

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

+ CS(OS) 2658/1999

NARINDER NATH SETH & ORS. Plaintiffs
Through: Mr. Gaurav Puri, Mr. Dilip Gupta and
Mr. Anil Punj, Advocates.

versus

MRS. LATA AND ORS. Defendants
Through: Mr. Ankit Agarwal and Mr. Sanjay
Abbot, Advocates for the defendants
No.1 to 5.
Mr. Siddharth Yadav, Advocate for
the defendant No.6.

% Date of Decision : February 08, 2012

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

J U D G M E N T

: REVA KHETRAPAL, J.

1. The above-mentioned suit is filed by the plaintiffs for partition of the properties left by late Shri Lachmi Narain Seth, who died intestate on 24.02.1967.

2. The facts averred in the suit are that the predecessor-in-interest of the plaintiffs and the defendants, late Shri Lachmi Narain Seth was

the owner of property bearing No. 33/5, East Punjabi Bagh, New Delhi-110006 and he was also the owner of Shop No.48, Khursheed Market, Sadar Bazar, Delhi. He died leaving behind him three sons and one daughter, namely, Shri Kedar Nath Seth who died on 23.05.1989, Shri Manmohan Seth who died on 21st June, 1990, Shri Krishan Lal Seth and Mrs. Kamla Chopra also died during the pendency of the present proceedings.

3. Shri Kedar Nath Seth died intestate and left behind him the plaintiffs as his legal representatives, being his widow, two sons and one daughter.

4. The defendant Nos.1 to 5 are the sons and daughter of late Shri Manmohan Seth. The defendant Nos.6(a) to (d) represent the branch of Shri Krishan Lal Seth and the defendant Nos.7(a) to (f) are the legal representatives of late Smt. Kamla Chopra, daughter of late Shri Lachmi Narain Seth.

5. It is the case of the plaintiffs that the defendant No.7 and after her demise her legal representatives have no claim to any right, title or interest of any nature in the suit properties and thus the suit

properties shall be divided in the ratio of one-third to each son represented by his respective branch of family.

6. The plaintiffs have filed a site plan of the property bearing No. 33/5, East Punjabi Bagh, New Delhi with the plaint wherein the portion in the exclusive possession of the plaintiffs is shown in red colour and is marked 'A', whereas the portion shown in black colour and marked 'B' is in the exclusive possession of the legal heirs of late Shri Krishan Lal Seth, with certain portion as common passage with plaintiffs and the portion marked blue comprising first floor of the said building is in the possession of the defendant Nos.1 to 5 as legal heirs of late Shri Manmohan Seth.

7. It is averred in the plaint that Shop No. 48 was being run by late Shri Lachmi Narain Seth in the name of M/s. S.L. Narain & Sons and his two sons, namely, Shri Krishan Narain Seth and Shri Manmohan Seth were also working in the said shop and, after the death of the father late Shri Lachmi Narain Seth, the said Shri Manmohan Seth forcibly turned out his elder brother Shri Krishan Narain Seth, and thereafter there was litigation between the two

brothers wherein it was subsequently agreed that the shop belongs to all the co-owners.

8. The plaintiffs allege that the defendants have refused to carry out the partition of the suit properties which are liable to be partitioned and for which a legal notice dated 09.07.1996 was given to them. However, the defendant Nos.1 to 5 particularly are adamant because they are in illegal possession of the first floor of the house and also of Shop No. 48, Khursheed Market, Sadar Bazar, Delhi.

9. It is alleged in the plaint that the plaintiffs again requested the defendants on 01.10.1996 by sending notices by registered A.D. post, which the defendants refused to accept and which were subsequently served by U.P.C.

10. In reply to the averments made in the plaint, a written statement was filed by the defendant Nos.1 to 5 wherein the specific case of the said defendants was that the present suit is an abuse of the process of law being for re-partition of the properties left by the deceased Lachmi Narain Seth, and filed in collusion with the defendant Nos.6 and 7, which properties were partitioned by Shri Lachmi Narain Seth

during his lifetime about 32 years back amongst his legal heirs by way of a family settlement.

