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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 2nd November, 2018

Date of decision : 4th February, 2019

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CS(OS) 2746/2014 & I.A. 9466/2015, 11813/2017 & 2287/2018

DHIAN NATH KAPUR

..... Plaintiff

Through: Mr. Alok K. Aggarwal and Mr.
Apoorv Rastogi, Advocates.
(M:9899068509)

versus

PRAN NATH KAPUR

..... Defendant

Through: Mr. Jasmeet Singh, Advocate for LRs
with Ms. Meera Bajaj/LR1 in person.

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. Late Shri Dina Nath Kapur was the owner of property bearing No.14, Park Area, Karol Bagh, New Delhi-110005 (*hereinafter 'Suit Property'*). He had two sons, the Plaintiff- Shri Dhian Nath Kapur and the Defendant - Shri Pran Nath Kapur (*hereinafter, 'Pran Nath Kapur'*). The property is a rectangular plot 170.4 feet long and 69.8 feet wide. Shri Dina Nath Kapur passed away on 20th March, 1978. He had executed a registered Will dated 15th May, 1965, registered on 29th May, 1965. There is no dispute between the parties that each of the parties owns and is entitled to 50% share in the property.
2. The present suit was filed by Shri Dhian Nath Kapur, through his duly constituted attorney, his daughter Dr. Anu Kapur (*hereinafter, 'Plaintiff'*).

The parties attempted mediation to amicably partition the property - however, no settlement could be arrived at. Accordingly, the present suit was filed seeking the following reliefs:-

- “i) pass a preliminary decree for partition of the aforesaid immovable property No.14, park Area, Karol Bagh, New Delhi-110005, declaring that the plaintiff and defendant are having 50% equal share each therein;*
- ii) appoint a Local Commissioner preferably an Architect to suggest the mode of partition by metes and bounds of the suit property No.14, Park Area, Karol Bagh, New Delhi-110005 and after the report is submitted a final decree be passed dividing the aforesaid suit property and giving 50% equal share to the plaintiff in accordance with law;*
- iii) a decree of permanent injunction against the defendant and in favour of the plaintiff thereby restraining the defendant, his agents, servants, employees, relatives, representatives, contractors, labourers, or any one claiming on behalf of the defendant from refurnishing and carrying out any construction activities in the suit property and/or selling, alienating, transferring, creating third party interest and/or parting with possession of the suit property in favour of any one including his relatives, descendants, representatives or agents or any other person or persons, in any manner whatsoever in whole or part of the suit property i.e., No.14, Park Area, Karol Bagh, New Delhi-110005;*
- iv) award the costs of the present proceedings in favour of the plaintiff and against the defendant.”*

3. The suit was initially listed on 10th September, 2014 on which date an *ex-parte ad-interim* injunction was granted in the following terms:

“Accordingly, till the next date of hearing, parties are directed to maintain status quo with regard to title and possession of the property bearing no.14, Park Area, Karol Bagh, New Delhi.”

4. The same was confirmed, during the pendency of the suit, vide order dated 1st October, 2014.
5. I.A. 23130/15 came to be filed, under Order XXII Rule 4 CPC as the Defendant - Shri Pran Nath Kapur passed away on 15th September, 2015. Thus, his wife-Smt. Swaran Kapur, son - Shri Jitender Kapur and his daughter - Smt. Meera Bajaj were impleaded as Defendant No.1, 2 and 3 (*hereinafter, ‘Defendants’*). The application for impleadment of legal heirs was, allowed on 15th July, 2016.
6. While disposing the application under Order XII Rule 6 being I.A.9465/2015, a preliminary decree was passed by this Court on 14th September, 2017. The Court held as under:-

“IA No.9465/2015

This suit is filed by the plaintiff against the defendant (his brother) for partition and injunction in respect of property that is a built up plot admeasuring 1302 sq. yards, bearing No.14, Park Area, Opp. Ajmal Khan Park, New Delhi -110005. This property originally belong to Mr. Dina Nath Kapur who died on 20th March, 1978 leaving behind a registered Will with the Sub-Registrar as document No.108 in book No.3, volume No.1, at pages 89 to 91 on 29th May, 1965.

