

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(OS) 726/2007

%

Reserved on: April 25, 2008

Pronounced on: 1st August, 2008

SH. PARKASH CHAND KHANNA

..... Plaintiff

Through Mr. H.L. Narula, Advocate

versus

SH. J.C. KHANNA

..... Defendant

Through Mr. Prem Kumar, Mr. Nilesh Sawhney,
Advocates

% **01.08.2008**

CORAM:

Mr. Justice S. Ravindra Bhat

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

Mr. Justice S. Ravindra Bhat:

1. The plaintiff seeks a decree of partition and perpetual injunction concerning a building on and the plot measuring 410 sq. yds., bearing No. 12 at Street No. A-15, Vasant Vihar, New Delhi (hereafter referred to as "suit property"). According to the plaintiff, in terms of the Conveyance Deed dated 06.09.2006 issued by the Lease Administration Office of the Delhi Development Authority, for and on behalf of the President of India,

he and the defendant are joint owners. The suit property consists of ground and first floor. The plaintiff claims that there a telephone connection in his favour, in the suit property. According to the suit averments, the plaintiff is a bachelor presently about 84 years who intends to dispose of his half share by sale and bequeath or transfer the proceeds to a Trust known as Smt. Durga Devi Charitable Trust. The plaintiff has been one of the founders of the said Trust for the last 13 years. He alleges that he requested the defendant to partition the property by metes and bounds but the latter has been avoiding doing so. The plaintiff alleges to have requested the defendant, his brother to agree to partition on 20.03.2007. According to the plaintiff, the defendant is now threatening to create a charge on the property by transferring, alienating or mortgaging it without even dividing it.

2. The plaintiff claims half share in the property; according to him, the defendant cannot encumber or create a charge without first having the joint property partitioned.
3. The plaintiff relies on certain documents such as Income Tax receipts dated 22.9.2004 (Ex. P-1); Receipt dated 22.07.2002 (Ex. P-2); receipt of electricity bill dated 07.03.2007 (Ex. P-3) and a copy of the registered Conveyance Deed executed on 06.09.2006 (Ex. P-6-P-10).
4. The defendant, who is the plaintiff's younger brother, in the written statement objects to the maintainability of the suit alleging that the plaintiff has no cause of action to

approach the Court. It is alleged that the plaintiff has withheld material facts from the Court. According to the defendant, the parties had agreed that there would be two separate and independent units in the suit property. The first floor is occupied by the plaintiff and the ground floor is occupied by the defendant. The plaintiff was working in Jullunder in 1970 when he wrote to the defendant agreeing to this arrangement.

5. The defendant, a Class-I Office of the Indian Economic Service became a member of the Government Servant Co-operative Housing Building Society on 19.10.1962. In this capacity he was allotted a plot in 1972 and handed over possession 03.03.1972. Since the plaintiff was suffering from disability and was unmarried, the defendant entered into agreement with him and arrived at a understanding whereby his name was also included in the Perpetual lease deed.
6. According to the defendant, after the plot was allotted, the parties agreed about the method of construction and the respective portions to be shared by them. The plaintiff and defendant constructed on their respective floors by using their funds. The plaintiff relies on a written agreement between the parties dated 30.01.1971 which had earmarked the ground floor to the defendant and the first floor to the plaintiff. The defendant also relies on other documents such as the share certificate issued by Government Servant Co-operative House Building Society (which has been denied) and the possession report dated 30.03.1972 issued in his favour which too has been denied by

the plaintiff. The other documents relied on are a Certificate dated 18.09.1973 (Ex. D-3), General Power of Attorney dated 01.07.1975 issued by the plaintiff (Ex. D-4), affidavit dated 21.07.1975 executed by the plaintiff (Ex. D-5) and an agreement dated 07.06.1994 (Ex. D-6). According to the defendant, all these establish that the property had been partitioned between the two brothers at all relevant and material times.

