant/Counter Claimant and in favour of the plaintiffs. Issue No.4. Whether the suit is barred by limitation?. OPD22 The plea of the defendant/Counter Claimant on which this issue has been framed is that the prescribed period of limitation is of three years commencing from the date when M/s. Ranjit Singh Jain Jewellers, tenant in Shop No.1734 also known as Shop No.173

was dissolved in the year 1997 as per Sales Tax record and the present suit filed in August, 2008 is hopelessly barred by time. However the counsel for the defendant/Counter Claimant neither in his oral arguments nor in his written arguments disclosed the Article of the Schedule to the Limitation Act, 1963 which prescribes the limitation for a suit for partition.

23. None of the Articles of the Schedule to the Limitation Act provides for a suit for partition. In the absence of any specific Article, the residuary Article 113 providing limitation of three years from the date when the right to sue accrues, would apply.

24. It has been held in Vijay Manchanda Vs. Ashok Manchanda 2010 (114) DRJ467[SLP (C) No.8872-2010 preferred whereagainst was dismissed vide order dated 1st April, 2010]. , Manita Khurana Vs. Indra Khurana AIR2010 Del 69 and Baleshwar Dayal Sharma Vs. Bimla Gupta MANU/DE/7690/2017 that no co-owner/joint owner of the property CS(OS) No.1599/2008 & CC NO.25/2009 Page 13 of 24 can be compelled to seek partition and if desires to keep the property joint, can do so without fearing that his right to claim a share of the immovable property of which he is the co-owner/joint owner will stand extinguished. A cause of action for a suit for partition would accrue only when partition is claimed and is denied or when the plaintiff is ousted from the property and the defendant starts claiming adversely to the plaintiff. This is nowhere the case of the plaintiffs or the defendant/Counter Claimant in this case. Though the plaintiffs have pleaded that they had for some time been requesting the defendant/Counter Claimant for

partition and which the defendant/Counter Claimant had been avoiding but the plaintiffs for the first time demanded partition from the defendant/Counter Claimant by getting issued a legal notice to the defendant/Counter Claimant only on 10th June, 2008 and the present suit has been filed within three years therefrom on 2nd August, 2008.

25. Issue no.4 also is thus decided against the defendant/Counter Claimant and in favour of the plaintiffs. Issue No.5. Whether the suit has been properly valued fee and the purpose of court for jurisdiction?. OPD26 Para 17 of the plaint in this regard is as under:-

"17. That the suit has been valued for the purposes of Court fee and jurisdiction as under: Relief of Partition - The suit has been valued for the purposes of jurisdiction at Rs.2.00 Crores (Rupees Two Crores Only) on which fixed court fee of Rs.20/- under Article 17 of Schedule-II of the Court Fee Act has been affixed as the Plaintiffs are in joint and constructive possession. CS(OS) No.1599/2008 & CC NO.25/2009 Page 14 of 24 Relief of Rendition of Accounts - The suit for the purposes of jurisdiction is valued at Rs.50,00,000/- (Rupees Fifty Lacs Only) which Plaintiffs estimate would be found due to them. For the purpose of Court Fees it is valued at Rs.200/- on which court fee of Rs.20/- has been affixed. Plaintiffs undertake to pay additional court fee on the amounts which would be found due to them on rendition of accounts and a Decree is passed in their favour to recover the said amounts from Defendant. Relief of Injunction - For the purposes of court fee and jurisdiction the suit is valued at Rs.200/- for jurisdiction on which court fee of Rs.20/- has been affixed. Total value for the purposes of jurisdiction is Rs.2,50,00,400/- on which total court fee of Rs.60/- has been paid. 27. Paras 5&6 of the preliminary objections in the written statement of the defendant/Counter Claimant in this regard is as under:-

"5. That the suit of the Plaintiff is not properly valued in terms of court fees act. In view of para 17 of the suit the full court fees as per ad valorem U/S7(c) of the court fees act the Plaintiff is required to pay the full court fees on the valuation of property. As per the own admission by the Plaintiff the valuation of the property for the relief of partition is Rs.2,00,00,000/- and for the relief of rendition of account

the value as stated is Rs.50,00,000/-. If suppose, the Honble Court may presume the said value is correct, the Plaintiff is required to pay the court fees on the said full value U/S7(c) of court fees act. Apart from it the Plaintiff, as per para 17 of the Plaintiff the total court fees paid by Plaintiff is Rs.60/- only. Hence the present suit is liable to be dismissed.

