

Romesh Chander Sethi Vs. Inder Mohan Sethi and anr.

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SooperKanoon Citation : sooperkanoon.com/708885

Court : Delhi

Decided On : Aug-12-2009

Reported in : 163(2009)DLT4

Judge : Reva Khetrapal, J.

Acts : Evidence Act - Sections 58; Delhi Rent Control Act - Sections 25B; Registration Act - Sections 17(1); Stamp Act - Sections 2(15); Code of Civil Procedure (CPC) - Sections 151; Delhi Development Rule

Appeal No. : CS (OS) 1432/1999

Appellant : Romesh Chander Sethi

Respondent : Inder Mohan Sethi and anr.

Advocate for Def. : Rajesh Yadav, Adv. for D-1 and ; Ravi Verma, Adv. for D-2

Advocate for Pet/Ap. : Dinesh Garg, Adv

Judgement :

Reva Khetrapal, J.

1. The plaintiff in the present suit seeks partition of property bearing No. 13-B/4, Old Rajinder Nagar, New Delhi claiming one-half share in the said property.

2. The facts succinctly stated are that in the year 1954, Shri Jagat Ram Sethi had purchased the leasehold rights of the aforesaid property, measuring 752.3 sq. metres (868 sq. yards) from the Delhi Improvement Trust (now DDA) by way of a perpetual Lease Deed dated 12th September, 1956, registered as Document No. 3112, Additional Book No. I, Volume 298 with the Sub-Registrar, Delhi on 24th September, 1956. On this plot, Shri Jagat Ram Sethi constructed a two and a half storeyed residential house and continued to hold the same as an owner till the time of his death on 15th April, 1978. He left surviving him Smt. Daya Wati Sethi his widow, Smt. Prem Sahni his daughter (the defendant No. 2), Shri R.C. Sethi his son (the plaintiff herein) and Shri I.M. Sethi his younger son (the defendant No. 1 herein). He also left a will dated 06.07.1971 bequeathing the property to his two sons, i.e., the plaintiff and the defendant No. 1 in equal shares with the right of residence to his wife during her lifetime alongwith the rental income therefrom.

3. About seven years later, his widow (Smt. Daya Wati Sethi) also died on 28th June, 1985. She too left a will dated 1st March, 1979 bequeathing the property in equal shares to her two sons. Thus, the plaintiff and the defendant No. 1 came to own the property in equal shares.

4. It is the case of the plaintiff that the two brothers came to an understanding with regard to the user of the portions of the property between them till it was partitioned. It is further the case of the plaintiff that in the year 1985, the first floor was rented out by the defendant No. 1 to one Shri Rajiv Verma while M/s. Trade Links Private Limited, which had vacated the first floor in 1985, continued to retain the barsati floor as tenant of the defendant No. 1. In October, 1991, the plaintiff retired and commenced residence in the ground floor. The defendant No. 1 retired in 1995, and then proceeded to recover possession of the first floor from Shri Rajiv Verma. At the time of the filing of the suit, therefore, the ground floor was occupied by the plaintiff, the first floor by the defendant No. 1, and the barsati floor was under the occupation of Trade Links Private Limited from whom the defendant No. 1 was recovering the rent.

5. The plaintiff's further case is that the plaintiff is being deprived of the proper usufruct of his share in the suit property and is unable to derive any advantage

from its immense potential. In other words, the plaintiff states that the property is being wasted and accordingly it has become necessary to seek partition of the same as undivided co-owner.

6. The defendant No. 1 has contested the suit by filing a written statement raising a number of preliminary objections to the maintainability of the suit. The first of the said preliminary objections which is the mainstay of the defence of the defendant No. 1 is that the suit for partition filed by the plaintiff is not maintainable as the property already stood divided in pursuance of an oral partition between the plaintiff and the defendant No. 1 on 5th July, 1985, immediately after the death of their mother on 28.06.1985 and the mutual agreement dated 06.07.1985 between the plaintiff and the defendant No. 1. The said mutual agreement was signed by the parties acknowledging the oral partition dated 05.07.1985 and the fact that they had taken possession of their respective portions.

7. The second preliminary objection of the defendant No. 1 relates to the impleadment of the defendant No. 2 by the plaintiff and it is stated that the defendant No. 2 is neither a necessary nor a proper party for the effectual disposal of the case. By way of preliminary objection No. 3, the defendant No. 1 has pleaded that even otherwise the suit of the plaintiff is not maintainable, as the plaintiff has not approached this Court with clean hands, and has deliberately suppressed the factum of division and partition of the suit property. Preliminary objection No. 4 relates to the plea of the defendant No. 1 that the suit is hopelessly time barred and liable to be thrown out on account of delay and laches. Preliminary objection No. 5 relates to the mis-description of the suit property in the plaint while in preliminary objection No. 6 it is stated that the suit for partition is not maintainable till the defendant No. 1 seeks a declaration against the oral partition and the mutual agreement dated 6th July, 1985.