7. It is claimed that both brothers had arrived at an understanding and embodied it in a series of documents, that there has been complete and effective partition of the suit properties in all respects and nothing further remains to be done. According to the defendant, in withholding these facts, the plaintiff has committed fraud. In any event, he is not entitled to the reliefs claimed in this suit. The defendant also alleges that he never threatened to charge or otherwise transfer the property, as is alleged by the plaintiff.

8. On 20th March, 2008, learned counsel for the parties had submitted that the suit could be proceeded with and finally heard on the basis of existing pleadings and documents. They urged that no further evidence, either oral or documentary was necessary. With their consent, the following issues were, therefore, framed:-

1. *Whether the plaintiff proves entitlement to a half share in the suit property?*
OPP.
2. *Whether the suit is not maintainable for the reason that plaintiff has suppressed material facts, as alleged in the written statement? OPD.*

3. *Whether the suit property was partitioned and, therefore, the suit is not maintainable?* OPD.
4. *Whether the suit property had never the character of joint property from its inception?* OPD.
5. *Relief, if any."*

ISSUE NOS. 1,3 AND 4

9. These issues are inter-related and overlap and, therefore, they are taken up together.
10. The rival pleadings reveal that though there is admission as to nature and possession enjoyed by the respective parties, there is absolute divergance in their stand as to ownership and entitlement of shares. The plaintiff asserts that ownership is joint and common; the defendant on the other hand, by placing reliance on series of documents, contends that the parties had already partitioned the property according to their convenience and understanding and acted upon it. The plaintiff relies upon the documents filed along with the suit such as copies of house tax receipts, electricity bill etc. and a copy of the Conveyance Deed dated 06.09.2006. In these, the names of both the plaintiff and the defendant are shown together. It is, therefore, urged that partition by metes and bounds had never taken place. Mr. Narula, learned counsel placed strong reliance on the last documents i.e. registered Conveyance Deed executed on behalf of the President of India i.e. 06.09.2006. The names of both the plaintiff and the defendant

appear in this. This document also adverts to a previous Lease Deed, by which property rights had been conferred. It is urged that all the material documents such as sanctioned building plan, completion certificate etc. issued by the Municipal Authorities concerning the suit property are with the defendant. These would bear out the plaintiff's contention that both parties have equal and undivided rights. Counsel urged that both the brothers approached and filed a joint application for conversion of the property which led to the conveyance deed being executed. There, it is submitted, it is too late in the day to urge that the property is not joint and that it has been partitioned.

11. Learned counsel submitted that taken in totality the documents of the defendant, at best, disclose existing of a working arrangement and do not point to partition as known by law. The plaintiff, who is advanced in age, is desirous of having his share in the property clearly delineated so that he can bequeath it to charity.
12. Counsel urged that without a physical division of the property there is no partition in the eye of the law. He relied upon the decision reported as *Income Tax Officer, Calicut vs. N.K. Sarada Thampatty*, AIR 1991 SC 2035. Learned counsel relied upon defendant's reply to an application under Order XII Rule 6 CPC filed by the plaintiff and submitted that they contain sufficient admission entitling the plaintiff to decree. According to the counsel, the admission about the existence of a Conveyance Deed Ex. P-6 containing the joint names of the parties, and the fact that Ex. D-6, the agreement dated

27.06.1994, by clause 4 stipulated that the parties would use a joint gate, and further that the previous perpetual lease deed dated 04.04.1971, electric and water connections and house tax receipts were of jointly those of the parties conclusively established that there was no partition.

13. Learned counsel relied upon the decision reported as *Uttam Singh Duggal & Co. Ltd. vs. United Bank of India & Ors.*, 2000 (7) SCC 120 to say that the materials on record, about the nature of the property, the admitted amounts spent by the plaintiff and the defendant, on construction upon the plot, the joint ownership evidenced by conveyance deed, etc are sufficient to decree the suit, in terms of Order 12, Rule 6. Counsel submitted that in the attendant circumstances of the case, the court should decree the suit and direct an inquiry into the best method of partitioning the property by metes and bounds, since the plaintiff and defendants are unable to arrive at a mutually agreeable solution in that regard.

