

HIGH COURT OF DELHI : NEW DELHI

C.S. (OS) No. 192/1999

Judgment reserved on: July 18, 2007

Judgment delivered on: January 07, 2008

Abhay Sapru, Plaintiff
! Through: In person

versus

\$ Chitralekha Bakshi & Anr., Defendants
^ Through: Mr. Sanjay Jain, Senior
Advocate with Mr. Jayant
Tripathi and Mr. Arjun Mitra,
for the Defendant No. 1.

***CORAM:**

HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

VIPIN SANGHI, J.

1. The Plaintiff has filed the present suit for partition and permanent injunction in respect of property bearing No.16A, Westend, New Delhi. The substantive reliefs prayed for in the suit reads as follows:

“pass a preliminary decree of partition declaring that the Plaintiff and Defendants each have 1/3rd share in property No. A-16, Westend, New Delhi – 110021; and

thereafter appoint a Local Commissioner to partition the suit property by metes and bounds and pass a final decree after

considering the report of the Local Commissioner ; and

pass a decree of permanent injunction in favour of the Plaintiff and against the Defendants restraining them from creating any third party rights/interest in any manner whatsoever in the property No. A-16, Westend, New Delhi – 110021;

pass a decree of permanent injunction in favour of the Plaintiff and against the Defendants restraining them from making any additional construction and/or alterations in the property No. A-16, Westend, New Delhi – 110021; and ”

2. Defendant No. 2, now deceased, was the mother of the Plaintiff, while Defendant No. 1 is the sister of deceased Defendant No.

2. Defendant No. 2 passed away on 28.12.2005 and the Plaintiff being the only legal representative of Defendant No. 2, exclusively succeeded to her estate.

3. The admitted facts are that Late Gen. B.M. Kaul acquired perpetual leasehold rights in respect of Plot No.16A, West End, ad measuring 1205 sq. yds. New Delhi, vide a registered sub-Lease Deed. Late Gen. B.M. Kaul built a single storied house on the said plot. He passed away on 18.04.1972 leaving behind his widow Smt. D.K. Kaul and two daughters, i.e. the two Defendants herein as his only class I heirs. The mother of Late Gen. B.M. Kaul had predeceased him. The Delhi Development Authority (DDA) mutated the leasehold rights in respect of the leased plot in the name of Smt. D.K. Kaul and the two

Defendants on 20th November 1978. The Diplomatic Enclave Extension Cooperative House Building Society Ltd., in the year 1979, also mutated the said property in the name of Smt. D.K. Kaul, Smt. Anuradha Sapru defendant No. 2, and Smt. Chitrlekha Bukshi Defendant No.1. Consequently, late Smt. D.K. Kaul, defendant No. 2 and defendant No.1 became entitled to 1/3rd share each in the suit property.

4. The Plaintiff states that in the year 1985, Smt. D.K. Kaul and Defendant No. 2 i.e. his mother nominated the Plaintiff as the nominee with respect to their 1/3rd share each in the suit property. Smt. D.K. Kaul died intestate on 25.11.1993. The Plaintiff states that since Smt. D.K. Kaul died intestate, the Plaintiff became owner of her 1/3rd share in the suit property being her only nominee in terms of Section 27 of the Delhi Cooperative Societies Act, 1972 and bye laws framed by the society. When he requested the society for recording his name in place of Smt. D.K. Kaul in the records of the society, the same was refused by the society on the ground that nomination by a member does not give a right of inheritance to the nominee and the same is governed by the normal law of the inheritance. This stand of the society, according to the Plaintiff, was contrary to law. The Plaintiff, by asserting his right to succeed to the 1/3rd share left by Smt. D.K. Kaul, filed the present suit for the reliefs as aforesaid.

