

Rajendra Shanker Vs. Devendra Shanker

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SooperKanoon Citation : sooperkanoon.com/922981

Court : Delhi

Decided On : Dec-05-2011

Judge : V.K. Jain, J.

Acts : Code of Civil Procedure (CPC) - Order 2 Rule 2; Evidence Act - Section 73

Appeal No. : CS(OS) 985/2002; CS(OS) 1701/2006; CS(OS) 1702/2006

Appellant : Rajendra Shanker

Respondent : Devendra Shanker

Advocate for Def. : Mr. M.Z.Chaudhary And Ors.

Advocate for Pet/Ap. : Mr. M.M.Kalra And Ors.

Judgement :

1. By this common judgment I shall dispose of all the three Suits referred above two of which are Probate Petitions (registered as suits) that were initially filed before the District Judge, Delhi but were withdrawn to this Court vide order dated 22nd August, 2005 to be tried along with the suit CS(OS) No.985/2002. Vide order dated 6th July, 2007 all the three matters were consolidated and it was directed that evidence will be read in all three matters.

2. Suit CS(OS) No. 985/2002 has been filed by Shri Rajender Shanker against his brother Shri Devendra Shanker seeking partition of the estate of their father late

Shri Damodar Dass Mathur alleged to be comprising of house No.104, Jor Bagh, New Delhi, investments in FDRs, Units, Shares, jewellery, goods etc. it is alleged in the plaint that late Shri Damodar Dass Mathur died intestate on 7th February, 1995 leaving the plaintiff and the defendant as his class I legal heirs. It is also alleged that after the death of Shri Damodar Dass Mathur the defendant took custody of jewellery, household goods and documents relating to investments made by him. It is further alleged that the plaintiff being co-owner is in constructive possession of the house and has also been continuously in actual possession of a part of that property. The plaintiff has therefore sought a decree for partition of house No.104, Jor Bagh, New Delhi as also the moveable properties belonging to his father late Shri Damodar Dass Mathur. He has also sought rendition of accounts calling upon the defendant to disclose particulars of moveable assets of the deceased and render accounts.

CS(OS) No. 1701/2006 is a petition filed by Shri Davendra Shanker (defendant in Suit CS(OS) No. 985/2002) seeking probate of the Will dated 26th April, 1994 alleged to have been executed by late Shri R.D.Mathur (brother of his father Shri Damodar Dass Mathur) whereas suit CS(OS) No.1702/2006 is the petition filed also by Shri Devendra Shanker seeking probate of Will alleged to have been executed by his father late Shri Damodar Dass Mathur on 12th April, 1994.

3. In his objections to the petitions seeking probate, Shri Rajender Shanker, plaintiff in suit CS(OS) No. 985/2002 disputed the Will set up by the petitioner and claimed the same to be forged and fabricated documents. It has also been alleged by him that property bearing house No.104, Jor Bagh, New Delhi as also the moveable properties subject matter of the proceedings were properties of the HUF comprising of Shri Damodar Dass Mathur, Shri R.D.Mathur, Shri Devendra Shanker and he himself i.e. Shri Rajender Shanker and therefore Shri R.D.Mathur could not have executed the Will dated 26th April, 1994 propounded by the petitioner. In his objections to the petition seeking probate of the Will alleged to have been executed by late Shri Damodar Dass Mathur, it is alleged that since the aforesaid properties were owned by the HUF comprising of Shri Damodar Dass Mathur, Shri R.D.Mathur, Devendra Shanker and Rajender Shanker, Shri Damodar Dass Mathur could not have executed the Will set up by the petitioner.

4. The following issues were framed on the pleadings of the parties:

1. Whether the suit of the plaintiff is barred under Order 2 Rule 2 of the CPC? -
OPP
2. Whether the defendant is the owner of ground floor and first floor of the suit property as per the Will dated 26th April, 1994 executed by late Shri R.D.Mathur and Will dated 12th April, 1994 executed by Shri Damodar Dass? -
OPD
3. Whether the Will executed by Shri Damodar Dass and late Shri R.D.Mathur are legal and valid and have been executed in accordance with law? - OPD
4. Whether the plaintiff is entitled for a decree of partition and rendition of accounts? - OPP
5. Relief.