The defendant's case

14. It is argued by the defendant that the cumulative effect of the documents on record show that whereas in regard to inconsequential issues such as house tax, water connection, electricity etc, the parties share amenities jointly, they had been separate and in possession of distinct portions, right from inception, in 1971. Particular reliance is placed on Exhibits D-2 to D-6,

which according to the defendant, conclusively manifests the parties desire to separate the property, not only *in prasenti*, but also for future, as evidenced by the agreement that the second floor rights would vest in the defendant and the third floor rights, if made available, would vest in the plaintiff.

15. It was argued by Mr. Prem Kumar that the plaintiff cannot, after having executed agreements and affidavits, which are not denied, and are part of the record, say that the property is undivided. The parties had divided it in the most convenient manner and even taken care to put it down in writing. The mere circumstance that a Conveyance Deed was issued in 2006 did not change the nature or character of ownership, which was separate.

16. It was urged that in any case, the plaintiff's conduct in approaching this court, without disclosure of material facts, and suppressing relevant documents, betrays his attempt to grab what is lawfully not his. Counsel urged that having lived in the premises all these years peacefully, in separate portions, the plaintiff in his old age has been swayed by local real estate brokers and is bent on creating mischief on the defendant and his wife, who live in the ground floor, without any other support. According to counsel there was never any threat of transfer, charge or alienation of the property by the defendant; in any case, the whole story is concocted.

It is urged that the plaintiff is estopped, in view of the documents admitted, and on record, from denying that the parties had conveniently partitioned the property; there was, as a consequence, no question of partitioning it by metes and bounds, as claimed by the plaintiff.

17. For a proper appreciation of the issues, it would be relevant to extract some relevant documents. Ex. D-2 is an admitted document; it is an agreement dated 30th January, 1971 executed by the plaintiff and the defendants, and reads as follows:

“Exhibit - D2

Agreement for occupation, ownership & use of the Building to be constructed on Plot A/15/12 Basant Vihar, New Delhi.

Agreement

This agreement is hereby executed this 30th day of January, 1971 by Parkash Chander Khanna son of Wasuram Khanna Typist District Courts, Jullundur (hereinafter called party No.1) and Shri Jagdish Chander Khanna s/o. Shri Wasuram Khanna, Research Officer, Planning Commission (hereinafter called the Party No.2) New Delhi for occupation, ownership and use of the building to be constructed on Plot No.A/15/12 Vasant Vihar, New Delhi, on the following terms and conditions:-

- 1. That both the parties will undertake construction of building on Plot No.A/15/12, Vasant Vihar, whereas the ground floor will be constructed, owned used and occupied by party No.2. This will also include the Garrage.*
- 2. Similarly the party No.1 will be entitled to construct the first floor on the main building and construction on the garrage.*
- 3. That Party No.1 will be entitled to construction of additional one room set for himself only on the first floor which in no circumstances can be rented out. In case it is mutually agreed to construct a second floor the cost and rent of this floor will be shared by the two parties at No.1 & 2.*
- 4. That expenditure on the foundation would be equitably divided between the two parties.*

In witness whereof the parties have signed this agreement on the day above written.

Witnesses:

Party No.1.

1.....
2.....

Party No.2.”

18. Exhibit D-3 is a document executed on 18th September 1973 by the plaintiff, entitled “To whomsoever it may concern” and declares that:

“By virtue of the mutual agreement and understanding with my brother J.C.Khanna of Sec.1/124 R.K.Puram N.Delhi, whereas he had built the ground floor on A 15/12 Vasant Vihar, the first floor has been built by me. I therefore enjoin the tenant on first floor to make the payment in cash or cheque in my name separately to Sh.J.C.Khanna on my behalf. Similarly the tenant on ground floor is requested to make payment directly to him or issue cheque in his name only.