8. On facts, the defendant No. 1 in his written statement did not dispute that Shri Jagat Ram Sethi died on 15th April, 1978, leaving behind a will dated 06.07.1971 (Ex.DW-1/P1), whereby he bequeathed the property in question unto his two sons, the plaintiff and the defendant No. 1. The defendant No. 1 also admitted that Smt. Daya Wati Sethi expired on 28th June, 1985, leaving behind a will dated

01.03.1979 (Ex.DW-1/P2) whereby she bequeathed whatever property she had to her two sons in equal shares. As regards the plaintiff's prayer for partition, as already stated, the defendant No. 1 set up an entirely different case to that of the plaintiff. According to him, immediately after the death of their mother on 05.07.1985, the plaintiff and the defendant No. 1 had decided to orally partition the suit property and enjoy their respective shares to the exclusion of each other. It was decided by them that the ground floor portion along with the garage block on the left side facing the building be allotted in favour of the plaintiff; and the first floor portion along with the barsatis, the barsati floor and the garage block on the right side facing the building be allotted to the defendant No. 1 and be owned by him to the exclusion of the plaintiff. Immediately after the said decision and in pursuance thereof, the plaintiff and the defendant No. 1 took possession of their respective portions. However, to acknowledge and record as a Memorandum the terms of the said oral partition, the plaintiff and the defendant No. 1 decided to make a mutual agreement. The said Memorandum was drawn up on 06.07.1985 acknowledging the oral partition and was signed by the plaintiff, the defendant No. 1 and the husband of the defendant No. 2, who signed as a witness. Another witness, namely, Shri B.R. Kohli signed the mutual agreement on 06.07.1985. Thereafter, the parties proceeded to rent out their respective portions to their separate tenants, to the exclusion of each other and to execute lease deeds in terms of the settlement arrived at between them. The suit property was also jointly mutated in the records of right in the names of the plaintiff and the defendant No. 1 on 16th August, 1978, i.e., subsequent to the death of Shri J.R. Sethi. In short, the case of the defendant No. 1 is that the property cannot be partitioned as it already stands partitioned between the plaintiff and the defendant No. 1 and that the defendant No. 2 has no right, claim or interest in the suit property.

9. In the written statement filed by the defendant No. 2, however, the defendant No. 2 has taken the stand that no will or bequest was executed by either of her parents and thus the claim of the plaintiff and the defendant No. 1 for half share each in the suit property is ill-founded. It is submitted by the defendant No. 2 that she too is entitled to a share in the suit property and that the same is liable to be partitioned amongst the parties to the suit as per their entitlement in law.

10. On the pleadings of the parties, the following issues were framed on 01.03.2001:

(1) Whether Jagat Ram Sethi left behind Will dated 6th July, 1971, as alleged? OPP

(2) Whether Smt. Daya Wati Sethi left behind Will dated 1st March, 1979? OPP

(3) Whether plaintiff is entitled to half share in suit property? OPP

(4) Whether defendant No. 2 executed the Writing dated 7th July, 1985 in the circumstances set out in the written statement filed by her? If so, its effect? OPD-2

(5) Whether suit property stood partitioned pursuant to an oral partition which had also been acted upon, as alleged? If so, its effect? OPD

(6) Whether defendant No. 2 is not a necessary party to suit? OPD-1

(7) Relief.

11. On the aforesaid issues, the parties went to trial. In the course of the trial, the plaintiff tendered in evidence his affidavit by way of evidence and was cross-examined by the learned Counsel for the defendant No. 1 at considerable length. The defendant No. 1 too tendered in evidence his affidavit by way of evidence and was cross-examined by the learned Counsel for the plaintiff. No evidence in rebuttal was led by the defendant No. 2. In the course of the recording of the evidence before the learned Local Commissioner Mr. Arun Bhardwaj, Advocate, the defendant No. 2, who had earlier filed a written statement contesting the suit, withdrew her claim vide letter dated 1st September, 2004 (Ex.DW-2/1). This letter was tendered by the counsel appearing for her [Mr. Vikram Nandrajog, Advocate], which reads as under:

REGISTERED ACK DUE

Prem Sahni

Tele: 2433044

20-A, D/C, Gandhi Nagar

Jammu-180 044

September 1, 2004

Mr. Vikram Nandrajog,
224, Lawyers Chambers,
Delhi High Court,
New Delhi-3

Dear Sir,

Re: Suit No. 1432/1999

Shri Ramesh Chander Sethi v. Shri Inder Mohan Sethi and Anr., Before Hon'ble Delhi High Court.

This acknowledges receipt of your letter dated 28/8/2004 regarding the next date of hearing of the above case.

Due to my old age and indifferent health and difficulty in travelling, after due consideration, I have decided not to press my case. Please be informed that I do not wish to pursue the case any further. I wish to withdraw my claim to the share of the property of my father Late Shri Jagat Ram Sethi.

Kindly inform the Hon'ble Court about this decision at the next hearing.

Kindly acknowledge. Thanking you,

Yours faithfully sd/

Mrs.Prem Sahni

12. Since the statement of the defendant No. 2 had not been recorded, in order to place matters beyond the pale of controversy, by an order dated 18th July, 2005,

this Court (Hon'ble Mr. Justice Swatanter Kumar) in order to fully and finally determine the issue in controversy in the present suit issued court notice to her and on 13.09.2005 recorded her statement. In her said statement, the defendant No. 2 categorically admitted that letter dated 1st September, 2004 (Exhibit DW2/1) had been written by her to her counsel, Mr. Vikram Nandrajog, instructing him not to pursue the case any further.