6. That in view of para 17 of the plaint sub-para i.e. for purpose of court fees and jurisdiction of the suit is mentioned as Rs.200/- fro partition and CS(OS) No.1599/2008 & CC NO.25/2009 Page 15 of 24 Rs.200/- for mense profit. In view of the said submission the suit is triable by senior civil judge only not by Honble High Court. Hence in view of para 17 of the plaint itself the suit is liable to be rejected. and the defendant/Counter Claimant in reply on merits to the paragraphs of the plaint qua court fees has pleaded that The court fees is required to be paid on the valuation of Rs.2,50,00,400.

28. When the counsel for the defendant/Counter Claimant, during the hearing raised the said contention contending that since the defendant/Counter Claimant is admittedly in possession of Shop No.1734- A also known as Shop. No.173 , the plaintiffs ought to have paid ad valorem court fees. I enquired from the counsel for the defendant/Counter Claimant, whether not the suit for partition was of both the shops and the plaintiffs, according to the defendant/Counter Claimant also were in possession of one of the shops, how could it be said that the plaintiffs were required to pay ad valorem court fees. No answer was forthcoming from the counsel for the defendant/Counter Claimant.

29. The counsel for the defendant/Counter Claimant in his written arguments has contended that the plaintiffs are liable to pay ad valorem court fees under Section 7 (c) of the Court Fees Act, 1870.

30. There is no Section 7 (c) of the Court Fees Act; either there is Section 7(iv)(c) which provides for court fees to obtain a declaratory decree or order where consequential relief is prayed or Section 7(v)(c) which provides for court fees on a suits for the possession of land, houses and gardens or Section 7(x)(c) which provides for court fees on a suit for CS(OS) No.1599/2008 & CC NO.25/2009 Page 16 of 24 specific performance or Section 7(xi)(c) which provides for court

fees on a suit between landlord and tenant. Else the law is clear that when the plaintiff is in possession or constructive possession of the property of which partition is sought, no ad valorem court fees is required to be paid and fixed court fees is to be affixed on the plaint. Reference in this regard may be made to Neelavathi Vs. N. Natarajan (1980) 2 SCC247 Jagannath Amin Vs. Seetharama (2007) 1 SCC694 and Saroj Salkan Vs. Capt. Sanjeev Singh (2008) 155 DLT300(DB).

31. Issue no.5 is also decided against the defendant/Counter Claimant and in favour of the plaintiffs. Issue No.6. Whether the counter claim has been properly valued for the purpose of court fee and jurisdiction?. OPP32 No arguments have been urged on this issue. I may in any case record that the defendant/Counter Claimant has valued the Counter Claim for the relief of declaration at Rs.200 and paid requisite court fees thereon and which is in accordance with Article 17(iii) of Schedule II to the Court Fees Act.

33. Issue no.6 is thus decided against the plaintiffs and in favour of the defendant/Counter Claimant. Issue No.2. Whether there was any mutual settlement as regards the suit property?. If so, its effect?. OPD Issue No.7. Whether the defendant is entitled to the decree of declaration as sought by way of counter claim?. OPD CS(OS) No.1599/2008 & CC NO.25/2009 Page 17 of 24 34. Issue no.2 is the key issue on which adjudication of the suit and the Counter Claim is dependent. If Issue no.2 is decided in favour of the defendant/Counter Claimant, the suit for partition will be dismissed and Counter Claim allowed. Conversely if Issue No.2 is decided against the defendant/Counter Claimant, a preliminary decree for partition shall follow and the Counter Claim dismissed.

35. As would be evident from the order dated 22nd April, 2016 reproduced above, this Court after hearing the counsels post conclusion of evidence was not satisfied that the defendant/Counter Claimant had discharged the onus of Issue no.2 but had still given an opportunity to the defendant/Counter Claimant to prove documents with respect to acting upon of the oral partition on the contention of the counsel for the defendant/Counter Claimant of the respective shops having been mutated in the name of the respective parties and electricity connection of Shop

No.1734 also known as Shop No.173

which the defendant/Counter Claimant claimed in the oral partition comes to his exclusive share had been got changed in the exclusive name of the defendant/Counter Claimant and that the oral partition was reflected in the Income Tax Returns of the parties.

36. Though the defendant/Counter Claimant in pursuance thereto filed IA No.9136/2016 supra but only seeking to examine the witnesses from (i) BSES Yamuna Power Limited (ii) the Office of Delhi Sales Tax and (iii) Indian Postal Department. Else in paras 3 & 5 of the application reference was made to the evidence already led. The only additional documents filed by the defendant/Counter Claimant along with this application were the CS(OS) No.1599/2008 & CC NO.25/2009 Page 18 of 24 receipts of Money Orders sent towards rent of Shop No.1734 also known as Shop. No.1734/2, Dariba Kalan, Delhi from January, 2001 to December, 2001, January, 2002 to December, 2002, January, 2003 to December, 2003 and January, 2004 to December, 2004 sent by M/s. Mehtab Singh Jain & Sons and addressed to Dear Madam, with no name of the addressee thereon.