We have agreed to this mode of rent collection on individual basis from the tenants of both the floors.”

Exhibit D-4 is a special power of attorney executed on 15th July 1975 by the plaintiff, authorizing one Dev Raj s/o Durga Dass, to represent him and act as attorney, *inter alia*, for the purpose of presenting the agreement of 30-1-1971 for registration. The said document recorded its purpose as follows:

“for the purpose of presenting agreement dated 30th Jan, 1971 entered into between myself and my real brother Jagdish Chander of 1/124 R.K.Puram, New Delhi regarding the mutual division of the Kothi No.A15/12, Vasant Vihar, New Delhi, by virtue of which I am the owner in possession of the first floor and Mr.Jagdish Chander is the owner in possession of the ground floor, besides other terms mentioned therein. As personally, I am unable to attend the Office of Sub Registrar Delhi for registration, I authorize my attorney to present the same before the said officer and make statement and get the same document registered and take such other steps necessary for the same purpose. I shall be bound by his such statement and acts towards this end.

Executed this Power of Attorney by me at Jullundur this 15 day of July 1975.”

19. Exhibit D-5 is in a similar vein; it is an affidavit executed by the plaintiff, on 21-7-1975;

and reads as follows:

“Exhibit D-5

I, Parkash Chander Khanna son of Sh.Wasu Ram, typist, Seat No.31, Old District Courts, Jullundur, do hereby solemnly affirm & declare:-

- 1. That the kothi No.A-15/12, situate in Vasant Vihar, N.Delhi, which is constructed on Lease hold land is a double storeyed and I am the full owner (lessee) of the first floor of the said premises and my younger brother Sh.Jagdish Chander Khanna is the full and exclusive owner of the ground floor.*
- 2. That since the letting out of this building I have been receiving the rent of the first floor and my younger brother Sh.Jagdish Chander, has been receiving the rent of the ground floor.*
- 3. That neither I have any connection, interest or right over the ground floor nor Sh.Jagdish Chander is having any interest, lien or right over the first floor.*
- 4. That ground floor was built by Jagdish Chander from his own resources which includes loan and the first floor was built with my own expenses which also include borrowing from other parties.*
- 5. That the income of the first floor is shown in my income tax return while that of the ground floor is shown to have been received by Jagdish Chander in his income tax return.*

That my above affidavit is true & correct to the best of my knowledge and belief. Nothing is in it.

Deponent.

*Jullundur
21.7.75.*

*Attested
M.T.C.JULLUNDUR.”*

20. The last document, Ex.D-6, reads as follows:

Exhibit D-6

This Agreement is executed between i) Parkash Chander Khanna S/o.Sh.Wasuram R/o.A-15/12 Vasant Vihar (hereinafter called the Party No.1) and J.C.Khanna S/O.Sh.Wasuram Khanna, R/o.A-15/12 Vasant Vihar, New Delhi (hereinafter called the Party No.2) this 27th day of June, 1994 to the following effect:

That the property at A-15/12 is jointly owned by the two parties and by mutual agreement the party No.1) is occupying the first floor, Party No.2 is occupying the Ground Floor. With a view to enable them, their successor/assignees to extend the existing built area up to the maximum permissible limit they have further mutually agreed to as under:-

That the Party No.2 or his successors/nominees will have the concurrence and approval of Party No.1 to the extension if area on Ground Floor to the permissible limit & for presenting the necessary plan and other documents & executing construction, after obtaining sanctions, at his own cost.

That the Party No.1 or his successors/nominees will have the concurrence and approval of Party No.2 to extend construction on the First Floor to the permissible limit and present and get approved the necessary plan and other documents from authorities. But the Party No.1 will have to share equitably the cost incurred by Party No.2 on additional pillars, laying foundations and other infrastructure towards extension of the covered area on the ground floor.