13. On the same date, i.e., on 13.09.2005, the following order was passed: Statement of Defendant No. 2 has been recorded in court today. Learned Counsel appearing for the plaintiff submits that in face of the letter Exhibit DW2/1 the defendant would have no right to claim any share in the property.

List for arguments on 7th December, 2005.

14. Around the end of November, 2005, however, the defendant No. 2 moved an application, being IA No. 9651/05 seeking to retract from the statement made by her on 13.09.2005 as well as the letter Exhibit DW2/1. Notice of the said application was issued to the plaintiff who submitted through his counsel that he did not wish to file any reply to the application and would argue his opposition to the prayer made in the application. Thereafter, the application came up for hearing on April 22, 2008 when the same was dismissed on the ground that the defendant No. 2 had neither cared to appear on 2nd November, 2006 when the same came up for hearing nor had cared to appear on 22nd April, 2008.

15. Significantly, no application was filed by the defendant No. 2 or her counsel for the restoration of the aforesaid application nor any fresh application was filed by the defendant No. 2 at any subsequent stage.

16. I have heard Mr. Dinesh Garg, the learned Counsel for the plaintiff, Mr. Rajesh Yadav, the learned Counsel for the defendant No. 1 and Mr. Ravi Verma, the learned Counsel for the defendant No. 2 and scrutinized the records. My findings on the issues framed by this Court are recorded hereunder.

17. Issues No. 1, 2 and 3: Issues No. 1, 2 and 3 which pertain to the Will dated 6th July, 1971 of Shri J.R. Sethi (Ex.DW-1/P1) and the Will dated 1st March, 1979 of

Smt. Daya Wati Sethi (Ex.DW-1/P2), for the sake of convenience, are being dealt with together as the effect and purport of both the Wills is the same. In the Will executed by him, Shri J.R.Sethi bequeathed his entire estate, stated to be wholly self-acquired, including House No. 13-B/4, Uttari Marg, New Delhi to his two sons, namely, Romesh Chander Sethi and Inder Mohan Sethi in equal shares. The testator gave his wife a life estate along with the net income from the net rent realized from the above-mentioned property during her lifetime. As regards his daughter, the defendant No. 2, he devised as follows:

That my married daughter, Mrs.Prem Sahni shall not be entitled to any share in any of the properties, movable or immovable whatsoever, as she has been sufficiently provided for by me by way of her dowry and other gifts and cash or kind from time to time. I hereby specifically divest her, i.e., my married daughter Smt. Prem Sahni from claiming any share in my property, movable or immovable.

18. On her demise, Smt. Daya Wati, the wife of late Shri Jagat Ram Sethi also bequeathed her estate including movable and immovable property of all kinds unto her two sons, i.e., the plaintiff and the defendant No. 1 in equal shares, half-share each.

19. The aforesaid two Wills have been specifically admitted in the written statement filed by the defendant No. 1 as also in the course of his cross-examination and have, therefore, been exhibited as Ex.DW-1/P1 and Ex.DW1/ P2 respectively. In his cross-examination, DW-1 stated that both the Wills were correct as per their originals. In the course of his further cross-examination, DW-1 stated that it was correct that the original Wills were with him and he had filed the same in eviction proceedings for the eviction of his tenant on the first floor.

20. The defendant No. 2 did not choose to lead any evidence in rebuttal to dispute the validity of the aforesaid two Wills nor she chose to cross-examine PW-1 or PW-2 or to appear in the witness box to state on oath that the two Wills had not been executed by her father and mother. It is trite law that the facts admitted in terms of Section 58 of the Evidence Act are not required to be proved (See: Seth Ramdayal Jat v. Laxmi Prasad JT 2009(5) SC 461; Gannmani Anasuya and Ors. v. Parvatini Amarendra Chaudhary : (2007) 10 SCC 296; L.K. Verma v. HMT Ltd. :

(2006) 2 SCC 269; Avtar Singh v. Gurdial Singh (2006) 12 SCC 552; Vice Chairman, Kendriya Vidyalaya Sangathan and Ors. v. Girdharilal Yadav : (2004) 6 SCC 325). It is accordingly held that the Will dated 06.07.1971 left behind by late Shri J.R.Sethi and the Will dated 01.03.1979 left behind by late Smt. Daya Wati Sethi are the genuine Wills of the aforesaid testator and testatrix. This being so, the plaintiff and the defendant No. 1 must be held entitled to half-share each in the suit property. Issues No. 1, 2 and 3 are decided accordingly.

21. Issues No. 4 and 6: Issues No. 4 and 6 are being dealt with together as both the said issues relate to the claim of the defendant No. 2 as set out by her in her written statement.