5. In his Written Statement in suit CS(OS) No. 985/2002 Shri Devendra Shanker has taken a preliminary objection that the suit is barred under Order 2 Rule 2 of CPC since he has failed to sue for possession. On merits, it is alleged that vide Will dated 12th April, 1994 late Shri Damodar Dass Mathur had bequeathed house No.104, Jor Bagh, New Delhi to late Shri R.D.Mathur who became its owner on the death of Shri Damodar Dass Mathur. Shri R.D.Mathur executed a Will on 26th April, 1994 whereby the suit property devolved upon his (Shri R.D.Mathur's) wife Smt. Sita Rani in her lifetime and thereafter ground floor, first floor, lawn and the servant quarter fell to the share of the defendant whereas second floor including terrace of servant quarter and right to raise further construction fell to the share of the plaintiff. In replication to the Written Statement, the plaintiff sought leave of the Court to rely upon the objections filed by him to the Wills propounded by the defendant Shri Devendra Shanker and has alleged that the testators did not have the testamentary capacity to execute these Wills. It is also stated that the Testamentary Court cannot go into the question of title with respect to right of the testator to make a bequest since it has only to decide whether the Will has been properly executed in terms of requirement of law or not.

Issue No.1

6. No arguments were advanced on this issue. The issue is therefore struck off.

Issues No.2 & 3

7. The burden of proving that the Will was validly executed and is a genuine document is no doubt on the propounder of the Will. He is required to prove that the Testator had signed the Will and had put his signature out of his own free Will. He is also required to prove that the Testator, at the time of execution of the Will, had a sound disposition of mind and was in a position to understand the nature and effect of what he was doing. If sufficient evidence in this behalf is produced by the propounder of the Will, the onus cast on him stands duly discharged. Another requirement of law is that if there are suspicious circumstances surrounding the execution of a Will, the onus is on the propounder to explain those circumstances to the satisfaction of the Court, before the Will is accepted as a genuine document. The suspicious circumstances may be many such as (i) the signature of the Testator may be shaky and doubtful or different from his usual signatures; (ii) the mental condition of the Testator may be feeble and debilitated at the time of the execution of the Will; (iii) the disposition may be such as is found to be unnatural, improbable or unfair in the light of relevant circumstances, such as exclusion of natural heirs without any reason (iv) the propounder may take a prominent part in the execution of the Will; (v) the Will may not see the light of the day for long time; (vi) the Will may contain incorrect recital of essential facts. Of course, the suspicious circumstances, alleged by a person who disputes the genuineness of the Will, ought to be real and germane and not the imagination of a doubting mind amounting to conjecture or mistrust.

It is also a settled proposition of law, fraud, coercion or undue influence is alleged in execution of a Will, the burden of proving the same would be on the person by whom such a plea is set up. (Madhukar D. Shende v. Tarabai Aba Shedage (2002) 2 SCC 85, Sridevi and Ors. v. Jayaraja Shetty and Ors., (2005) 2 SCC 784.)

8. Exh. PW-1/2 in suit CS(OS) No. 1702/2006 is the Will dated 12th April, 1994 alleged to have been executed by late Shri Damoder Dass Mathur, father of the

parties, whereas Exh. PW-1/2 in CS(OS) No. 1701/2006 is the Will alleged to have been executed by late Dr. R.D.Mathur on 26th April, 1994. Both the Will purport to be attested by two common witnesses viz. Shri Rajiv Mathur and Shri Viresh Shankar Mathur. Shri Rajiv Mathur, in his affidavit by way of evidence, has stated that the Will by Shri Damodar Dass Mathur was signed by him as an attesting witness. According to him Shri Viresh Shankar Mathur was the other attesting witness to the Will. He has stated that the Will was signed first by the testator then by him and thereafter by Shri Viresh Shankar Mathur and all of them signed it in presence of each other. He has also stated that at the time of execution of the Will the testator was in sound and disposable state of mind. Similar deposition has been made by Shri Rajiv Mathur in respect of Will purported to have been executed by late Shri R.D.Mathur on 26 th April, 1994. The deposition of Shri Rajiv Mathur has been corroborated by the petitioner Shri Devendra Shanker who has also identified the signature of the testators on the Wills. In his affidavit by way of evidence Shri Rajender Shanker has claimed that the Will set up by the petitioner are forged and fabricated document.

9. I see no reason to disbelieve the testimony of Shri Rajiv Mathur which could not be successfully impeached during his cross examination. No reason has been assigned by Shri Rajender Shanker for this witness to make a false statement, prejudicial to his interest. The witness being the nephew of late Shri Damodar Dass Mathur and Shri R.D.Mathur, it was quite natural for the testators to request him to be a witness to their Wills. This is more so when both, Shri Devendra Shanker as well as Shri Rajender Shanker being beneficiaries of the Will executed by them, could not have been the attesting witness.