All the assets which were left by the deceased father of the plaintiff and defendant were duly distributed in the ratios of 1/2:1/2 and only the suit property needs to be partitioned. Both the parties agree that the plaintiff and defendant are in joint possession of the property as per the terms of the Will and there is no dispute qua their shares in the property

being 50% each per the registered Will. It is alleged that since the defendant was coming in the way of the plaintiff's enjoying of the premises he filed this suit for partition by meets and bounds.

The defendant though had admitted the Will dated 29.5.1965 to be the last and final Will of their deceased father, but alleged that as per the said Will the parties could make use of this property for residing themselves, letting on rent or sale with mutual consent and divide sale proceeds among themselves half and half, but so long as the property remains in joint possession, the share of each for its use or rent income will be governed by the Will itself. It is alleged that since, the parties have not agreed mutually to sell the property, the suit is premature. The legal heirs of defendant though have shown their inclination to sell the property and distribute the proceeds equally but the same is opposed by the plaintiff as he insist the property needs to be partitioned by meets and bounds.

The question if the property can be divided/partitioned by meets and bounds or needs to be sold can be looked into while passing the final decree. However one thing which stands admitted by both the parties is per Will dated 29.5.1978 both brothers are entitle to equal shares in premises in dispute and hence have consented to passing of the preliminary decree.

The learned counsel for the plaintiff has even referred to an admitted undated letter Ex.P3 written by the defendant-Pran Nath Kapur and it read as under:-

“You have decided to not to sell the house and therefore I suggest you house land should be divided half half and the two registry in separate names of Dhian Nath and Pran Nath be made so that there will be no dispute after my death.”

In the circumstances, I feel there is no impediment in passing of a preliminary decree declaring both the plaintiff and his brother to be the owners of the subject

property in equal shares and hence a preliminary decree of partition is passed in favour of the plaintiff - Dhian Nath Kapur to be owner of 1/2 share in the subject property per Will dated 29.05.1978 and the other 1/2 goes to the legal heirs of Late Sh.Pran Nath.

The application stands disposed of in terms of the above.”

7. After the preliminary decree was passed, I.A. 11813/2017 has been filed praying for passing a final decree. The said I.A. was filed by the Plaintiff seeking vertical division of the suit property. Notice was issued to the North Delhi Municipal Corporation (*hereinafter, 'NrDMC'*), which thereafter, filed an affidavit. Suggestions were given by both parties. Review petitions were filed in respect of order dated 14th September, 2017. On 5th July, 2018, this Court, while considering the intention of the testator, as contained in the Will, appointed a Local Commissioner for suggesting the modes of partition. The Local Commissioner filed his report. Parties concur that no oral evidence is required. Thereafter, submissions were heard on behalf of both sides.

8. The short question that needs to be addressed is only in respect of the final decree that is required to be passed and how the property needs to be partitioned. The preliminary decree already determines the share of the parties, and there is no dispute in this regard. The findings of the Court in order dated 14th September, 2017 are: -

- (i) That the Will dated 15th May, 1965 clearly gave equal share to both brothers;
- (ii) An undated letter i.e. Exhibit-P-3 is relied upon by the Plaintiff wherein Sh.Pran Nath Kapur, himself, during his lifetime, had

agreed that the house should be divided half-half and the Registry in two separate names ought to be made.

9. While considering the review petition filed by the Defendant, the Court observed in order dated 8th January, 2018 as under:

“Hence, the issue qua partition by metes and bounds if can be effected prior to the sale in terms of the specific condition given in the Will or the effect of undated letter of the defendant noted in the impugned order dated 14.09.2017 only shall be considered at the time of final decree, as agreed earlier and hence in view of above, there is no error apparent on the face of record. The application is disposed of in terms of the above.”