11. So far as Shop No.48, Khursheed Market, Sadar Bazar, Delhi is concerned, it is the case of the defendant Nos.1 to 5 in their written statement that the said shop had fallen to the share of their predecessor-in-interest - late Shri Manmohan Seth.

12. Besides the aforesaid pleas raised in the written statement, it is also the case of the defendant Nos.1 to 5 that another property being No.123, Khursheed Market, Sadar Bazar, Delhi is also liable to be partitioned between the parties, but has deliberately not been mentioned and included by the plaintiffs in the present suit. It is stated that the said shop was owned by late Shri Lachmi Narain Seth and registered in his name in the record of L&DO till his death and was in physical possession of Shri Manmohan Seth, who was carrying on independent business therein in the name and style of “M/s. Angura Industrial Corporation”, which he continued to carry on even after the death of Shri Lachmi Narain Seth. The said property came to the share of late Shri Kedar Nath Seth through the family settlement and was got transferred in his name by the ‘No Objection

Certificates' dated 24.02.1967 of the legal heirs of late Shri Lachmi Narain Seth after his death, to give effect to the family settlement entered into during the lifetime of Shri Lachmi Narain Seth, and the possession handed over to the predecessor-in-interest of the plaintiffs, Shri Kedar Nath Seth after taking the same from Shri Manmohan Seth. By virtue of the family settlement, the material documents and original papers thereof are also in the possession of the plaintiffs through their father late Shri Kedar Nath Seth.

13. The further case of the defendants No.1 to 5 is that the commercial property No.48, Khursheet Market came to the share of Shri Manmohan Seth just as commercial property No.123, Khursheed Market came to the share of Shri Kedar Nath Seth. However, at the instance of Shri Kedar Nath Seth, the legal heirs of late Shri Lachmi Narain Seth did not give 'NOC' for transfer of shop No.48 in favour of Shri Manmohan Seth, and the said shop till date stands in the name of late Shri Lachmi Narain Seth. As far the third son is concerned Shri Krishal Lal Seth, the defendant No.6, who all along was working with M/s. Rallis India Limited, and had no interest in business activities was sufficiently compensated with cash and jewellery

during the lifetime of Shri Lachmi Narain Seth, to keep a balance with the other sons Shri Kedar Nath Seth and Manmohan Seth. Further, as sufficient amount was spent by Shri Lachmi Narain Seth in the marriage of his only daughter Smt. Kamla, she too was not given any share in the family properties.

14. Significantly, it is asserted by the defendants No. 1 to 5 in the written statement filed by them that the said family settlement was signed by all the parties and the original documents were in possession of late Shri Kedar Nath Seth and, as such, the plaintiffs are taking undue advantage of the said documents being in their possession and power and seeking re-partition of the properties to claim more share in the same. It is further asserted that the defendant No.6, Shri Krishan Lal Seth is hand and glove with the plaintiffs.

15. It is, however, admitted in the written statement by the defendants No. 1 to 5 that the entire first floor portion comprising of three rooms set with open terrace is in their possession through Shri Manmohan Seth, exclusively, for more than 32 years.

16. The first and amended site plans filed by the plaintiffs are denied by the defendant Nos.1 to 5 as false and incorrect. It is

averred that the plaintiffs' father Shri Kedar Nath Seth and the defendant No.6, Shri Krishan Lal Seth were given accommodation of three rooms set each on the ground floor, with common front and rear setbacks and courtyard. However, the plaintiffs after the said family settlement constructed unauthorized portion by covering courtyard, etc., that is, in all three rooms and a temple room, totalling seven rooms accommodation is in their possession. Site plan has been filed by the defendant Nos.1 to 5 in support of the aforesaid averments.

17. In the written statement filed on behalf of the defendant No.6, the defendant No.6 has expressed his readiness and willingness to partition of the properties mentioned by the plaintiff and stated that he is also entitled to share in the other properties left behind by the deceased, being Shop No.17, Shop No.123 and 123A, Khursheed Market, Sadar Bazar.

18. On the aforesaid pleadings of the parties, the following issues were framed for consideration on 25.05.2007:-

- “1. Whether there was a family partition and settlement between the parties about 32 years before or not? **OPD (1 TO 5).***
- 2. Whether late Sh. Lakshmi Narain Seth left behind other properties than those mentioned in the plaint, if so, whether*

they are liable to be partitioned or not? OPD (1 TO 6).