10. Section 73 of Evidence Act which provides that in order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved. It appears to me that both the signatures have been made by one and the same person. The power of the Court to make such a comparison was upheld in Sukhwinder Singh & Others versus State of Punjab, 1994 (5) SCC 152, Ashok Kumar Uttam Chand Shah v. Patel

Mohmad Asmal Chanchad, AIR 1999 Guj. 108 and Satish Jayanthilal Shah v. Pankaj Mashruwala, (1997) 2 Crimes 203 (Guj.). I have also compared the signature of Shri R.D.Mathur with his signatures on Exh. RW-1/X2, which is the income tax return filed by him for the assessment year 1995-96 and Income Tax Challans Exh. RW-1/X6 and RW-1/X7 which are the documents relied upon by Shri Rajender Shanker himself and in my opinion the author of the signature on the Will purported to be executed by late Shri R.D.Mathur and the author on these documents is one and the same person. Similarly, I have also compared the signature on the Will purported to be executed by late Shri Damodar Dass Mathur with the signatures of Shri Damodar Dass Mathur on Exh. RW-1/X4 and RW-1/X5 which are income tax challans and also with the signatures on Perpetual Lease Deed (Exh.RW-1/P1). In my opinion, the author of signature on the Will purported to be executed by late Shri R.D.Mathur and the author of the signature on RW-1/X4, RW-1/X5 and RW-1/P1 are the one and the same person.

11. There is no evidence of either late Shri Damodar Dass Mathur or late Shri R.D.Mathur not being in sound, disposing state of mind at the time these Wills purport to be executed by them. No evidence has been led by the Objector Shri Rajender Shanker to prove that either of them was suffering from any such illness as could have impaired their state of minds. Both of them have been signing in English which indicates that they were well educated. In fact late Shri (Dr.) R.D.Mathur was a doctor as is evident from his name itself. I, therefore hold that the Will set up by Shri Devinder Shanker stands duly proved. The issues are decided accordingly.

Issues No. 4 & 5

12. It is not in dispute that house No.104, Jor Bagh, New Delhi is jointly owned by both Shri Davendra Shanker and Shri Rajender Shanker. The question for determination is as to whether the property would devolve on them in terms of Will executed by late Shri R.D.Mathur and Shri Damodar Dass Mathur or it devolves on them by succession or it devolves partly in terms of the Will and partly by succession. If the property devolves solely in terms of the Wills executed by late Shri R.D.Mathur and late Shri Damodar Dass Mathur, Shri Rajender Shanker

would get only second floor including terrace of the servant quarter whereas Shri Davindera Shanker would get ground floor including lawn and the servant quarter as well as first floor and in that case Shri Rajender Shanker would have full right to make any additional construction on second floor and above it. The land underneath the plot in that case would be owned by Shri Davendra Shanker and Shri Rajender Shanker in the ratio of 2:3 and 1:3 respectively. On the other hand if the property devolves wholly by succession, both of them will get equal share in the house, they being the only legal heirs of late Shri R.D.Mathur.

13. Exh. RW-1/X2 is the copy of the income tax return filed by M/s Damodar Dass Rameshwar Dayal (HUF) through Shri R.D.Mathur for the assessment year 1995-96. A perusal of return and the statement of income sheet annexed to it would show that rental income from the first floor of house No.104, Jor Bagh, New Delhi was shown as the income of the HUF whereas the ground floor of the house was shown as self occupied. It further shows that the HUF also had income from certain investments, including an FDR, debentures/bonds, short term bonds and the amounts lying saving bank accounts. Exh. RW-2/B are the copies of income tax returns of M/s Damodar Dass Rameshwar Dayal (HUF) filed through its karta Shri Davinder Shanker, for the assessment years 2001-02, 2002-03, 2004-05, 2005-06 and 2006-07. Income from house property has been disclosed in the return for the assessment year 2001-02. A perusal of statements of income annexed to the returns for the assessment year 2004-05 and 2005-06 would show that the assessee claimed benefit of house tax paid by it in respect of property no. 104, Jor Bagh, New Delhi and consequently the income from the aforesaid house was shown as 'nil' in this year. It would show that in these years also deduction of Rs.52,670/- paid towards house tax and Rs.119/- paid towards ground rent of plot No.104, Jor Bagh, New Delhi was claimed by the assessee as a result of which there was no net income from the aforesaid property. Same is the position in respect of assessment year 2005-06. Income from other sources has also been disclosed in these returns. It would thus be seen that the income from house No.104, Jor Bagh, New Delhi was being shown as income of M/s Damodar Dass Rameshwar Dayal (HUF) not only in the lifetime of Shri R.D.Mathur but even after his death. Shri Davinder Shanker himself has been claiming benefit of the house tax and ground rent paid in respect of property house No.104, Jor Bagh, New