10. In order dated 5th July, 2018, while considering the applications filed by the parties including I.A.11813/2017, the Court observed as under: -

“18. Thus, it is the intention of the testator which is paramount importance and to cull out the intention the first step is to give literal meaning to the words expressed/used in the Will”

11. Thus, the Court had held that the intention as contained in the Will, as also the letter Exhibit-P-3, which is of paramount importance, should be considered at the stage of passing of the final decree. Again on 5th July, 2018, this Court considered three further applications moved by the parties and observed as under: -

“19. Now if one gives a literal meaning to each and every word as written in the Will dated 15.05.1965 it says after the death of the wife of the testator this house shall be the sole property of his two sons namely Mr.Pran Nath Kapur and Mr.Dhyan Nath Kapur and they can make use of it for residing themselves, letting it on rent or sell with mutual consent, but as long as

the house remains as their joint property share of each for its use or rental income will be as stipulated viz., Ground floor with Western side flat, Garrage etc. will remain in possession of Sri Dhian Nath Kapur and first floor with Barsati and three flats of Eastern side will remain in possession of Shri Pran Nath Kapur. Both Shri Pran Nath and Dhian Nath will be entitled to use open ground and live peacefully.

20. A bare perusal of the above would reveal the intention of the testator was as long as both the sons are alive and are living together in peace and as long as the house remains their joint property, each one shall use their respective portions allotted to them as per the Will. The condition stipulated is applicable only upon the sons living and using the property and is not extendable upon death of anyone of the sons. Hence on death of one of the sons, the condition stipulated viz., use of respective portions for residing themselves shall automatically go away.

21. The Will dated 15.05.1965 do not visualize a situation if upon the death of any of the son(s), their legal heirs shall be bound by such condition of user of respective accommodation; the right of residential use being a personal right was given to Mr.Pran Nath Kapur and Mr.Dhyan Nath Kapur only, hence upon death of any of the two brothers, such condition would automatically be waived as a deceased brother cannot use the property for his residence. Thus upon death of any one of the son(s) the remainder would not be bound to use the property in such particular manner, as stipulated in Will.

22. Moreso both the plaintiff and defendant being legatees of the testator, during their lifetime entered into a settlement vide an undated letter viz. Exhibit P-3 which notes as the plaintiff has decided not to sell the property the house be divided half and half and two registries in separate name be made so that there is no

dispute after his death.

23. If the legal heirs of the defendant insist the intention of the testator be respected then why they resist to the intention of their own father/husband who during his lifetime had agreed to divide/partition the property. Thus there is no impediment to move towards passing a final decree. However at this stage the Court is not to decide how the property is to be divided into two units since as a comprehensive report of the Local Commissioner would be needed who shall in his report would consider all factual/legal aspects qua division of property in two units viz. super structure or otherwise, if possible or lest sale is the only alternative. Hence before passing a final decree of partition it would be appropriate to appoint a Local Commissioner to suggest the various modes of partition. Mr. Amit Chadha, Advocate (Mobile No.9911116613) is therefore appointed as a Local Commissioner to visit the property and suggest modes of partition. The fee of the Local Commissioner is fixed at ₹ 1,25,000/-, besides incidental and out of pocket expenses, to be shared by the parties equally. The commission be executed within ten weeks from today and report thereof be filed thereafter. Needless to say that learned Local Commissioner shall put the parties to advance notice prior to his visit/inspection of the suit property.”

12. Thus, this Court has already held that so long as the sons of Late Shri Dina Nath Kapur are alive, each one has the right to “*use their respective portions of the said property*”. This is the clear intention of the Will dated 15th May, 1965. The letter Exhibit-P-3, written by the Defendant to the Plaintiff also reads as under: -

“You have decided to not to sell the house and therefore I suggest you house land should be divided half half and the two registry in separate names of

Dhian Nath and Pran nath be made so that there will be no dispute after my death.”

13. In this background, the Court had appointed a Local Commissioner to suggest the mode of partition by metes and bounds.

14. While the Plaintiff seeks vertical division of the property, the Defendants pray for either horizontal division or sale of the property. An objection was raised by the Defendants that vertical partition of the property would not be as per the building bye-laws and would not be acceptable to the Nr.D.M.C. Thus, on 2nd February, 2018, the Court had also called for an affidavit by Nr.D.M.C. The parties thereafter submitted reports by their respective Architects.