37. Else, the defendant/Counter Claimant in his examination-in-chief purported to prove (i) Site Plan as Ex.DW1/1; (ii) Counterfoils of Rent Receipts issued by the defendant/Counter Claimant of rent of Shop No.1734/2, Dariba Kalan, Delhi to Puneet Jewels as Ex.DW

to Ex.DW1/26; (iii) Certificates of Registration under Delhi Value Added Tax Act, 2004 of Puneet Jewels at Dariba Kalan, Delhi as DW1/27; (iv) Certificate of Registration of Puneet Jain, proprietor of Puneet Jewels ,at 1734, Dariba Kalan, Delhi with Municipal Corporation of Delhi as Ex.DW1/28; (v) Electricity Bills of Shop No.1734/2, Dariba Kalan, Delhi in the name of the defendant Chakresh Jain as Ex.DW1/29 to DW1/35; (vi) Bill of Electricity of Shop No.173

of November, 1991 in the name of M/s. Ranjit Singh Jain as Ex. DW1/36; (vii) Notice of Demand under the Delhi Sales Tax Act, 1975 in the name of M/s. Ranjit Singh Jain Jewellers at the address of 307, Dariba Kalan, Delhi as Ex.DW1/37; (viii) Assessment Order of M/s. Ranjit Singh Jain Jewellers under the Delhi Sales Tax Act for the year 1997-98 as Ex.DW1/38; and, (ix) Notice of Demand under the

Central Sales Tax Act, 1956 and Assessment Order in the name of Ranjit Singh Jain Jewellers at the address of 307, Dariba Kalan, Delhi as Ex.DW1/39 and DW1/40. CS(OS) No.1599/2008 & CC NO.25/2009 Page 19 of 24 38. While glancing through the aforesaid documents and to which no attention was drawn by either counsels during the hearing, an interesting aspect came to light. The counterfoils of Receipt of Rents issued to Puneet Jewels filed and proved as Ex.DW

to DW

and DW1/15 to Ex.DW1/26 by the defendant himself, show the same to have been issued by Suresh Chand Chakresh Kumar, demolishing the claim of the defendant/Counter Claimant of oral partition. The rent receipts issued by the defendant himself with respect to shop of which he claims to have become sole owner under the oral partition, in the joint names of Suresh Chand Jain (being the predecessor-in-interest of the plaintiffs) and the defendant/Counter Claimant unequivocally establish that the said shop is the shop of the plaintiffs as well as the defendant/Counter Claimant. Though the remaining Rent Receipts do not bear the said stamp but the same is of no avail. There was no explanation in the written statement in this respect and there is no explanation thereof in the affidavit by way of examination-in-chief of the defendant/Counter Claimant also. I am of the view that the same is enough to allow the suit and to dismiss the Counter Claim.

39. However since the counsel for the plaintiffs argued that the defendant/Counter Claimant in his cross-examination has admitted in entirety the claim of the plaintiffs, I have also perused the cross- examination of the defendant/Counter Claimant conducted on 8th April, 2013, 12th September, 2013 and 23rd March, 2015. The defendant/Counter Claimant therein is found to have stated (i) that there was no Dissolution Deed of M/s. Ranjit Singh Jewellers and there was only an Assessment Order proved by him as Ex.DW1/38 (however a perusal of DW1/38 being CS(OS) No.1599/2008 & CC NO.25/2009 Page 20 of 24 an Assessment Order for the year 1997-98 of M/s. Ranjit Singh Jewellers under the Delhi Sales Tax Act does not show that the firm had been dissolved); (ii) that the possession of the shop was not delivered to him, either by M/s. Ranjit Singh Jain Jewellers or by the Sale Tax Department but by the verbal Family Settlement; (iii) that M/s. Ranjit Singh Jain Jewellers was not the owner of either of the two shops;