22. In the written statement filed by her, the defendant No. 2 categorically stated that both Shri Jagat Ram Sethi and Smt. Daya Wati Sethi died intestate and that the two Wills purported to have been executed by her late father and mother were created documents, which were created by her brothers by representing that the same were for the purpose of mutation and that she would continue to have all the rights in the suit property as co-owner thereof. Further, according to the defendant No. 2, the plaintiff and the defendant No. 1 obtained from her in writing that she accepts the existence, correctness and genuineness of the Will dated 06.07.1971. The said writing was executed by her on the representation of the plaintiff and the defendant No. 1 that the Will was only for the purpose of mutation and not for any other purpose. Similarly, after the death of their mother, the plaintiff and the defendant No. 1 created the alleged Will dated 01.03.1979. The plaintiff and the defendant No. 1 got the document dated 06.07.1985 also signed by Shri Sat Paul Sahni, (husband of the defendant No. 2) as a witness to the said document. The two Wills in question and the document executed by her accepting the existence, correctness and genuineness of the Will dated 06.07.1971 (not filed) and the purported mutual agreement dated 06.07.1985 were all documents created by the plaintiff and the defendant No. 1 for the specific purpose of effecting mutation in respect of the suit property.

23. In the aforesaid backdrop of the admission of the defendant No. 2 that she had accepted the existence, correctness and genuineness of the Will dated

06.07.1971, a few facts need to be noted at this stage in order to deal effectively with the matter.

24. Not only does the defendant No. 2 admit that she had accepted in writing the existence, correctness and genuineness of the Will dated 06.07.1971, and that her husband Shri Sat Paul Sahni had witnessed the agreement dated 06.07.1985, the defendant No. 2 at no point of time thereafter, prior to the filing of her written statement, chose to challenge the Wills in question. The defendant No. 2 having disputed the genuineness of the Wills in her written statement, in the course of the trial an affidavit of evidence of PW-2 Shri M.M.Mehta was filed by the plaintiff, who was an attesting witness to the Will executed by Smt. Daya Wati Sethi in order to prove the Will. However, at this juncture, the defendant No. 2 made a statement that she did not wish to press her case and the following order was recorded by the Local Commissioner, Mr. Arun Bhardwaj, Advocate in the Record of Proceedings on 14.09.2004:

The defendant No. 2, Smt. Prem Sahni through her Advocate Mr. Vikram Nandrajog filed letter dated 01.09.2004 stating that she does not wish to press her case. Counsel for plaintiff is closing her evidence in affirmative and is dropping PW-2 Shri M.M. Mehta....

25. Thereafter, the defendant No. 2 chose not to press her case either by appearing in the witness box or by cross-examining the witnesses of the plaintiff and the defendant No. 1. Had she not made a statement that she did not press her case, presumably the plaintiff would have formally proved the original Will of his late father and that of his late mother. As things stood, the plaintiff chose to drop the remaining witnesses on the premise that the defendant No. 2 was not pressing her claim in the suit property. It was only much later on issuance of court notice to her, for the purpose of recording her formal statement that the defendant No. 2 appeared to state that she wanted to press her claim, though she did not deny that her counsel had on her despatching a letter to him in this regard made a statement before this Court that she did not press her case.

26. Yet again, when the matter was listed for arguments, the defendant No. 2 filed an application under Section 151 CPC being I.A. No. 9651/2005 to contest the

suit, but again chose not to press the said application, resulting in its dismissal in default three years later, i.e., on 22.04.2008. As already stated, no effort was thereafter made by the defendant No. 2 to have the said application restored or to press her claim in the suit property in any other manner whatsoever.

27. The aforesaid being the admitted position, the defendant No. 2 cannot at this stage of the proceedings be permitted by this Court to render at naught the document dated 06.07.1985 witnessed by her husband, the letter dated 14.09.2004 sent by her to her counsel instructing him not to press the case, the statement made by her counsel before the Local Commissioner that the defendant No. 2 did not intend to press the case resulting in the closure of the remaining evidence of the plaintiff, the admission made by her in Court in her statement recorded by the Court on 13.09.2008 that she had instructed her counsel not to press her claim. The effect of the defendant No. 2 having filed an application even thereafter before this Court and having chosen not to pursue the same, yields the same result. The shifting stands taken by the defendant No. 2 and the fact that she did not choose to lead any evidence in support of her claim or to put herself in the witness box, in my view, must weigh heavily against the defendant No. 2.

28. Further the onus of proving of issue No. 4 that her husband had executed the writing dated 7.7.1985 in the circumstances set out by her in her written statement was squarely upon the defendant No. 2. She having failed to discharge the said onus, issue No. 4 must be decided against her. The necessary corollary is that issue No. 6 must also be decided against the defendant No. 2. Issues No. 4 and 6 are decided accordingly.

29. Issue No. 5: The only surviving issue which remains to be considered by this Court pertains to the stand taken by the defendant No. 1 that the suit property stood partitioned pursuant to an oral partition, which had also been acted upon by both parties. The onus of proving this issue was upon the defendant No. 1.

30. Before going into the evidence adduced by the parties, it is deemed appropriate to set out the contents of this document, which is heavily relied upon by the defendant No. 1 in support of his case. It reads as under: Terms of mutual agreement between brothers Romesh Chandra and Inder Mohan Sethi, son of late

Shri J.R.Sethi and late Mrs.D.W.Sethi, drawn up on the demise of their mother, who passed away on 28.06.1985.

1. The ground floor portion, along with the garage block on the left side facing the building is allotted in favour of R.C.Sethi.