15. Thus, in order to pass a final decree, the following material is to be considered by the Court: -

- Affidavit of Nr.D.M.C.
- Report of the Local Commissioner
- Architect’s report submitted on behalf of the Plaintiff
- Architect’s report submitted on behalf of the Defendant

16. The crux of each of these documents is set out below: -

A. Nr.D.M.C. Affidavit: -

17. The affidavit filed on behalf of Nr.D.M.C. dated 23rd April, 2018 states as under: -

- That under clause 4.4.3 of the Terms and Conditions (iv) of the Master Plan of Delhi 20-21, sub-division of plots is not permissible;
- If parties, for their own mutual convenience decide to divide the property as per their own arrangements, the Nr.D.M.C. would not be

bound by the same;

- From the perspective of Nr.D.M.C., the plot would be treated as a single entity. If any sanction, regularisation or modification is required, both co-owners have to make a joint application for the entire property.
- However, the Nr.D.M.C. does not dispute the fact that there are several plots on that very road which are sub-divided.

B. Local Commissioner's Report: -

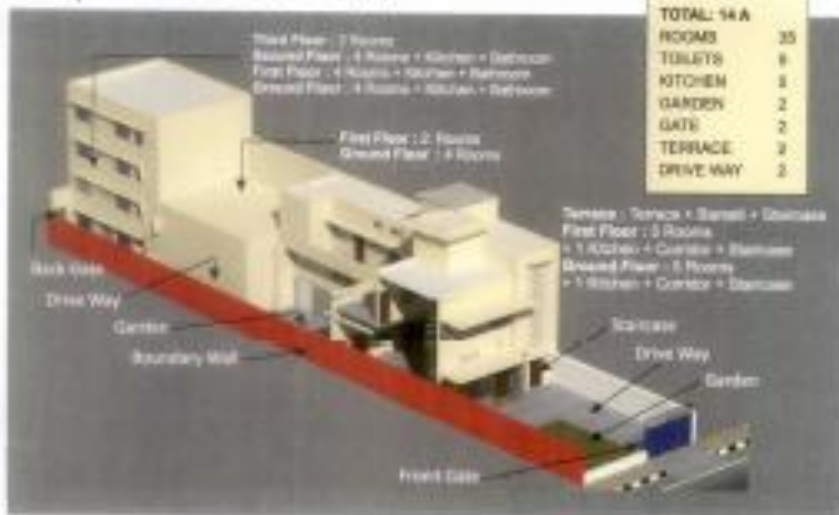
18. The local commission was executed on 28th July, 2018. A perusal of the report reveals that the Commissioner undertook a full inspection of the various structures located in the plot. The Local Commissioner, after visiting the property and inspecting the various areas and the locality, gave the following findings:

- The parties, under Sections 312 and 313 of the MCD Act can apply for sub-division.
- Parties can also apply for sanction/modification/regularisation of the building plans, considering the plot as one entity.
- There is no impediment to the parties possessing separate independent portions of the said property.
- The division of the property in a vertical manner would be feasible. The structural engineer, representing the Defendants has submitted a report dated 27th January, 2018 which suggests as to how the structure can be vertically divided.
- The property can be divided into 2 portions 14A and 14B, in the following manner:

Layout of 2 Independent Houses after Proposed Vertical Division of Suit Property.



Independent House - 14A



Independent House - 14B





- The Plaintiff is willing to take either 14A or 14B.
- The party which takes 14B would have to construct a new staircase for access to the first floor.
- There are 4 other properties being plot Nos.3, 4, 6 and 7, on the same street, which have been divided vertically.

19. The Local Commissioner concludes as under: -

“It is submitted that in view of the above inspection/study of the suit property and the existing built up condition of the property in question, I am,

certain that Vertical Division and Partition of the super structure of the property bearing No. 14, Park Area, Karol Bagh, New Delhi-110005 can be initiated and carried out by Meters and Bound in the proportion as per the order passed by the Hon'ble High Court in the present suit."