Delhi in the income tax return of the aforesaid HUF which he filed as its karta.

14. The concept of blending the self-acquired property of the coparcener of a joint Hindu family with his self- acquired property or throwing it into a common stock of the HUF is an established doctrine of Hindu Law, duly recognized by Courts in a number of cases. In *Rajanikanta Pal v. Jagmohan Pal*: AIR 1923 PC 57, Privy Council held that where a member of a joint Hindu family blends his self- acquired property with property of the joint family, either by bringing his self-acquired property into a joint family account, or by bringing joint family property into his separate account, the effect is that all the property so blended becomes a joint family property. In *Mallesappa Bandeppa Desai and Ors. vs. Desai Mallappa and Ors.* AIR 1961, Supreme Court, 1268, Supreme Court, inter alia, observed as under:-

"The rule of blending postulates that a coparcener who is interested in the coparcenary property and who owns separate property of his own may by deliberate and intentional conduct treat his separate property as forming part of the coparcenary property. If it appears that property which is separately acquired has been deliberately and voluntarily thrown by the owner into the joint stock with the clear intention of abandoning his claim on the said property and with the object of assimilating it to the joint family property, then the said property becomes a part of the joint family estate; in other words, the separate property of a coparcener loses its separate character by reason of the owner's conduct and get thrown into the common stock of which it becomes a part.

This doctrine therefore inevitably postulates that the owner of the separate property is a coparcener who has an interest in the coparcenary property and desires to blend his separate property with the coparcenary property.

There can be no doubt that the conduct on which a plea of blending is based must clearly and unequivocally show the intention of the owner

of the separate property to convert his property into an item of joint family property. A mere intention to benefit the members of the family by allowing them the use of the income coming from the said property may not necessarily be enough to justify an inference of blending; but the basis of the doctrine is the existence of coparcenary and coparcenary property as well as the existence of the separate property of a coparcener."

In this regard, Supreme Court in *Goli Eswariah v. Commissioner of Gift Tax, Andhra Pradesh*: AIR 1970 SC 1722

"The separate property of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by him into the common stock with the intention of abandoning his separate claim therein. The separate property of a Hindu ceases to be a separate property and acquires the characteristic of a joint family or ancestral property not by any physical mixing with his joint family or his ancestral property but by his own volition and intention by his waiving and surrendering his separate rights in it as separate property. The act by which the coparcener throws his separate property to the common stock is a unilateral act. There is no question of either the family rejecting or accepting it. By his individual volition he renounces his individual right in that property and treats it as a property of the family. As soon as he declares his intention to treat his self acquired property as that of the joint family, the property assumes the character of joint family property. The doctrine of throwing into the common stock is a doctrine peculiar to the Mitakshara School of Hindu law.

No formalities are required in order to place the self-acquired property into the common hotchpotch of the HUF and the question in each case is of the intention on the part of owner on separate property as to whether he intended to abandon his separate right and give it the property a character of joint family property. Each case has to be

considered having regard to its individual facts and surrounding circumstances.”