3. *The two parties also agree that in further addition of storey or floor to the existing house the Party No.2 will have the approval of Party No.1 or his successors to construct the 2nd floor at his own cost and Party No.1 or his successors will have the approval of constructing the 3rd floor at his own cost. They will also have the necessary approval of each other to present plans etc. In case the construction of 3rd floor is not allowed the both parties will build the 2nd floor jointly or in two parts and share cost.*

4. *Unless mutually agreed upon by Party No.1 and Party No.2 the front gate of the house at A-15/12 will be used by Party No.2 and the thirteen feet long side lane gate by Party No.1 with a view to ensure privacy and non-*

interference in vehicular and other movements.

(PAKASH CHANDER KHANNA)

(J.C.KHANNA)

PARTY NO.1

PARTY NO.2.”

21. The plaintiff has not disputed the defendant's assertion about the latter having been allotted the plot, in his capacity as member of the Government Servants' Co-operative House Building Society; however, he has denied the share certificate issued to the defendant. The plaintiff has also not disputed the letter relied on by the defendant. The latter does not dispute that the plaintiff had contributed for part of the construction on the plot, and was, according to understanding, entitled to occupy the first floor. The question is, as to the character of the property- is it joint, or is it owned, through independent portions, by the parties.

22. The plaintiff's depends on the original lease deed, and the conveyance, executed in 2006, whereby the parties are shown as joint owners. He also relies on phone connection, water and electricity connection, to say that the property is jointly owned. The defendant is on the other hand, relying on several documents, D-2, D-3, D-4, D-5 and D-6.

23. Though a reading of the conveyance deed would indicate facially that the property is owned jointly, yet this court cannot be unmindful of the other materials on record. These are four documents, D-2 to D-6. In *Harinder Pal Singh Chawla –Vs-Nirmal Danire & Ors* 51 (1993) DLT 191 the court was concerned with a claim for partition of property, which was subject of a bequest. It was held that:

“21. Land is common. House is built in a manner that it is one bungalow. The ground floor foundation and walls support the first floor and likewise the first floor supports the second floor. Thus from the construction point of view the building may be one unit. But the bequests in favour of defendant No. 1 of the ground floor confers exclusive and independent right on the legatee. Similarly, the upper portion goes exclusively and independently to the other legatee. The nature of construction of the building as one unit and the land underneath remaining undivided, cannot lead to the conclusion that it is an undivided family dwelling house. If this is accepted for purpose of attracting Section 4 of the Partition Act, there will be hardly any case where this provision will not apply. What is to be seen is that the house never became an undivided family house. From day one, it was a divided house. Therefore, these things cannot confer the status of a family dwelling house on the property. So far as the land is concerned, the Will does not speak anything about it. Whatever may be the interpretation of the Will in this behalf is yet to be seen.

22. The most important feature of the case is that the property devolved on the two legatees in pursuance of a Will. The Will gave exclusively and independently the respective portions of the property to the respective legatees. Therefore, this property never had the status of any undivided family dwelling house. If further follows from this that we need not consider the question of partition at all. The property was never joint. The Will itself gave separate independent portions to the legatees. There was never any occasion to effect partition nor partition is necessary, the much needed jointness, commonality or family never came about. The point may be examined from another angle. If the bequest was in favour of two strangers, could this argument be pressed in service. Merely because the bequest is in favour of brother and sister this argument has been advanced. In case of bequests being in favour of strangers what will happen to the argument regarding common walls and land underneath being undivided? This common land and wall argument will not stand in such a case. It is just a chance that the grant is in favour of brother and sister. Was the house in question ever a family dwelling house? The answer is no. The bequest cannot convert it into one.”

The effect of such documentary evidence has to be weighed by keeping principles embedded in Sections 91 and 92 of the Evidence Act. The interplay between these two provisions was

explained by the Supreme Court in *Bai Hira Devi and Others v. Official Assignee of Bombay*,

AIR 1958 SC 448, as follows:

“4. Chapter VI, Evidence Act which begins with Sec. 91 deals with the exclusion of oral by documentary evidence. Section 91 provides that :

“When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.”