C. Architect's Report Submitted on Behalf of the Plaintiff: -

20. The structural engineer on behalf of the Plaintiff has placed on record photographs of various plots having two separate gates i.e. plot Nos.3, 4, 6, 7, 11, and 12. According to the Plaintiff, plot No.14 i.e. the suit property can also have two gates. The plot faces the Ajmal Khan Park on Gangeshwar Dham Marg, Karol Bagh and is a freehold property. The Plaintiff is 84 years of age and his wife is 81 years of age. Both parties can have an independent access and the property can be partitioned.

21. The Plaintiff's engineer has also given the plans for the ground, first and the second floor after vertical division. Thus, according to the Plaintiff, it is practically possible to have a vertical division of the plot.

D. Architect's Report Submitted on Behalf of the Defendants: -

22. According to the Defendants' engineer, since the building bye-laws do not permit division of the plot, any sub-division would be unauthorised, as per MPD 20-21. He relies on a reply by Nr.D.M.C. dated 27th April, 2015 where, in response to the query as to whether partition of plots is allowed, the corporation stated "*no partition is allowed as per MPD 20-21*".

23. In this report, even the vertical division is not practical as it would require erecting of new structural members like columns and beams and would also involve substantial costs.

24. Thus, the engineer recommends that it is not advisable to make

vertical division. The conclusion in the said report reads as under:-

“Due to the above serious structural concerns it is not advisable to make vertical division by simply erecting a wall but proper structural measures as suggested above and shown in structural drawings attached shall be taken. However it’s better to demolish the whole structure and reconstruct it after getting proper approval from the concerned authority. Any such partition with addition and alteration without the authority approval deemed illegal and also detrimental to the safety and stability of structure and its occupants.

Due to above observations and conclusions it is recommended to go for reconstruction of the building after carrying out necessary structural design changes as per prevalent BIS codes.”

Analysis & Findings:-

25. A perusal of the Will dated 15th May, 1965 and Exhibit-P-3 read with the reports of the Architects, shows that the parties are not willing to come to any consensus on the manner in which the suit property is to be partitioned, despite the shares being determined.

26. Late Shri Dina Nath Kapur was the absolute owner of the property. Presently, the Plaintiff’s family is in possession of the ground floor portion of the front building as also the western side flats. The Plaintiff is 84 years old and his wife is 81 years of age. They live together with their unmarried daughter.

27. On the other hand, the Defendant has passed away. His wife, Smt. Swarna Kapur who is 87 years of age, lives with her grandson (daughter’s son), Shri Aditya Bajaj and his wife, Smt. Tanvi Bajaj. The son of Shri Pran

Nath Kapur – Jitender Kapur lives in Canada and the daughter – Meera Bajaj lives in Paschim Vihar, Delhi. Thus, from the Defendant's side, apart from Pran Nath Kapur's wife, his extended family is using the property. On the other hand the Plaintiff and his wife reside in the suit property with their daughter.

28. The Defendants submit that the suit property deserves to be sold and the sale proceeds be divided between the Plaintiff and the Defendant equally. It is thus clear that since the Defendant-Shri Pran Nath Kapur has passed away, his family is interested in selling the property.

29. At this stage, the intention of the testator Shri Dina Nath Kapur - the original owner, as per his Will dated 15th May, 1965 deserves to be considered. The relevant portions in the Will relating to the suit property read:

"1. PROPERTY N O.1 Bungalow at 14, Park Area, Karol Bagh, New Delhi

On my death in case my wife, Vidyavati is still alive she will have full rights of its use but no power of sale, mortgage, transfer or donate or to make gift. She will have full authority to reside, or to lease it on rent and recover its rent and append the same as she likes none of my sons, daughters or other relations would have any concern with it.