15. It was contended by the learned Counsel for Shri Davendra Shanker that there is no evidence of the existence of any HUF. In this regard he has relied upon the deposition of Shri Rajender Shanker wherein he stated that he did not remember whether he was a member of the HUF or not and whether he signed any paper as a member of the HUF or not. It was further contended by the learned Counsel for Shri Davendra Shanker that even if existence of any such HUF is believed, the income tax return would only show that late Shri Damodar Dass Mathur and Shri R.D.Mathur have been treating the rental income from the house as the income of the HUF and there is no evidence of the property itself having been thrown into the hotchpotch of HUF. In my view, the contention has no merit. The existence of HUF though disputed by Sh. Davendra Shankar in the pleadings, M/s Damodar Dass Rameshwar Dayal stands proved from the documents, authenticity of which cannot be disputed. This is not the case of Shri Davendra Shanker, anywhere during his deposition in the Court that the income tax documents purported to be signed by Shri (Dr.) R.D.Mathur did not bear their signatures and that the purported signatures on these documents have been forged. More importantly, this is not his case that the income tax returns for the years 2001-02, 2002-03, 2004-05, 2005-06 and 2006-07 were not filed by him or his signatures on these documents have been forged. The fact that Shri Davendra Shanker himself kept on filing income tax returns in the name of M/s Damodar Dass Rameshwar Dayal (HUF) leaves no reasonable doubt about the existence of the HUF and therefore I hold that there was an HUF under the name and style of M/s Damodar Dass Rameshwar Dayalk which continued not only after the death of Shri Damodar Dass Mathur but also thereafter. The case of Shri Rajender Shanker is that the aforesaid HUF comprised of Shri Damodar Dass Mathur, Shri R.D.Mathur, he himself and his brother Shri Davendra Shanker. This is nowhere the case of Shri Davendra Shanker either in the pleadings or in his deposition in the Court that the HUF comprised only Shri Damodar Dass Mathur, Shri R.D.Mathur and he himself. He denies the very existence of such an HUF at any point of time.

16. As regards the contention that property house No.104, Jor Bagh, New Delhi was never thrown into the hotchpotch of HUF, though there is no direct evidence of the aforesaid property having been thrown into the hotchpotch of HUF, the documentary existence in the form of ITR Returns clearly shows that it was actually thrown into the hotchpotch of the HUF and was treated as an HUF property. This is not the case of Shri Davendra Shanker either in the pleadings or during his deposition in the Court that late Shri R.D.Mathur and Shri Damodar Dass Mathur had only treated the rental income from house No.104, Jor Bagh, New Delhi as HUF property, with a view to save tax or to give a limited benefit with respect to sharing of rental income with other coparceners, without throwing the property into the hotchpotch of HUF. Therefore, contention to this effect, raised during the course of arguments, cannot be accepted having no basis either in pleadings or in the evidence of the parties. The income tax returns give no indication that only the rental income was being treated as HUF property without throwing the house itself into the common hotchpotch of HUF. It would be pertinent to note here that during the accounting years 2001-02, 2002-03, 2004-05, 2005-06 and 2006-07 (Exh. RW-2/A) to which the returns were filed by Shri Davinder Shanker, there was no actual rental income from house No.104, Jor Bagh, New Delhi as is evident from the statement of income annexed to the returns. Despite that benefit for the house tax and ground rent paid during these years was claimed in the income tax returns for these years. Had this property not been thrown into the hotchpotch of HUF there would have been no reason to take benefit of these payments in the income tax returns of the HUF even during the years when there was no rental income of the house.

17. In Gundlappli Mohan Rao and others, vs. Gundlapalli Satyanarayana and Ors. AIR 1972, Andhra Pradesh, 233, the first defendant who was the father of the plaintiff and defendants No. 2 and 3 had filed income-tax returns for two years showing the status of the family as HUF. The declaration, however, was not accepted by the Assessing Authority who assessed the first defendant as an individual. It was claimed by the first defendant that a statement made by him for the purpose of income-tax returns cannot be taken as an unequivocal declaration of his intention to impress business in question with the character of a joint family property. Rejecting the contention, the High Court observed that it was not a case

where declaration was made on ignorance of true position or with the sole object of evading payment of higher income- tax. Noticing that no explanation had been offered by him as to why he had to make such a declaration not once, but in two years if he did not really intend to impress the property with the character of a joint family or coparcenary property, the Court held the business to be a joint family property. Noticing that this was not the case of the first defendant that he had made the declaration with a view to gain any advantage or for the reason that he was ignorant of true position, the High Court observed that nothing prevented him from putting forward such a defence and considering his conduct, coupled with the statement made by him, in the income-tax returns, it was a case of abandoning the interest in the self-acquired property and impressing it with the character of a joint family property. Thus, despite the income-tax declaration having been not accepted by the Assessing Officer, the High Court was of the view that the first defendant had blended his self-acquired property with that of the joint family property. In the case before this Court, as noted earlier, there is no evidence or even averment that late Shri Damodar Dass Mathur /Dr R.D. Mathur had disclosed the income from house No. 104 Jor Bagh, New Delhi with a view to earn some income-tax benefit, without intending to blend the property with the property of the joint family. The case set up by Shri Davendra Shanker, on the other hand, is that there was no HUF at all. Moreover, as noted earlier, Shri Davendra Shanker himself has been claiming benefit of house tax and ground rent paid in respect of this property in the income-tax returns which he filed as the Karta of the HUF, even after death of Shri Damodar Dass Mathur /Dr R.D. Mathur.