The normal rule is that the contents of a document must be proved by primary evidence which is the document itself in original. Section 91 is based on what is sometimes described as the “best evidence rule”. The best evidence about the contents of a document is the document itself and it is the production of the document that is required by Sec. 91 in proof of its contents. In a sense, the rule enunciated by Sec. 91 can be said to be an exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act.

5. Section 92 excludes the evidence of oral agreements and it applies to cases where the terms of contracts, grants or other dispositions of property have been proved by the production of the relevant documents themselves under Sec. 91; in other words, it is after the document has been produced to prove its terms under Sec. 91 that the provisions of Sec. 92 come into operation for the purpose of excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. The application of this rule is limited to cases as between parties to the instrument or their representatives in interest. There are six provisos to this section with which we are not concerned in the present appeal. It would be noticed that Secs. 91 and 92 in effect supplement each other. Section 91 would be frustrated without the aid

of Sec. 92 and Sec. 92 would be inoperative without the aid of Sec. 91. Since Sec. 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding or subtracting from the terms of the document properly proved under Sec. 91, it may be said that it makes the proof of the document conclusive of its contents. Like Sec. 91, Sec. 92 also can be said to be based on the best evidence rule. The two sections, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas Sec. 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike Sec. 92 the application of which is confined only to bilateral documents. Section 91 lays down the rule of universal application and is not confined to the executant or executants of the documents. Section 92, on the other hand, applies only between the parties to the instrument or their representatives in interest. There is no doubt that Sec. 92 does not apply to strangers who are not bound or affected by the terms of the document. Persons other than those who are parties to the document are not precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the terms of the document. It is only where a question arises about the effect of the document as between the parties or their representatives in interest that the rule enunciated by Sec. 92 about the exclusion of oral agreement can be invoked. This position is made absolutely clear by the provisions of Sec. 99 itself. Section 99 provides that "persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document." Though it is only variation which is specifically mentioned in Sec. 99, there can be no doubt that the third party's right to lead evidence which is recognized by Sec. 99 would include a right to lead evidence not only to vary the terms of the document, but to contradict the said terms or to add to or subtract from them. If that be the true position, before considering the effect of the provisions of Sec. 92 in regard to the appellants' right to lead oral evidence, it would be necessary to examine whether Sec. 92 applies at all to the present proceedings between the official assignee who is the respondent and the donees from the insolvent who are the appellants before us.

.....

As a matter of fact, from the terms of Sec. 92 itself, it is clear that strangers to the document are outside the scope of Sec. 92; but Sec. 99 has presumably been

enacted to clarify the same position. It would be unreasonable, we think, to hold that s.99 was intended not only to clarify the position with regard to the strangers to the document, but also to lay down a rule of exclusion of oral evidence by implication in respect of the parties to the document or their representatives in interest. In our opinion, the true position is that, if the terms of any transfer reduced to writing are in dispute between a stranger to a document and a party to it or his representative in interest, the restriction imposed by Sec. 92 in regard to the exclusion of evidence of oral agreement is inapplicable; and both the stranger to the document and the party to the document or his representative in interest are at liberty to lead evidence of oral agreement notwithstanding the fact that such evidence, if believed, may contradict, vary add to or subtract from its term. The rule of exclusion enunciated by Sec. 92 applies to both parties to the document and is based on the doctrine of mutuality. It would be inequitable and unfair to enforce that rule against a party to a document or his representative in interest in the case of a dispute between the said party or his representative in interest on the one hand and the stranger on the other.”

24. D-2 is described as “*Agreement for occupation, ownership & use of the Building to be constructed on Plot A/15/12 Basant Vihar, New Delhi.*” It embodies the relative rights of the parties to different portions of the building (ground and first floor), right of occupation, and the right to rent out the premises. D-3 is similar, though executed two years later; the tenants of different portions, according to the parties agreement, were to pay rents directly to the brother who let them into the concerned premises (ground floor or the first floor, as the case may be). D-4 significantly enough, empowered the plaintiff’s attorney to register D-2. In this, he describes D-2 as a document-

“regarding the mutual division of the Kothi No.A15/12, Vasant Vihar, New Delhi, by virtue of which I am the owner in possession of the first floor and Mr.Jagdish Chander is

the owner in possession of the ground floor, besides other terms mentioned therein.”