5. Defendant No.1 filed her written statement. She

admitted the facts as recorded aforesaid in paragraphs 2 & 3. She further states that after about 16 years of her father's death, there were simmering of dispute. An oral family settlement was arrived at, which was recorded in a memorandum on 12th February 1988 duly signed by late Smt. D.K. Kaul and the two daughters, namely Defendant No. 1 and 2. She further states that as per the family settlement, she took exclusive possession of the terrace and above the ground floor, while the mother late Smt. D.K. Kaul and Defendant No. 2 retained the ground floor and continued to live in it. She further states that in terms of the settlement, she commenced construction on the first floor with her own funds and with the funds of her husband. The mother late Smt. D.K. Kaul and Defendant No. 2 and the Plaintiff acquiesced. On 25.11.1993, the mother Smt. D.K. Kaul died leaving surviving two daughters, i.e., Defendant No. 1 and 2. She died intestate. The two daughters succeeded in equal shares to the property of Smt. D.K. Kaul. The estate of Smt. D.K. Kaul had to be worked out keeping in view the family settlement of 1988. In 1994, the construction on the first floor was completed by Defendant No. 1 and said portion was let out to a tenant and she recovered the rents from the tenants as an owner. The property taxes with respect of the ground floor were contributed by Defendant No. 2, while those in respect of first floor were met by Defendant No. 1. She further states that the earlier tenant vacated the first floor premises, which was repaired by her and let out to another tenant by Lease Deed dated

15.10.1999. Defendant No.1 also made a counter claim praying for the following relief:

“Declaration that first floor and above (including whatever can be legally constructed) of property No. A-16, Westend, New Delhi – 110021 with proportionate rights in the land is the ownership of Defendant No. 1 (Chitralkha Bukshi), and that the Plaintiff or Defendant No. 2 have no right or interest therein.

If for some reason (and without prejudice to the main contention) the family settlement of 1988 is to be ignored, and it is held that the property is owned by Defendant No. 1 and 2 in equal shares, a decree for partition be passed. It will be a preliminary decree followed by a final decree.”

6. The case of Defendant No. 1 in the counter claim is that consequent upon the oral family settlement of 1988, she became the owner of the first floor and above of the suit property including proportionate rights in the land. She further states that so long as her interest in the first floor and above is maintained, she would not claim interest on the ground floor which belonged to her sister, Defendant No. 2. She further states that if for some reason, the family settlement is to be ignored, the estate of Smt. D.K. Kaul is to be treated as including $1/3^{\text{rd}}$ share in the ownership in the suit property, and such $1/3^{\text{rd}}$ share in the ownership would devolve upon Defendant No. 1 and 2 in equal shares under the law of succession and not upon the Plaintiff on account of the nomination made by Late Smt. D.K. Kaul in the records of the society. It is stated that subsequent to grant of a

perpetual lease by the President of India in respect of the plot, nomination is meaningless.

7. The Plaintiff filed his replication and written statement to the counter claim of Defendant No. 1 wherein he, inter-alia, states as follows:

“It is also denied that any family settlement was arrived and and/or terms of the settlement were recorded in the memo dated 12.2.1988. It is also denied that the alleged family settlement was signed by Smt. Dhanraj Kishori Kaul and by Smt. Anuradha Sapru as alleged. It is also denied that the Plaintiff has signed any affidavit dated 12.2.1988 recording the factum of settlement. It is submitted that Annexures A & B to the written statement are forged and fabricated by Defendant No. 1 and have been filed with a view to mislead this Hon'ble Court.”

8. The Plaintiff denied the stand taken by Defendant No. 1 and reiterated his own position, as contained in the plaint. The plaintiff also states that the Defendant No.1 was not the exclusive owner of the first floor of the suit property. Instead she was one of the co-owners along with the plaintiff and the defendant No.2

9. On the pleadings of the parties, the court framed the following issues on 12th December 2000:

“(a) Whether the act of nomination by the predecessor-in-interest with the Cooperative Society is over ridden by the provisions of Hindu Succession Act, 1956 or not?

(b) Whether the cost of construction of the first floor of the suit property was paid by Defendant No. 1 or not? If so its effect.