3. *Whether the plaintiff is entitled to partition of the properties mentioned in the suit? OPP.*

4. *Whether the parties had acted upon the family settlement, if any, and whether the parties are in possession of their respective shares? OPD (1 TO 5). ”*

19. On the aforesaid issues, the parties went to trial by adducing evidence by way of affidavits of Mr. Narender Seth as PW1, Mr. Rajeev Seth as DW1 and Mr. Sandeep Seth as DW2. In order to avoid prolixity, it is proposed to deal with the evidence of the aforesaid three witnesses while dealing with the issues.

20. My findings on the issues are given below.

21. **ISSUE NOS.1, 3 and 4**

“1. Whether there was a family partition and settlement between the parties about 32 years before or not? OPD (1 TO 5). ”

“3. Whether the plaintiff is entitled to partition of the properties mentioned in the suit? OPP.”

“4. Whether the parties had acted upon the family settlement, if any, and whether the parties are in possession of their respective shares? OPD (1 TO 5). ”

22. In view of the fact that Issue Nos.1, 3 and 4 are interlinked and interconnected, it is proposed to deal with the evidence relating to these three issues together.

23. In the affidavit by way of evidence filed by PW-1, Mr. Narender Seth on behalf of the plaintiffs (Exhibit PW1/A), PW1 has reiterated and re-affirmed the averments made by him in the plaint and proved on record the three Special Power of Attorneys in his favour given by the co-plaintiffs as Exhibits P1/1, P1/2 and P1/3 respectively, the amended suit as Exhibit PW1/4, the certified copies of the Lease Deed of property No. 33/5, East Punjabi Bagh, New Delhi and shop No.48, Khursheed Market, Sadar Bazar, Delhi as Exhibits P1 and PW1/D5 and the site plan of the Punjabi Bagh property as Exhibit P1/7. He states that the two properties which are the subject matter of the present suit were the exclusive properties of late Shri Lachmi Narain Seth, viz., the property bearing No. 33/5, East Punjabi Bagh, New Delhi approximately admeasuring 272.7 sq. yards, purchased on 18.12.1961 and shop No.48, Khursheed Market, Sadar Bazar, Delhi purchased in the year 1964.

24. He further states that shop No.123, Khursheed Market was purchased from the funds of Shri Kedar Nath Seth though in the name of late Shri Lachmi Narain Seth and accordingly after the death of Shri Lachmi Narain Seth, all his legal heirs agreed and consented to transfer of property No.123, Khursheed Market in favour of the father of the plaintiffs, namely, late Shri Kedar Nath Seth and for the aforesaid purpose late Smt. Dhanwanti Seth (wife), late Smt. Kamla Chopra (daughter), late Shri Krishan Lal Seth (son) and late Shri Manmohan Seth (son) executed relinquishment documents in favour of the plaintiffs' father and upon their filing of affidavits and 'No Objections', Shop No. 123, Khursheed Market, Sadar Bazar, Delhi was transferred in the name of late Shri Kedar Nath Seth vide letter dated 13.12.1967 from the Government of India, Ministry of Labour, Employment and Rehabilitation, Office of Regional Settlement Commissioner.

25. Copies of the aforesaid four affidavits have been placed on record as Ex.PW1/D1, Ex.PW1/D2, Ex.PW1/D3 and Ex.PW1/D4 and the letter dated 13.12.1967 is marked as Mark 'E'. It may be noted at this juncture that the aforesaid documents are not denied by the

defendant Nos.1 to 5. The certified copy of the lease and conveyance deed dated 29.10.1969 in favour of Shri Kedar Nath Seth is exhibited as Ex.P1/8.

26. PW1 further states that property No. 123, Khursheed Market, Sadar Bazar, Delhi was further transferred by an Agreement to Sell dated 11.08.2003 and also a Power of Attorney was executed (Mark 'F' and Mark 'G'), whereunder the said property was sold by the plaintiffs.