In Pearey Lal Vs. Nanak Chand and Ors., AIR 1948 Privy Council, 108, the business of the father was assessed to income-tax as a joint family business. There was no explanation from the father as to why the business was got assessed as joint family business. On a claim by the son seeking partition of the business, Privy Council observed as under:-

"Among these there is nothing equal in importance to the respondent's testimony in his examination in chief that the cycle business was assessed to Income Tax as a joint Hindu family

business and that the assessment notices were in the appellant's possession. He was not cross-examined on these statements and he was not contradicted. All that the appellant said about them is that the business had been assessed for twenty years and that he had not been keeping, the notices received from the Income Tax department. The necessary conclusion is that the business was assessed as a joint family business. That may not be conclusive in favour of the respondent, because there might be an advantage to the appellant, though he was the true-owner of the business, in having it assessed to Income Tax as a joint family concern. But as no- explanation has been offered by the appellant, the fact that the assessment was made on the joint family goes far to establish the respondent's case."

18. It cannot be disputed that a necessary pre- condition for application of the doctrine of blending is the existence of coparcenary property. This doctrine postulates that the owner of a separate property has a coparcenary having an interest in the coparcenary property and desires to amalgamate that property with the coparcenary property. This is not the case of Shri Davendra Shanker that Damodar Dass Rameshwar Dayal HUF had no other property at all and, therefore, there was no occasion to blend house No. 104 Jor Bagh, New Delhi with the common property of the HUF. No such plea has been taken either in the pleadings or in the deposition of Shri Davendra Shanker. Moreover, a perusal of the income-tax return of the HUF for the assessment year 1995-96 would show that the HUF owned properties other than house No. 104, Jor Bagh, New Delhi though they were not immovable properties. The HUF had fixed deposits, debentures, bonds as well as amounts lying in Saving Banks account. Therefore, it cannot be said that no property of the joint family was available for amalgamating house No. 104, Jor Bagh, New Delhi with that property. It would be pertinent to note here that blending does not require any physical mixing of the self acquired property with the jointly held property, the requirement being only to abandon the individual right in the self-acquired property and share that right with the properties of the HUF.

19. It was also contended by the learned Counsel for Shri Davendra Shanker that in the plaint of CS(OS) No. 985/2002, Shri Rajender Shanker has not pleaded that

house No.104, Jor Bagh, New Delhi was thrown into the hotchpotch of M/s Damodar Dass Rameshwar Dayal (HUF) or was otherwise the property of HUF and therefore evidence produced by him in this regard needs to be excluded from consideration. I do not find merit in this contention. It is true that in the plaint of suit CS(OS) No. 985/2002 Shri Rajender Shanker did not plead either the existence of any such HUF or house No.104, Jor Bagh, New Delhi being the property of an HUF, but, in his objections to the Probate Petitions, which he filed on 30th May, 2003, Shri Rajender Shanker specifically alleged that property house No.104, Jor Bagh, New Delhi as also other moveable properties refused in petitions were properties of HUF comprising of he himself, Dr. R.D.Mathur Shri Damodar Dass Mathur and Shri Davendra Shanker and therefore, Shri Damodar Dass Mathur and Shri R.D.Mathur could not have executed the Wills propounded by the petitioner. In his replication in CS(OS) No. 985/2002 Shri Rajender Shanker in para 01 of the reply of preliminary objections referred to the objections filed by him in Probate Petitions sought leave of the Court to rely on those objections. He specifically alleged that the testators did not have the testamentary capacity to execute the Will and the Testamentary Court cannot go into the question of title with respect to right of the testator to make a bequest and it is the Civil Court alone which has full jurisdiction to go into all questions, including testamentary capacity of the testator. Obviously, by testamentary capacity the plaintiff Shri Rajender Shanker meant the title of Shri Damodar Dass Mathur and Shri R.D.Mathur with respect to the properties which were subject matter of the Wills executed by them. Thus, by incorporation Shri Rajender Shanker has in the pleadings of suit CS(OS) No. 985/2002 pleaded not only existence of HUF, but also that he, Shri Davendra Shanker, late Shri Damodar Dass Mathur and late Shri R.D.Mathur were the members of that HUF and house No. 104, Jor Bagh, New Delhi was the property of that HUF. It would, therefore, not be appropriate to say that evidence with respect to existence of an HUF and the property being owned by HUF is beyond the pleadings of the parties.