2. The first floor portion, along with the barsaties and a garage block on the right side facing the building is allotted to I.M.Sethi.

3. Till such time as their DDA flat is ready for occupation, the sister Mrs. Prem Sahni and her husband Mr. Sat Paul Sahni be permitted to occupy the accommodation presently in their occupation on the first floor.

4. A specified portion of the ground floor will be retained for occasional use by either of the brothers during visits to Delhi. This portion will be equipped with furniture, refrigerator, B & W T.V, crockery, cutlery, etc. from the main house.

5. From amongst the funds available in various banks, the money will be reserved for priority utilisation towards:

i) Payment of rates, taxes and other expenses incurred on the house (e.g Electricity, water, telephone rental, etc.

ii) For repairs/modifications/alterations essentially required for maintenance of the building, including provision of tube well, sump, etc. to augment the water supply system.

iii) For provision of extensions to the garage blocks on either side of the main building (subject to these extensions being in conformity of the house and construction of a multi storeyed building which might be put on the plot subject to mutual agreement of the owners.

6. The proceeds of the rent receipts from all the portions let out will be shared between the brothers equally until such time as either party wants to take possession of the respective portions for any specific purpose (e.g. for additions/alterations), or upon moving in after retirement from active service.

7. Since I.M.Sethi has been allotted the first and second (barsati floor of the main building), he would be entitled to make additions/alterations to the barsatis at his cost and according to his plans.

8. It was agreed that unless mutually agreed upon between the brothers on any specific items, moveable property belonging to their respected parents will not be sold, but would be shared between them. In case of major items (e.g. Colour T.V set, A.C machines, etc.), the brother taking over the item will pay half the cost of purchase or rated market value to the other brother.

9. The case at hand, and jewellery including silver, watches, etc. left by the respected parents would be shared equally between the brothers inheriting the property according to the wills left by the parents. Similar fair/equitable distribution would apply to other personal effects, household goods (e.g. Clothes, linen, quilts, blankets, carpets, etc.) after removal of items retained from common usage.

sd/- sd/- sd/- sd/Sat

Paul Sahni

I.M. Sethi

R.C. Sethi

B.R. Kohli

31. The aforesaid document, it is reiterated at the risk of repetition, is signed by the plaintiff, the defendant No. 1, the husband of the defendant No. 2 and by an independent witness Mr. B.R.Kohli. In the course of his cross-examination, PW-1 Shri R.C.Sethi categorically admitted the signatures of all the aforesaid persons on both pages of the document and also admitted that the same was in his handwriting as the handwriting of his brother (defendant No. 1) was bad. He, however, denied that the document Ex.DW-1/1 was based on an oral partition dated 05.07.1985 and stated that it was merely an ad hoc arrangement pending occupation of their respective portions of the suit property after retirement, as both of them had long periods of Govt. service left. He admitted that the ground floor

and the left side garage were in his possession as on date, which was used by him in rear part and the front part was rented out to one Shri Mehta and that on 02.11.1991, the said tenant (Shri Mehta) vacated the front part of the ground floor and thereupon he shifted into this portion. In further cross-examination, he also admitted that two joint affidavits had been executed by him and the defendant No. 1 dated 13.07.1989 and 17.02.1993 and one undated affidavit had also been executed (Ex.PW-1/D1, PW-1/D2 and PW-1/D3) and that the contents of the said affidavits were correct. He also admitted that one Shri Rajiv Verma was inducted as a tenant on the first floor by the defendant No. 1 and that on the death of said tenant, the defendant No. 1 had filed an eviction petition against Ms. Neeru Verma, the wife of the said Rajiv Verma in respect of part of the first floor of the suit property, in which he (the plaintiff) had been impleaded as a proforma defendant. He admitted that the defendant No. 1 had entered into a lease deed with the said Rajiv Verma, that the defendant No. 1 used to collect rent from the said tenant and that he had never claimed rent from the said tenant. He also admitted that the defendant No. 1 had taken possession of the portion in the occupation of Ms. Neeru Verma on her vacating the same and he did not make any objection to the same.

32. In his further cross-examination, the plaintiff admitted that the fencing of the lawn in his possession and the ground floor was done by him without obtaining any permission from the defendant No. 1; that the lawn was entirely in his occupation and that the defendant No. 1 had no right to use the lawn, but stated that in turn, he (the plaintiff) was not allowed to visit the roof, the first floor and the second floor and the defendant No. 1 had forced him to shift his water tank from the roof top to his (the plaintiff's) garage.

33. DW-1, Shri Inder Mohan Sethi in his cross-examination admitted that in the DDA records the suit property stood in the joint names of the plaintiff and the defendant No. 1, but stated that this was so as there was no provision in the DDA rules for partition of leasehold property. He, however, stated that the suit property was assessed to property tax which was earlier being paid in his father's name, but in accordance with the new rules of the MCD, a person is entitled to pay property tax for the portion in his possession and from the last year (i.e. the year

2003), he had been paying the property tax for the portion in his occupation. He, however, admitted that the partition was not entered in the records of the MCD or in the Jamabandi (Ex.PW-1/D4).