(c) Whether the family settlement was ever effected by the Plaintiff and by the deceased Smt. Dhanraj Kishore, if so to what effect?

(d) Relief. “

10. Vide order dated 3.2.2003, the following additional issue was framed by the court:

“1. Whether the provisions of the family settlement dated 12.2.1988 operates as a Will, if so to what effect? OPP.”

11. On 6.1.2005, the Plaintiff made a statement before the court that he would not prefer to lead any oral evidence and his evidence may be treated as closed. He further stated that the memorandum recording oral settlement dated 12.2.1988 be treated as admitted and the matter may be listed for Defendant's evidence, if any. Consequent upon this order, the memorandum recording oral settlement dated 12.2.1988 has been given exhibit mark Ex. D-1/3. Defendant No. 1, the only contesting Defendant, has also not led any oral evidence and I have proceeded to hear arguments of the parties in the aforesaid circumstances.

12. During the course of the arguments, written submissions were also filed. The written submissions filed by the Plaintiff are in remarkable contrast to his written statement filed to the counter claim as well as the pleadings contained in the plaint.

13. The contention of the Plaintiff as now urged before me

is that the Plaintiff is the owner of the leasehold rights in respect of the plot underlying the suit property to the extent to which Smt. D.K. Kaul and Defendant No. 2 became entitled to exclusively possess and enjoy the ground floor under the memorandum recording oral family settlement Ex.D-1/3, and that the rights of Defendant No. 1 in the leasehold are only to the extent of the portion earmarked as that of Defendant No. 1 under the family settlement.

14. From the aforesaid it is seen that the Plaintiff has been shifting his stand from time to time. Initially, the stand of the Plaintiff was that he and his mother Defendant No. 2, were owners in respect of the suit property to the extent of 1/3rd share each. While so pleading, the Plaintiff did not disclose the fact that there had been an oral family settlement which was recorded in the memorandum of family settlement Ex. D-1/3. As aforesaid, in his replication he denied the execution of the said memorandum of family settlement and labeled the same as '*forged and fabricated by Defendant No. 1*' and as having been filed '*with a view to mislead this Hon'ble Court*'. Subsequently, after having denied the family settlement altogether, the Plaintiff summer saulted from his stand when he made a statement on 6.1.2005, admitting the said memorandum recording oral family settlement Ex. D-1/3. Not only that, he also shifted his stand by contending that the ownership in the leasehold rights of Defendant No. 1 was restricted only to the portion that was earmarked as of

Defendant No. 1 under the memorandum recording oral family settlement dated 12.2.1988, Ex. D-1/3.

15. Now turning to the specific issues, I find that in view of the statement made by the Plaintiff on 6th January 2005, admitting the family settlement in the memorandum recording oral settlement dated 12.2.1988, Ex. D-1/3, the first part of issue (c) viz. whether the family settlement was ever effected by the plaintiff and by the deceased Smt. Dhanraj Kishore has to be answered in the affirmative. The second part of issue `c' viz. the effect of the family settlement Ex.D-1/3 shall be considered a little later.

16. I now proceed to consider the additional issue framed on 3.2.2003 viz., that the provisions of the family settlement Ex. D-1/3, operate as a Will of late Smt. D.K. Kaul.

17. Section 2(h) of the Indian Succession Act, 1925 (the Act) gives the definition of a 'Will'. It reads as under:

2(h) 'Will' means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

18. Section 63 of the Act, so far as it is relevant, reads as follows:

63. Execution of unprivileged wills.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged, or a mariner

at sea, shall execute his will according to the following rules: -

(a)...

(b)...

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of the witnesses shall sign the will in the presence of the testator but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary.

19. Also relevant is Section 68 of the Indian Evidence Act, 1872. The relevant extract of section 68 is reproduced hereinbelow for the sake of convenience:

68. Proof of execution of document required by law to be attested. - If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

20. Thus, Section 63(c) of the Act provides the mode of execution of the 'Will', while Section 68 of the Indian Evidence Act, 1872 provides the mode of proof of execution of a document, required

by law to be attested.