(iv) that he could not admit or deny that M/s. Mehtab Singh Jain & Sons was occupying the shop in its tenancy without payment of any rent; (v) that he did not obtain the consent of the plaintiffs before giving the shop on rent to Puneet Jewellers; (vi) he could not remember the date or month of the verbal settlement whereunder the shops were so partitioned but it occurred in the year 2000; (vii) the verbal Family Settlement was never recorded in writing and there was no document of any nature with respect thereto; (viii) that he did not execute any Relinquishment Deed pertaining to Shop No.307, Dariba Kalan, Dehli or his business interest therein; (ix) that the shops till date have not been mutated by MCD in the name of either of the parties; (x) that he had never written to the MCD claiming that by way of oral partition Shop No.1734 (also known as Shop No.1734/2) had come to his share though he had been paying House Tax with respect to his portion thereof; (xi) that he had not written any letter to M/s. Mehtab Singh Jain & Sons informing that under the oral partition the shop in their tenancy had gone to the plaintiffs; (xii) that about 8-9 months prior to 12th September, 2013, M/s. Mehtab Singh Jain & Sons had sent a money order for rent in his wifes name but he had refused to accept the same; (xiii) that Puneet Jain is his son and both he and his son are running the business of Puneet Jewels in Shop No.1734 also known as Shop No.1734/2; (xiv) though CS(OS) No.1599/2008 & CC NO.25/2009 Page 21 of 24 there was a rent agreement with Puneet Jewels but the same had not been produced; (xv) that it is correct that the plaintiffs are entitled to 50% share in the suit properties. It is correct that one of the suit shops was lying locked till November, 2005; again said, intermittently used to open that suit shop even prior to that when electricity connection was disconnected by DESU; it is incorrect to suggest that I broke open the locks of the said suit shops and occupied the same in November, 2005; instead I occupied the same with mutual consent of the plaintiffs and the defendant; Volunteered; the keys of that shop were always with me; it is incorrect to suggest that since November, 2005 I have been conducting the business in the shop occupied by me; it is incorrect to suggest that I have not produced my ITR (for which direction for production whereof was issued on the previous date of 12th September, 2013); for the reasons I want to conceal that since November, 2005 I have been conducting the business in the shop occupied by me.

40. The defendant, indeed in the cross-examination on 23rd March, 2015 has admitted that the plaintiffs are entitled to 50% share in the suit properties and the plaintiffs are entitled to decree on said admission also. In the said context, notice may also be taken of order dated 3rd February, 2014 recording Learned counsel for the defendant submits that the witness does not wish to produce the copies of his income tax returns pertaining to the financial years 2004-2005 to 2012-2013 and that while deferring the cross-examination on 12th September, 2013, direction was issued to the defendant/Counter Claimant to produce the same. Adverse inference has to be drawn against the defendant/Counter Claimant therefrom also. If a party withholds important documents in his possession which can throw light on CS(OS) No.1599/2008 & CC NO.25/2009 Page 22 of 24 the facts at issue, the Court may draw an adverse inference, even if the burden of proof does not lie on the party. Reference may be made to Gopal Krishnaji Ketkar Vs. Mohamed Haji Latif AIR 1968 SC1413 and Union of India Vs. Ibrahim Uddin (2012) 8 SCC148 41. The defendant/Counter Claimant, inspite of opportunity granted on 22nd April, 2016, has thus failed to discharge onus of Issue no.2.

42. The emphasis of the counsel for the defendant, on both shops being of same size and with same location advantage, does not prove partition. It cannot be forgotten that a vacant shop has far more value than a shop, of the same size and with the same location, in the occupation of tenant protected by Delhi Rent Control Act, 1958. Similarly, the factum of the electricity meter being in the name of the defendant alone also does not prove partition. The defendant, as a co-owner in occupation, was entitled to apply therefor.

43. Resultantly, the suit has to succeed and the Counter Claim has to fail.

44. Issues no.2 & 7 are thus decided against the defendant/Counter Claimant and in favour of the plaintiffs. Issue No.8. Relief.

45. The suit thus succeeds. A preliminary decree for partition of Shops No.1734-A & 1734 also known as Shops No.173

& 1734/2, Dariba Kalan, Delhi is passed, declaring the plaintiffs (i) Kanak Jain; (ii) Abhay Kumar Jain; (iii) Rekha Jain; and, (iv) Ektaa Jain together to be having 50% share therein and the defendant Chakresh Kumar Jain to be having the remaining

50% share therein. CS(OS) No.1599/2008 & CC NO.25/2009 Page 23 of 24 46.
Decree sheet be drawn up.

47. Counter Claim No.25/2009 of the defendant is dismissed.

48. Decree sheet be drawn up.

49. List for exploring the possibilities of partition of the properties by metes and bounds. The counsels to on the next date of hearing also inform the status of the eviction proceedings if any undertaken against M/s. Mehtab Singh Jain & Sons.

50. List on 30th April, 2019. RAJIV SAHAI ENDLAW, J.

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