34. The learned Counsel for the defendant No. 1 placed strong reliance on the following documents to prove his case of oral partition:

(i) Joint affidavit dated 17.02.1993 executed by the plaintiff and the defendant No. 1 (Ex.PW-1/D2), representing to the authorities that they had two separate portions in the manner set out in the memorandum dated 05.07.1985,

(ii) Joint affidavit dated nil (Ex.PW-1/D3) stating that the electricity supply to the house was controlled through four meters which were granted in favour of late Shri J.R.Sethi, and that two meters each would serve each of the portions in the possession of the plaintiff and the defendant No. 1.

(iii) Certified copy of the eviction petition No. 303/95 filed by the defendant No. 1 against his tenant, Ms. Neeru Verma (Ex.D1W1/1), widow of Shri Rajiv Verma, wherein it was clearly stated that rent was being paid by the said tenant to the defendant No. 1, along with Enclosure-B thereto wherein it was stated that the defendant No. 1 was residing in Bombay while the defendant No. 2 (the plaintiff herein) was in occupation of ground floor of the suit premises.

(iv) Lease agreement of the defendant No. 1 with his tenant Shri Rajiv Verma for the first floor (Ex.D1W1/3).

(v) Reply filed by the defendant No. 1 to the application under Section 25B of the Delhi Rent Control Act of Ms. Neeru Verma (Ex.D1W1/4), wherein it was clearly stated that after death of their father, the plaintiff and the defendant No. 1 had mutually divided the property in question as set out in the joint affidavit dated 17.02.1993.

(vi) Letter dated 06.02.1987 from the defendant No. 1 to the Managing Director of M/s. Trade Links Ltd. calling upon him to vacate the two barsati rooms and for timely payment of rent (Ex.D1W1/7) with A.D Card (Ex.D1W1/8).

(vii) Letter dated 21.04.1988 from the defendant No. 1 to M/s. Trade Links Ltd. enclosing the Memorandum of Agreement between the plaintiff and defendant No. 1 (Ex.D1W1/9).

(viii) Letter dated 28.04.1988 from M/s. Trade Links Ltd. to the defendant No. 1 regarding deposit of rent in the account of the defendant No. 1 (Ex.D1W1/10).

(ix) Letter dated 13.05.1988 from M/s. Trade Links Ltd. to the defendant No. 1 regarding deposit of rent in the account of the defendant No. 1 (Ex.D1W1/11).

(x) Letter dated 18.11.1988 from M/s. Trade Links Ltd. to the defendant No. 1 regarding deposit of rent in the account of the defendant No. 1 (Ex.D1W1/12).

(xi) Letter dated 24.06.1988 from Mr. Rajiv Verma to the defendant No. 1 regarding cheques issued towards rent to the defendant No. 1 and bank statement in respect thereof (Ex.D1W1/13 Colly.)

(xii) Letter dated 25.10.1991 from the plaintiff to the defendant No. 1 referring to their respective tenants (Ex.D1/2).

(xiii) Letter dated 30.10.1991 from Mr. Rajiv Verma to the plaintiff stating therein that the request of the plaintiff to vacate the tenanted premises was not reasonable, as he had no locus to make any such demand, as his landlord was the defendant No. 1 (Ex.PW-1/D6).

(xiv) Letter dated 04.06.1992 by Mr. Rajiv Verma stating therein that the plaintiff had nothing to do with the tenanted premises on the first floor and had no legal right or authority to come to the said portion of the tenanted premises (Ex.D1W1/14)

(xv) Carbon copy of letter from the plaintiff to the defendant No. 1 (Ex.D1/3) regarding non-payment of electricity bills of the first floor tenants.

(xvi) Letter dated 01.04.1992 from the plaintiff to the defendant No. 1 (Ex.D1/4) regarding working out of the wealth tax of the portion in the possession of the defendant No. 1.

(xvii) Letter dated 07.02.1993 from the plaintiff to the defendant No. 1 (Ex.D-1/5) stating that they had to get names of the owners of the house altered into their names for their respective portions as also for the electricity connections.

(xviii) Letter dated 29.11.1992 from the plaintiff to the defendant No. 1 advising the defendant No. 1 to serve a legal notice to the tenant occupying his first floor (Ex.PW-1/D7).

(xix) Letter dated 24.06.1992 from the plaintiff to the defendant No. 1 (Ex.PW-1/D8) stating that they had to get the names of the allottees altered in the DESU records, i.e. ground floor in his name and first floor in the name of the defendant No. 1.

(xx) Letter dated 23.06.1995 from the plaintiff to the defendant No. 1 enclosing an affidavit for signatures of the defendant No. 1 (Ex.D-1/6).

35. Mr. Rajesh Yadav, the learned Counsel for the defendant No. 1 urged that the aforesaid sheaf of correspondence clearly showed complete severance of legal status, and the factum of oral partition between the parties stands clearly established from a bare reading of the same. He further contended that the plaintiff had come to the court with unclean hands having suppressed the most material facts viz., the execution of document dated 06.07.1985 recording the factum of oral partition. There was not a whisper in the plaint with regard to the same and, on the other hand, when the defendant asserted the oral partition and placed on record the Memorandum dated 06.07.1985, the plaintiff chose not to file any replication to the aforesaid written statement. In the course of his cross-examination, the plaintiff in one breadth admitted that there was an oral partition of 05.07.1985, but in the very next breadth resiled from the said statement by stating that no oral partition had taken place.