21. I have held in Test Case 21/2000, **Ms. Sumitra Devi and Others Vs. State and Other**, decided on 15th May 2007, that an unprivileged will under the Indian Succession Act cannot be probated unless it complies with the requirements of Section 63 of the said Act. The memorandum recording oral family settlement Ex.D-1/3, purports to record an earlier oral arrangement. If one were to assume the same to constitute a "Will" under Section 63 of the Act, the "Will" has to be in writing, and it is not even claimed that Late Smt. D.K. Kaul was entitled to make a privileged/oral "Will". The memorandum of family settlement does not purport to be a legal declaration of the intention of a testator, in this case Late Smt. D.K. Kaul, in respect of her property, which could be said to express her desire to be carried into effect after her death. At the time when the memorandum of family settlement was drawn up, there is nothing to indicate that Late Smt. D.K. Kaul intended to make a "Will". Moreover, the Plaintiff has not led any evidence to prove the execution of the memorandum of family settlement as a "Will" in compliance with Section 63(c) of India Succession Act. Consequently, the settlement Ex.D-1/3 cannot be construed as a Will of Late Smt. D.K. Kaul. Accordingly, the additional issue framed on 3.2.2003 is decided against the Plaintiff.

22. Issue (a) was framed as the Plaintiff had claimed ownership over the 1/3rd share of Late Smt. B.L. Kaul, being her

nominee in the records of the society. The claim was based on the premise that a nominee in the records of a cooperative society succeeds to the interest of the member on the demise of such member, to the exclusion of the legal heirs of such member under ordinary law of succession. The above question is no longer *Res-integra* and stands fully settled by various judicial pronouncements. In ***Shri Ashok Chandra Aggarwala vs. Delhi Administration & Ors.***, ILR (1985) 1 Delhi 796, a single judge of this court held that an interest of a member of a cooperative society in the lease of the property held by him can devolve by testamentary or intestate succession and a third kind of succession (by nomination) cannot be created under Section 26 of the Cooperative Societies Act. The said decision was assailed by way of Letters Patent Appeal (LPA No.31/85 reported as 1998(7) AD (Delhi) 639) which came to be dismissed by a division bench and the order of the Single Judge was upheld. The Division Bench held that the principles laid down by the Apex Court in ***Sarbati Devi & Another v. Usha Devi***, AIR 1984 SC 346 were applicable in interpreting section 26 of the said Act and Rule 35 of the Delhi Co-operative Societies Rules. The Division Bench also cited with approval the decision in ***Sushila Devi Bhaskar vs. Ishwar Nager Cooperative House Building Society Ltd. & Ors.***, 45 (1991) DLT 318, wherein it was held that despite nomination in favour of a person, the property or the amount of the deceased, can be claimed by the heirs of the deceased in accordance with law of succession governing

them. The right of the nominee is merely to get recognised as the person who is charged with the responsibility of administering the estate in accordance with the Law of Succession. [See **Vishin N. Khanchandani & Anr. v. Vidya Lachmandas Khanchandani & Anr.** (2000) 6 SCC 724)]. This issue is therefore decided against the Plaintiff and in favour of the defendant.

23. Turning to the first part of issue (b) viz., “whether the cost of construction of the first floor of the suit property was paid by defendant No.1 or not”, I am of the view that since the family settlement has been admitted by the Plaintiff, the same has to be decided in favour of Defendant No.1. On a mere reading of the settlement Ex.D-1/3, particularly clauses (2), (3) and (4) thereof, wherein the “Second Party” is Defendant No.1 herein the said position becomes abundantly clear. These clauses read as follows:

“2.That the portion shown in green in the site plan attached on the ground floor and the terrace/roof of the building shall be exclusively owned by the party of the SECOND PART.

3. That the SECOND PARTY shall have the exclusive right of entrance from the rear portion of the ground floor as shown in green in the site plan attached and the parties shall have the right to raise the construct, walls on the ground floor of the property for proper exclusive and better enjoyment of their respective portions in the aforesaid property.