D-5 is an affidavit of the plaintiff. It, *inter alia*, records the understanding of both brothers, regarding the suit property, in the following manner:

“That the kothi No.A-15/12, situate in Vasant Vihar, N.Delhi, which is constructed on Lease hold land is a double storeyed and I am the full owner (lessee) of the first floor of the said premises and my younger brother Sh.Jagdish Chander Khanna is the full and exclusive owner of the ground floor.”

D-6 is the last in the series of documents entered into by the parties. For the first time, it talks of joint ownership of the property. However, barring a solitary reference to such expression, the document goes on to delineate the existing sharing of the property; ground and second floor rights inhere with the defendant and first and third floor rights (if any) inhere with the plaintiff.

As opposed to the D-2 to D-6 series of documents, the plaintiff relies on the original lease document, and the Conveyance deed, later executed in 2006; they show the brothers as joint owners.

25. In the opinion of this court, the weight of evidence points to the plaintiff and the defendant having agreed, ever since 1971, to construct upon the property in a particular manner, and occupy as well as possess entitlements and rights in respect of specific, defined portions of the building. This understanding was acted upon by the parties; they inhabited in such earmarked portions or floors. They also provided how future constructions had to be made, and apportioned

between them. In the face of such evidence, the fact that their names appear jointly in the lease-deed, and, later, in the conveyance deed, is not of much consequence.

26. *Polammarasetti Varana Venka Satyanarayana v. Suddha Apparao Naidu (Dead) and Others*, (1997) 9 SCC 244 and *Tara Chand –vs- Sagar Bai* 2007 SCC and the judgment of this court in *Amarjeetlal Suri –vs- Moti Sagar Suri* 119 (2005) DLT 295 are authorities for the proposition that wherever parties act upon understandings evidenced by written deeds, or documents, a *species* of estoppel binds them; they cannot contend to the contrary. Here too, the documentary evidence found in the form of D-2 to D-6 and the subsequent actions of the parties conforming to the understanding incorporated in them, points at their intention of conveniently partitioning the property to their mutual satisfaction as far back as in 1971.

27. In view of the above discussion, it is held that the property never had the character of joint property; it had been partitioned in 1971. The plaintiff's share was clearly defined; he accepted it and has been in enjoyment of it, ever since, for the last 37 years. He cannot therefore, seek partition of the property now. Issue Numbers 1,3 and 4 are answered against the plaintiff and in favour of the defendant, in these terms.

Issue No. 2

28. It is often said that a suitor or litigant should approach the court with all material facts, not concealing anything relevant, and with “clean hands”. What is meant by material facts, has been explained in several cases. In *Anurima Barua –vs- Union of India* 2007 (6) SCC 81, the

position was explained as follows:

“29. Material fact would mean material for the purpose of determination of the lis, the logical corollary whereof would be that whether the same was material for grant or denial of the relief. If the fact suppressed is not material for determination of the lis between the parties, the court may not refuse to exercise its discretionary jurisdiction. It is also trite that a person invoking the discretionary jurisdiction of the court cannot be allowed to approach it with a pair of dirty hands. But even if the said dirt is removed and the hands become clean, whether the relief would still be denied is the question.