*After death of my wife this house will be sole property of my two sons Shri Pran Nath and Dhian Nath and they can make use of it for **residing themselves, letting on rent or sell with mutual consent as they think fit and divide its sale proceeds among themselves half and half** , but as long as the house remains as their joint property share of each for its use or rent income will be as under:-*

Ground floor with Western side flat, Garrage etc. will remain in possession of Sri Dhian Nath Kapur and

first floor with Barsati and three flats of Eastern side will remain in possession of Shri Pran Nath Kapur. Both Shri Pran Nath and Dhian Nath will be entitled to use open ground and live peacefully.”

Thus, under the Will, both sons of the original owner could make use of the property for **residing themselves**. It is only with mutual consent that the property could be sold and the proceeds divided half-half.

30. Further, during the lifetime of Shri Pran Nath Kapur, he had written a letter to his brother – the Plaintiff agreeing that the land should be divided half-half and two separate registries in the names of the two brothers ought to be made. The said document, Exhibit P-3 is extracted in paragraph 12 above. These two documents were considered by this Court in order dated 5th July, 2018, where the clear finding of this Court was that as per the Will, the intention of the testator was that both the sons can make use of the property for residing themselves. Thus, the Plaintiff’s submission that the Plaintiff cannot be forced to sell the property and the Plaintiff ought to be permitted to reside in the suit property, is valid and justified. The same in fact reveals the true intention of the Testator.

31. The question arises as to what should be the final decree that should be passed in the matter. A perusal of the Local Commissioner’s report along with the reports of the structural engineers submitted by both sides shows that vertical division of the property is not impossible. It may require some construction/modifications here and there. However, the same is feasible. The age of the Plaintiff and his wife as also Defendant No.1, clearly shows that any order of sale or demolition or reconstruction would result in uprooting them completely. From the submissions addressed by the parties,

it appears that they do not have the resources for re-building or re-constructing the entire property. The Court has to bear these circumstances in mind while passing the final decree.

32. The purpose of filing of the present suit, on behalf of the Plaintiff, is to primarily have a determination on the shares of the parties, and to the extent possible, have independent access and live comfortably in the place where they are already residing. It is submitted, on behalf of the Plaintiff, that the Plaintiff is also emotionally and sentimentally attached to the suit property, which was purchased by his father. Thus, this Court cannot ignore the wishes of the Plaintiff while passing the final decree.

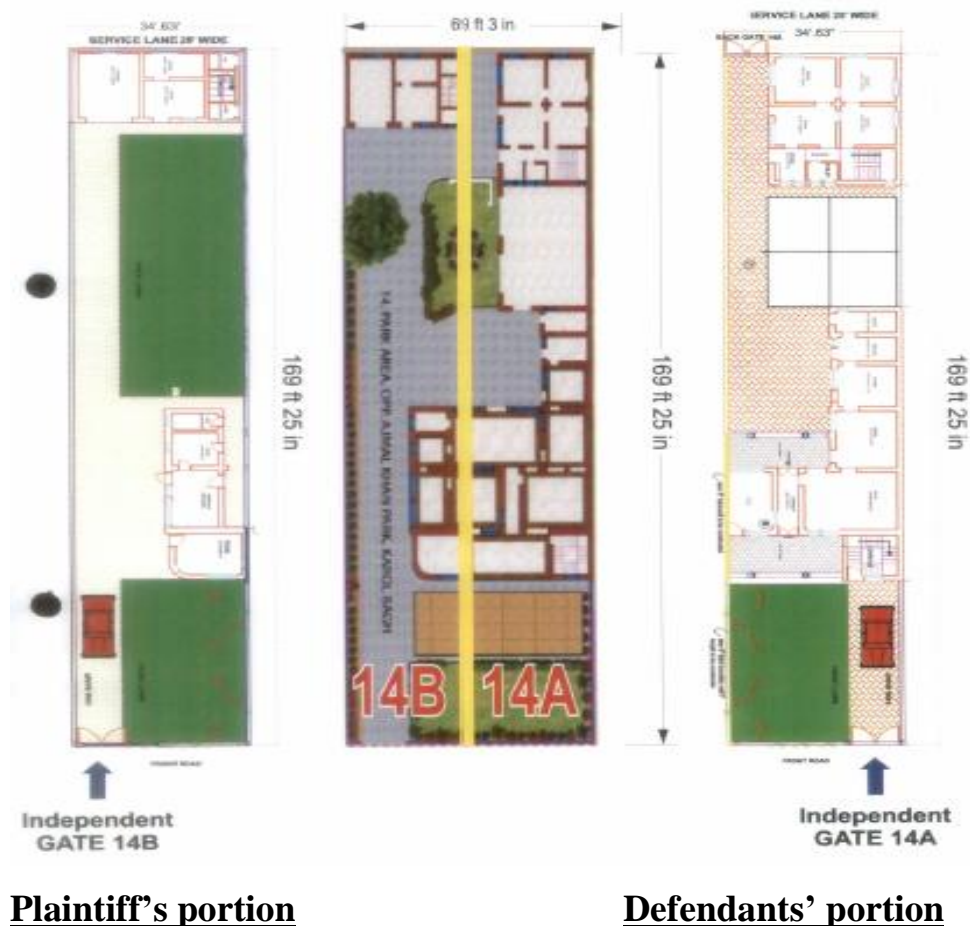
33. The intention in the Will, the letter, Exhibit-P-3 as also that of the Plaintiff, who is before the Court, is that he would like to enjoy living in the suit property and does not intend to sell the same.