4.That the party of the SECOND PART shall be fully and exclusively entitled to enjoy the roof/terrace of the building and shall be entitled to construct one and/or more floors as

she likes and permitted by the authorities and the parties of the FIRST PART shall have no objection to the same for any reason whatsoever. The proposed plans of the first floor to be constructed is annexed herewith.”

24. From these clauses it is clear that it was defendant No.1 who was entitled to raise construction at her own cost on the terrace of the Ground Floor i.e. on the first floor and above. The plaintiff has not even averred in the plaint that he, or his predecessor in interest i.e., the deceased defendant No.2 had raised any construction on the terrace above the ground floor of the property. On the other hand, defendant No.1 has made categorical averments to this effect in paragraph Nos.4 and 8 of the preliminary submissions contained in her Written Statement. As aforesaid, no evidence has been led by either of the parties. Therefore, I conclude that the cost of construction of the First Floor of the property in question was paid by defendant No.1. The first part of issue (b) is accordingly decided in favour of Defendant No.1 and against the plaintiff.

25. The second part of issue (b) viz., the effect of the defendant No.1 having built the first floor of the suit property from her own funds and the second part of issue (c), viz., what is the effect of the family settlement Ex.D-1/3 are now being dealt with by me. The contention of the plaintiff is that the family settlement Ex.D-1/3 had the effect of partitioning the suit property by metes and bounds and vesting the exclusive lease hold rights in the plot underneath the suit

property in its entirety, (except the position marked in green in the plan annexed to the family settlement Ex.D-1/3 on the rear side), in Defendant No.2 and Late Smt. D.K. Kaul, and after the demise of Late Smt. D.K. Kaul, upon Defendant No.2. After the demise of defendant No.2, those rights have vested in the plaintiff. Therefore, the contention is that the lease hold rights are not undivided half and half between the Plaintiff and Defendant No.1 and the same stand demarcate by metes and bounds as per the family settlement Ex. D-1/3. This is obviously disputed by Defendant No.1 who contends that the rights in the land underneath the suit property is jointly owned by the plaintiff and defendant No.1 equally, and defendant No.1 has exclusive ownership of the first floor and above in the said property.

26. The shares of the three co-sharers were clearly defined. The said family settlement in its recitals records inter-alia;

“(i) that the leasehold rights of the said plot has already been transferred/mutated in the names of the parties thereto by the DDA vide their letter No.F.6(15)78-CS/DDA. 1853 dated 20th November 1978.

(ii)The names of the parties thereto have already been substituted as members of the Diplomatic Enclave Extension Cooperative Housing Society Ltd., in place of late Late Gen. B.M. Kaul, and the parties thereto have become the owners of the leasehold rights of the said plot and the building constructed thereon; having inherited the same from Late Gen. B.M. Kaul.

27. Consequently, the undivided shares and interest of the three co-sharers i.e., Late Smt. D.K. Kaul, and the two defendants

stands acknowledged in Ex.D-1/3. No doubt, the parties stated that *“with a view to avoid any future disputes amongst the parties hereto and to maintain peace in the family the parties hereto at the advice and intention of friends and near relations, mutually partitioned the aforesaid properties by metes and bounds by an oral family settlement and the portions belonging to each parties have been de-marked as per the site plan attached hereto.”*

28. However what is the purport of the so called mutual partition by metes and bounds has to be analysed and understood in the light of the other terms of Ex.D-1/3, and the law.

29. The status of the parties was not that of joint owners of the said property. There were not coparceners and the suit property was not coparcenary property. They were having separate and defined title as their shares were clearly defined. There could be no oral family arrangement which could alter their respective pre-defined shares in the suit property, and therefore, the mere recording of the same in a memorandum at a subsequent point of time would make no difference either. Section 19 of the Hindu Succession Act, 1956 states that if two or more heirs succeed together to the property of an intestate, they shall take the property as tenants-in-common and not as joint tenants. Reference may be made in this regard to ***Kalooram Govindram v. CIT***, AIR 1966 SC 4. Consequently, one of the co-sharers could not relinquish or acquire the share, or any part of it, of another without the

execution of a registered document of transfer.