36. Per contra, Mr. Dinesh Garg, the learned Counsel for the plaintiff contended that there was no oral partition, as the arrangement between the parties was merely for the transfer of amenities. Further, there being no provision in the Code of Civil Procedure for filing of replication, no adverse inference could be drawn against the plaintiff for non-filing of the same. According to him, the theory of oral

partition was negated by the defendant No. 1 himself, when he stated in his cross-examination that no negotiations for settlement of partition ever took place, since there was no need for any negotiations and the terms were drawn up by the plaintiff and accepted by him. Thus, learned Counsel urged that according to the defendant No. 1's own admission, there was no oral partition and, if there was no oral partition, the document dated 06.07.1985 required compulsory registration and fell within the mischief of Section 17(1)(b) of the Registration Act. In any case, he submitted, the said document was never acted upon.

37. In support of his contention, Mr. Garg, the learned Counsel for the plaintiff placed reliance on the judgment of the Hon'ble Supreme Court reported in *Sk. Sattar Sk. Mohd Choudhary v. Gundappa Ambadas Bukate* : AIR 1997 SC page 998. In paragraph-27 of the said judgment, it was held as under:

27. Partition, specially among the coparceners, would be a Transfer for purposes of Registration Act or not has been considered in *Nani Bai v. Gita Bai Kom Rama Gunge* : AIR 1958 SC 706 and it has been held that though a partition may be effected orally, if the parties reduce the transaction to a formal document which was intended to be evidence of partition, it would have the effect of declaring the exclusive title of the coparcener to whom a particular property was allotted (by partition) and thus the document would fall within the mischief of Section 17(1)(b) of the Registration Act under which the document is compulsorily registerable. If, however, that documents did not evidence any partition by metes and bounds, it would be outside the purview of that Section. This decision has since been followed in *Siromani v. Hemkumar* : AIR 1968 SC 1299 and *Roshan Singh v. Zile Singh* AIR 1988 SC 881.

38. Reference was also made by Mr. Garg to the following judgments:

Bhagwan Das and Ors. v. Girja Shankar and Anr. JT 2000 (Supp) 1 SC 246
Ravinder Kaur and Ors. v. Jagmohan Singh and Ors. : AIR 2005 Punjab and Haryana 56; *Chinthamani Ammal v. Nandagopal Gounder and Anr.* : (2007) 4 SCC 163; *Siromani and Ors. v. Hem Kr. and Ors.* : 1968 (3) SCR 639, *Krishnan Lal v. Ved Prakash and Ors.* decided by this Court (Hon'ble Mr. Justice Pradeep Nandrajog) on 23.03.2005 in CS(OS) 729/1989 and *Lala Om Prakash v. Hari Ram*

: AIR 2005 (Delhi) 190 (DB).

39. Mr. Rajesh Yadav, the learned Counsel for the defendant No. 1, on the other hand, relied upon the following decisions to buttress his contention that a partition had already been taken place between the parties: Kale and Ors. v. Dy. Director of Consolidation and Ors. : AIR 1976 SC 807; Tek Bahadur Bhujil v. Debi Singh : AIR 1966 SC 292 and Roshan Singh v. Zile Singh AIR 1988 SC 881.

40. An instrument of partition is defined in Section 2(15) of the Stamp Act as under:

2(15) An instrument of partition means any instrument whereby co-owners of any property divide or agree to divide such property in severalty and enclose entire final order for effecting the partition passed by any Revenue Authority or any Civil Court and an award by an Arbitrator directing the partition.

41. It is trite that for the last several decades, Courts have recognized that it is legally permissible to arrive at an oral family settlement dividing/partitioning the properties and thereafter to record the said settlement in a memorandum in writing, whereby the existing co-owners record that the property has already been partitioned or divided. Such a memorandum does not by itself partition the property nor does it create or extinguish any rights, but only records an oral partition in writing, as agreed to between the parties. The test for the embargo of Section 17(1)(b) of the Registration Act to apply being that the document must create, declare, assign, allot or extinguish any right title or interest, if it is a mere record of a previously completed transaction and does not in praesenti create any right it cannot be treated as an instrument creating partition. The distinction is fine, but nevertheless of some import. Eventually it is the intention of the parties which has to be gleaned and culled out from the document itself, evidenced by their mutual dealings with each other as well as with the concerned authorities in relation to the property in question, i.e., the DDA, MCD, DESU, TAX Authorities etc.

42. It is also trite that whether the past tense or the present tense has been employed in formulating the document is not conclusive in the determination of the

question as to whether the document does or does not create or extinguish any right. A memorandum of family settlement may very well be in the present tense, yet the Court may arrive at a conclusion that it is merely evidence of a previously completed transaction. Likewise, use of the past tense does not necessarily indicate that the document is a recital of a past transaction and it may very well create a right, title or interest in praesenti and, therefore, fall within the mischief of Section 17(1)(b) of the Registration Act.