20. For the reasons given in the preceding paragraphs I am of the considered view that house No.104, Jor Bagh, New Delhi was thrown into the hotchpotch of HUF M/s Damodar Dass Rameshwar Dayal consisting of Shri Damodar Dass Mathur, Shri (Dr.) R.D.Mathur, Shri Rajender Shanker (plaintiff in suit CS(OS) No.

985/2002) and Shri Davendra Shanker, defendant in the same suit. All of them had 1/4th share each in the aforesaid house. Consequently, Shri Damodar Dass Mathur could have bequeathed only 1/4th share in property house No.104, Jor Bagh, New Delhi to Shri R.D.Mathur. The Will dated 12th April, 1994 executed by him therefore would operate only to the extent of 1/4th share in house No.104, Jor Bagh, New Delhi. Shri R.D.Mathur who being a member of the HUF also had 1/4th share in the aforesaid house thus, became owner of half share in this house since 1/4th share in the house was bequeathed to him by his brother Shri Damodar Dass Mathur. The Will, executed by Shri R.D.Mathur, therefore would operate to the extent of half share in property house No.104, Jor Bagh, New Delhi. Since, being members of HUF Shri Davendra Shanker and Shri Rajender Shanker had 1/4 th share each in the aforesaid house, their respective share in the house, on death of Shri Damodar Dass Mathur and Shri R.D.Mathur would be as follows:

(a) Undivided half of the ground floor, first floor, lawn and servant quarter falls to the share of Shri Davendra Shanker in terms of Will executed by late Shri R.D.Mathur. Since he owns 1/4th share in the property in his capacity as a member of the HUF, he now has a total of 3/4th share in the ground floor, first floor, lawn and servant quarter of the house, whereas the remaining 1/4th share in these portions of the property comes to the share of Shri Rajender Shanker.

(b) Half share in the second floor and terrace of the servant quarter fell to the share of Shri Rajender Shanker in terms of the Will executed by late Shri R.D.Mathur. Since he also had 1/4th share in the property as a member of the HUF his share in the second floor and terrace of the servant quarter now comes to 3/4th. He also has 3/4th share in the right to make additional construction permissible under the law on the second floor and above it as well as on the terrace of the servant quarter. The remaining 1/4th share in the aforesaid portions of the property including 1/4th share in the right to make additional construction now belongs to Shri Davendra Shanker.

No arguments have been advanced, with respect to any movable property and, therefore, no order needs to be passed with respect to any movable property. The

issues are decided accordingly.

ORDER

In view of my findings on the issues, Probate of the Will dated 12th April, 1994 executed by late Shri Damodar Dass Mathur and Probate of the Will dated 26 th April, 1994 executed by late Shri (Dr.) R.D.Mathur with copy of the Will annexed to it be issued to Shri Davendra Shanker, petitioner in suits CS(OS) No. 1701/2006 and 1702/2006 and defendant in suit CS(OS) No. 985/2002. A preliminary decree of partition is passed declaring the share of Shri Davendra Shanker and Shri Rajender Shanker in property house No.104, Jor Bagh, New Delhi as under:

a) Shri Devendra Shanker has 3/4th share in the ground floor, first floor, lawn and servant quarter, whereas Shri Rajender Shanker has 1/4th share in these portions.

b) Shri Rajender Shanker has 3/4th share in the second floor of the property as also on the terrace of the servant quarter. He also has 3/4th share in the right to raise construction on the second floor and above it as well as on the terrace of the servant quarter. Shri Davendra Shankar has 1/4th share in these portions of the house as well as in the right to raise additional construction in the property. Shri Naresh Chand Garg, an officer of this Court, is appointed as Local Commissioner to suggest the partition of house No.104 Jor Bagh, New Delhi by metes and bounds. His fee is fixed at Rs.50,000/- which shall be contributed by the parties in equal share. He shall be at liberty to take help of an architect to assist him in giving report in terms of this order and if an architect is engaged by him, his fee would also be shared equally by the parties. The Local Commissioner will submit his report to the Court within 08 weeks from today. The parties shall be at liberty to apply for passing of final decree after the report of the Local Commissioner is submitted.