30. Even if the aforesaid aspect is kept aside, the family settlement is recorded as a bi-partite agreement instead of as a tripartite agreement. Mrs. D.K. Kaul and Smt. Anuradha Sapru (Defendant No.2) together consist of the first party to the settlement, and Mrs.Chitralkha Bakshi (Defendant No.1) was the second party.

31. The relevant terms of Ex.D-1/3 are reproduced herein below. The first party is defined as Late Smt. D.K. Kaul and Defendant No.2 jointly, and second party is defined as Defendant No.1.

NOW THIS DEED WITNESSES:

1. That the portion shown in red in the site plan of the property bearing No.A-16, West End Colony, New Delhi, attached herewith consisting of the construction portion and open portion of the ground floor of the property, except the portion shown in green, shall be exclusively owned by the parties of the FIRST PART jointly.
2. That the portion shown in green in the site plan attached on the ground floor and the terrace/roof of the building shall be exclusively owned by the party of the SECOND PART.
3. That the SECOND PARTY shall have the exclusive right of entrance from the rear portion of the ground floor as shown in green in the site plan attached and the parties shall have the right to raise the construct walls on the ground floor of the property for proper, exclusive and better enjoyment of their respective portions in the aforesaid property.

4. That the party of the SECOND PART shall be fully and exclusively entitled to enjoy the roof/terrace of the building and shall be entitled to construct one and/or more floors as the likes and permitted by the authorities and the parties of the FIRST PART shall have no objection to the same for any reason whatsoever. The proposed plans of the first floor to be constructed is annexed herewith.
5. That the party of the SECOND PART shall obtain water and electricity including power from the connections already available ;and shall have sub meters installed for the floors constructed by her.
6. That the parties shall pay property tax of the respective portion of the property.
7. That it is agreed between the parties that in case Smt. D.K. Kaul joint party of the FIRST PART predecessor Smt. Anuradha Sapru, the other joint party of the FIRST PART, in that event she will become the exclusive and absolute owner of the ground floor of the property and the second party, Smt. Chitralkha Bakshi or her heirs shall not inherit any right or claim the share of her mother the aforesaid Smt. D.K. Kaul in any manner.”

32. It is apparent from the terms of the memorandum recording oral family settlement that the same did not divide the property by metes and bounds between all three owners. Even if one were to assume that the family settlement Ex.D-1/3 separated the interest of defendant No.1 by metes and bounds, and Defendant No.2 and late Mrs. B.M. Kaul continued to be joint in ownership and possession, upon the demise of Late Smt. D.K. Kaul, her interest in the

leasehold to the extent of 1/3rd share would vest in defendant No.1 and 2 equally. The parties were conscious of the possibility that Late Smt. D.K. Kaul might predecease defendant Nos.1 and 2, and therefore, to preserve their living arrangement agreed that defendant No.1 would not claim any interest in the ground floor portion. I have already held that the said family settlement does not constitute a "Will" of Late Smt. D.K. Kaul. The parties should be taken to be aware of the law, and if they had intended that the share and interest of Late Smt. D.K. Kaul should exclusively devolve upon only defendant No.2, they could have so provided by Late Smt. D.K. Kaul executing a "Will" to that effect. But that apparently was not the intention. The intention was to allow defendant No.2 to succeed as per the law to the estate of Late Smt. D.K. Kaul, i.e., to the extent of half of her estate and that included her 1/3rd interest in the existing property. Even if an oral partition had taken place and recorded in Ex. D-1/3, the same would again have to be undertaken in view of the devolution of the undivided interest of Late Smt. D.K. Kaul upon defendant Nos.1 and 2 equally. Moreover, both the plaintiff and defendant No.1 are seeking partition of the property and the dispute appears to be limited in scope to the extent of share that each one of them has in the property.