34. The material on record shows that several properties in the vicinity have been vertically divided and thus, the vertical division of the property is the best mode of partition that would be appropriate taking the overall facts and circumstances into consideration. Though the Court, in an appropriate case, does have the power to direct sale of the property and distribution of sale proceeds under Section 2 of the Partition Act, this is not a case where such a course of action ought to be adopted. The age of the Plaintiff and his wife as also the wife of late Shri Pran Nath Kapur i.e. the Defendant No.1 who is residing in the property dissuades the Court from passing an order for sale as the same would deprive the parties of the enjoyment of the suit property in their ripe old age.

35. The vertical division of the property as suggested by the structural engineer of the Plaintiff and by the Local Commissioner is accordingly held

to be feasible and practical in the facts and circumstances of the present case.

36. A final decree for partition is accordingly granted dividing the property into two equal vertical halves, in the manner as suggested in the Local Commissioner's report at Annexure-F. The western part of the property, shown as '14B' in Annexure F to the LC Report, is already substantially in the possession of the Plaintiff and the Plaintiff shall, therefore, retain the western portion of the property. The Defendant shall have exclusive possession and ownership of the eastern portion of the property. The western portion shall be numbered as 14-B and the eastern portion shall be numbered as 14-A. The suit property shall be divided as under:



Plaintiff's portion

Defendants' portion

37. Both parties shall enjoy ownership and possession of their respective portions of the property. They are permitted to apply to the Municipal Authorities, as per the prevailing bye-laws, for mutation in accordance with the judgment of this Court in *Lubhaya Kapoor Vs. J.R. Chawla & Ors., (1986) 10 DRJ 359*. The authorities shall process any such application made on behalf of the parties expeditiously. The parties are permitted to get separate electricity and water connection installed and pay their respective taxes, charges and other duties for their respective portions. However, for the purpose of construction, the plot shall be considered as a whole and the construction shall be within the permissible FAR Limits. The said plot shall not, however, be saleable except as a whole. The parties and their legal heirs would be entitled to enjoy possession of their respective portions of the property at least during the lifetime of the Plaintiff and his wife as also Defendant No.1. If, either during or after the lifetime of Shri Dhian Nath Kapur and his wife, as also Smt. Swaran Kapur wife of Shri Pran Nath Kapur, the suit property is to be sold, the same shall be only with the mutual consent of the parties or their legal heirs.

38. Decree sheet be drawn accordingly in terms of Paragraph 36 above. **Annexure – F** to the Local Commissioner's report at page 233 of the paper-book, shall form part of the decree. No order as to costs. All pending applications also stand disposed of.

PRATHIBA M. SINGH
Judge

FEBRUARY 04, 2019

Rekha