43. In construing a document with a view to ascertain whether the same is an instrument of partition or not, judicial notice, in my view, must also be taken of the fact that more often than not oral partitions are worked out between the parties and acted upon for as many as two to three decades, before one of the parties seeks a decree of partition from a court of law for the reason that the portion of the property in his possession has not risen proportionately in value in relation to the portion in the occupation of his co-owner/s. For instance, if, with the passage of time, a penthouse becomes more valuable than a condominium on the first floor, an oral partition earlier effected between the parties may very well fall to the ground. Terrace rights may appear to be more attractive after a passage of time than title to the ground floor and its lawn, and vice versa. A family settlement must, however, be viewed by the Court from all angles, i.e., not only from the aspect of equitable partition amongst the parties, but also from the angle that if for any reason, unknown or unforeseen, the proportionate value of the portion in the occupation and possession of one or the other party dwindles, the same should not become a ground for dumping the oral partition, duly accepted and acted upon by the parties over a long period of time. A degree of finality must attach itself to any agreement to afford sanctity to it.. This is all the more so in the case of family arrangements in which fragile family ties are involved, which cannot in societal interests be allowed by Courts to snap for monetary considerations.

44. Viewed from all angles and on its true construction, this Court finds that the document (Ex.D-1/1) merely contains a recital of an oral partition effected between the two brothers at a prior point of time, though doubtlessly it is couched in the present tense. It incorporates the decision arrived at between the parties as to the manner in which the parties would enjoy the movable and immovable assets

bequeathed to them by their joint ancestor to the mutual satisfaction of both. Correspondence inter se the parties and with the authorities, tenants, etc. referred to hereinabove, buttresses the factum of oral partition between the parties. It also cannot be lost sight of that it took 14 years from the date of execution of the document, i.e., Memorandum dated 6-7-1985, for the plaintiff to assert his right to partition by metes and bounds. In the suit filed by him on 27.05.1999, the plaintiff stated that shortly after the mother's death, the two brothers (plaintiff and defendant No. 1) came to an understanding with regard to the user of the portions of the property between them till it was partitioned, but the plaintiff carefully suppressed the document (Ex.D-1/1) as also the entire documentary evidence placed on record by the defendant to show that the suit property had already been partitioned between the two brothers and the said partition had been acted upon by each of them, without any demur or protest at any stage.

45. The document (Ex.D-1/1) does not, therefore, in my view, effect partition, but merely records the oral partition arrived at between the parties. Law in regard to registration of such a document was laid down, more than eight decades ago by the Privy Council that a mere agreement to divide does not require registration, but if the writing itself effects a division, it must be registered. [See: *Rajangam Ayyar v. Rajangam Ayyar* reported in (1923) 69 Ind Cas 123 : AIR 1922 PC 266 and relied upon by the Supreme Court in *Nani Bai v. Geeta Bai* : AIR 1958 SC 706]. Since then, the Courts have consistently followed the aforesaid decisions of the Privy Council and the Supreme Court as evidenced from the decisions rendered in *Tek Bahadur Bhujil v. Debi Singh Bhujil and Ors.* (supra); *Bakhtawar Singh v. Gurdev Singh and Anr.* : (1996) 9 SCC 370; *Kale and Ors. v. Dy. Director of Consolidation and Ors.* (supra); *Roshan Singh v. Zile Singh* (supra); *K.G. Shivalingappa v. G.S. Eswarappa* : (2004) 12 SCC 189; *Maturi Pullaiah v. Maturi Narasimham* : AIR 1966 SC 1836; *Vijay Kumar Jain v. Sanjay Kumar Jain* : 100 (2002) DLT 482 and *Nitin Jain v. Anuj Jain and Ors.* : AIR 2007 Delhi 219 (DB).

46. As things stand, the plaintiff by virtue of the oral partition is in occupation of the ground floor, the lawn and the garage block on the left side facing the building. The defendant is in occupation of the first floor, the barsati floor and the garage block on the right side facing the building. It is more or less an equitable

distribution of the property bequeathed to the parties. In terms of the Memorandum, however, the mutual agreement of the owners is necessary for the expansion of the existing building. Clause 5(iii), which is the relevant clause, reads as under:

5(iii). For provision of extensions to the garage blocks on either side of the main building (subject to these extensions being in conformity of the house) and construction of a multi storeyed building which might be put on the plot subject to mutual agreement of the owners

47. In consequence of the above clause, I am of the view that in the event either of the parties, at any point of time, desires to extend the garage block in his possession and/or to construct a multi-storeyed building on the suit property, the same shall be subject to the agreement of the other party. Such a view, in my opinion, is in conformity with Clause 5(iii) of the Memorandum. Any other view, in my considered opinion, would operate to the prejudice of one or the other party and therefore ought not to be countenanced. Thus, for instance if the defendant wishes to construct a second and third floor (in lieu of the barsati floor) he must, of necessity, do so by mutual agreement between him and the plaintiff as such rights are vested in him by the oral partition as recorded in the mutual agreement nor, in fact, have such rights been claimed by the defendant in his pleadings. Likewise, the construction of a multi- storeyed building with a basement by disturbing the status quo must enure for the benefit of both parties and can only be subject to the mutual agreement of the parties.

48. With the aforesaid observations, the suit is dismissed, leaving the parties to bear their own costs.