33. The intention of the parties while executing the family settlement Ex. D-1/3 appears to be to sanitize the involvement of defendant No.1 from the existing constructed and living portions,

possibly to avoid or to resolve disputes with the defendant No.2 and her mother. Mere separation of residences or even businesses between the family members does not lead to an inference of partition by metes and bounds (see **Madan Lal v. Yoga Bai**, (2003) 5 SCC 89). The family settlement Ex.D-1/3 does not deal with, and it could not have dealt with the effect of this arrangement on the respective undivided 1/3rd shares of the parties in the land underneath, which they acquired by inheritance and which right is duly recognised in the settlement Ex.D-1/3. The family settlement does not suggest that the parties had also partitioned by metes and bounds this interest in the land or that on the arrangement being arrived, the defendant No.1 lost its then owned one-third share in the land. The scheme of the family arrangement itself suggests that it was not a complete and final partition by metes and bounds but a living arrangement arrived at between the parties. The intention was clearly to avoid disputes and ensure full enjoyment of the property in question by the two groups, in peace and harmony. The First Party had the whole built up portion on the ground floor alongwith the open areas for their exclusive enjoyment and exclusive entry from the front portion of the plot and the second party was exclusively bestowed the right to construct on the terrace/roof with entry from the rear. The construction, if any, made by the second party was to be exclusively enjoyed by her. This appears to be equitable. Defendant No.1 was expected to spend from her own pocket and raise construction before the rights conferred

could have been enjoyed exclusively. The arrangement was arrived at keeping in mind the limitations of the existing structure and the possibility of addition that could have been made. The intention discernible from the various clauses is that the arrangement arrived at was to continue during the life time of the structure existing and principally agreed to be added to it. Since the defendant No.1 has built the first floor of the suit property from her own funds and, as per the family arrangement, she is entitled to exclusively use and enjoy the same. All accretions from the said portion are her exclusive property. She is also entitled to get credit for the cost of the structure on the first floor, after accounting for depreciation, as and when the actual physical partition of the property takes place by metes and bounds between the parties. Since the land rights have not been dealt with in Ex.D-1/3 with any finality, which is only a memorandum recording an oral family settlement and is an unregistered document, there was no complete partition by metes and bounds [See ***Hari Ram v. Late Om Prakash*** 2003 IV AD (Delhi) 124].

34. This does not mean that no rights have got crystallized under the arrangement. The decisions relied upon by the plaintiff beyond doubt have held that family arrangements have a special sanctity and are binding upon the parties and cannot be lightly interfered with. Thus, the arrangement is binding on the parties and the property shall be enjoyed by the parties strictly in accordance with

the terms of the arrangement, but the same does not constitutes a partition by metes and bounds for all purposes. The family arrangement would continue to bind the parties till so long as the property is not actually partitioned between the plaintiff and defendant No.1 by metes and bounds. Consequently, I declare that both the plaintiff and defendant No.1 have equal share in the property in question subject to my observations above with respect to the first floor structure. A preliminary decree is passed to this effect. I also declare that the family settlement Ex. D-1/3 is binding between the parties and would continue to bind them till the property is finally partitioned by metes and bounds between them. I appoint Mrs. Maninder Acharya, Advocate, 439, Lawyers Chambers, Delhi High Court, New Delhi as the Local Commissioner to suggest modes of actual physical partition of the suit property keeping in view my aforesaid findings with regard to the respective shares of the parties. She would be entitled to take the assistance of qualified Architects, Engineers and draftsmen, if considered necessary. She should file her report within four months. She would tentatively be paid a fee of Rs.60,000/- apart from all other out of pocket expenses, including those payable to Architects, Engineers and Draftsmen. The same shall be shared by the parties equally.

35. List the matter before the court for directions on 14th

May 2008.

January 07, 2008
P.K. BABBAR

VIPIN SANGHI,
JUDGE.