In Moody v. Cox [1917 (2) Ch 71], it was held :

"It is contended that the fact that Moody has given those bribes prevents him from getting any relief in a Court of Equity. The first consequence of his having offered the bribes is that the vendors could have rescinded the contract. But they were not bound to do so. They had the right to say "No, we are well satisfied with the contract; it is a very good one for us; we affirm it". The proposition put forward by counsel for the defendants is : "It does not matter that the contract has been affirmed; you still can claim no relief of any equitable character in regard to that contract because you gave a bribe in respect of it". If there is a mistake in the contract, you cannot rectify it, if you desire to rescind the contract, you cannot rescind it, for that is equitable relief. With some doubt they said : "We do not think you can get an injunction to have the contract performed, though the other side have affirmed it, because an injunction may be equitable remedy." When one asks on what principle this is supposed to be based one receives in answer the maxim that any- one coming to equity must come with clean hands. It think the expression "clean hands" is used more often in the text books than it is in the judgments, though it is occasionally used in the judgments, but I was very much surprised to hear that when a contract, obtained by the giving of a bribe, had been affirmed by the person who had a primary right to affirm it, not being an illegal contract, the courts of Equity could be so scrupulous that they would refuse any relief not connected at all with the bribe. I was glad to find that it was not the case, because I think it is quite clear that the passage in Dering v. Earl of Winchelsea 1 Cox, 318 which has been referred to shows that equity will not apply the principle about clean hands unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for. In this

case the bribe has no immediate relation to rectification, if rectification were asked, or to rescission in connection with a matter not in any way connected with the bribe. Therefore that point, which was argued with great strenuousness by counsel for the defendant Hatt, appears to me to fail, and we have to consider the merits of the case."

In Halsbury's Laws of England, Fourth Edition, Vol. 16, pages 874-876, the law is stated in the following terms :

"1303. He who seeks equity must do equity. In granting relief peculiar to its own jurisdiction a court of equity acts upon the rule that he who seeks equity must do equity. By this it is not meant that the court can impose arbitrary conditions upon a plaintiff simply because he stands in that position on the record. The rule means that a man who comes to seek the aid of a court of equity to enforce a claim must be prepared to submit in such proceedings to any directions which the known principles of a court of equity may make it proper to give; he must do justice as to the matters in respect of which the assistance of equity is asked. In a court of law it is otherwise : when the plaintiff is found to be entitled to judgment, the law must take its course; no terms can be imposed.

1305. He who comes into equity must come with clean hands. A court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper. This was formerly expressed by the maxim "he who has committed iniquity shall not have equity", and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation, or where the plaintiff sought to enforce a security improperly obtained, or where he claimed a remedy for a breach of trust which he had himself procured and whereby he had obtained money. Later it was said that the plaintiff in equity must come with perfect propriety of conduct, or with clean hands. In application of the principle a person will not be allowed to assert his title to property which he has dealt with so as to defeat his creditors or evade tax, for he may not maintain an action by setting up his own fraudulent design."

29. In a somewhat similar vein, the Supreme Court, in its earlier decision, reported as *S.J.S.*

Business Enterprises (P) Ltd. vs. State of Bihar and Others, (2004) 7 SCC 166, ruled that

suppression of a material fact by a litigant disqualifies him from obtaining any relief. The rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. The suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the court, whatever view the court may have taken. Reliance was placed on *R. vs. General Commrs. for the purposes of the Income Tax Act for the District of Kensington*, (1917) 1 KB 486.

30. In this case, the plaintiff did not advert to the documents produced by the defendant; he later admitted them. They clearly disclose that from the inception, when the parties to this litigation had taken charge of the property, they arrived at written understanding and acted upon it. These facts clearly had a material bearing on the likely outcome of the proceedings. Yet the plaintiff made no attempt to explain why he did not disclose them in the pleadings. In these circumstances, it has to be concluded that the plaintiff is clearly guilty of suppression of material facts, which disentitles him to any relief.

31. In view of the findings on issue Nos 1 to 5, it is held that the plaintiff is not entitled to any relief. The suit has to, therefore fail; it is accordingly dismissed. In the circumstances of the case, the plaintiff shall bear the costs; counsel's fee is quantified at Rs. 25,000/-.

DATED: 1st August, 2008

S. RAVINDRA BHAT, J