27. PW-1 proved on record the notice dated 09.07.1996 exhibited as Ex.P1/9, the receipts of issuance of the said notice as Ex.P1/10 collectively, the notice dated 27.09.1996 as Ex.P1/11 and the UPCs as Ex.P1/12 collectively.

28. He asserts that upon the death of late Shri Lachmi Narain Seth, the plaintiffs have become entitled to one-third share from the aforementioned two properties of late Shri Lachmi Narain Seth, which are joint family properties of the plaintiffs and the defendants. It is alleged by him that the defendant Nos.1 to 5 have further constructed some rooms on the first floor which are being unauthorisedly occupied by them. In relation to property No.48, Khursheed Market,

he asserts that this shop is being used exclusively by the defendants No.1 to 5 for profit. A partition by metes and bounds and the passing of a decree of possession is prayed for and in the alternative that the properties be ordered to be auctioned and the sale proceeds divided as per law.

29. In the course of his cross-examination, PW1 Mr. Narender Nath categorically denied the suggestion that any family partition had taken place of the house in the year 1966, during the lifetime of his grandfather, or that he had any documents to show that such partition had taken place. He denied the suggestion that the plaintiffs had constructed three more rooms on the ground floor and stated that the family of the plaintiffs was residing at the ground floor in three rooms only, and the family of the defendant No.6 was residing at the ground floor in the remaining three rooms. As regards Shop No.48, he reiterated that the said shop was in the possession of defendant Nos.1 to 5 and that earlier the partnership firm in the name of M/s. M/s. S.L. Narain and Sons had been functioning in the said shop till 1978-79 under the partnership of his father and uncle. He stated that the said shop was purchased in the year 1964. He admitted that the original

papers of shop No.48, Khursheed Market were in his possession. As regards Shop No.123, Khursheed Market, he stated that it was purchased in the early 1960s and was transferred to his father's name in the year 1967.

30. The aforesaid evidence adduced by the plaintiffs is sought to be rebutted by the defendant Nos.1 to 5 through DW1 Mr. Rajeev Seth, who asserted in his affidavit by way of evidence (Ex.DW1/A) that the suit properties had already been partitioned by Shri Lachmi Narain Seth during his lifetime, about 32 years back, amongst his legal heirs by way of a family settlement in the year 1966. As per the family partition, commercial property No.48, Khursheed Market had come to the share of Shri Manmohan Seth, whereas commercial property No.123, Khursheed Market had gone to the share of late Shri Kedar Nath Seth. The deceased Lachmi Narain Seth did not give anything to Shri Krishan Lal Seth in the aforesaid commercial properties and instead compensated him with sufficient amount of cash and jewellery during his lifetime. He asserted that the parties were in settled possession of their respective portions of the residential house without any interference since the year 1966. In paragraphs 11 to 13

of his affidavit by way of evidence, he made the following significant assertions:-

“11. I state that the said Family Settlement was signed by all the parties and the original documents in relation to the said family settlement were in possession of Late Sh. Kedar Nath Seth, the predecessor-in-interest of plaintiffs.

12. I state that the plaintiffs have concealed the material documents of Family Settlement and other original papers in their power and possession. Late Shri Kedar Nath Seth, being the eldest son of the deceased Laxmi Narain and was controlling the entire affairs of the properties left by Sh. Laxmi Narain Seth and was given all the said documents of family settlement.

13. I state that the defendants no.1 to 5, have repeatedly requested the plaintiffs to supply copy of the said Family Settlement time and again, but the plaintiffs flatly refused to oblige the said defendants.”

31. As regards the commercial properties, DW1 Rajeev Seth elaborated that after the death of Shri Lachmi Narain Seth, in order to give effect to the family settlement, the legal heirs of late Shri Lachmi Narain Seth on 24.02.1967, gave their respective ‘No Objection Certificates’ by means of affidavits for transfer of property No.123 Khursheed Market in the name of Shri Kedar Nath Seth and physical

possession of the said property was delivered to Shri Kedar Nath Seth, thereafter in or around 1972 or 1973. Simultaneous to the vacation of the said property by Shri Manmohan Seth, Mr. Manmohan Seth was given possession of shop No.48, Khursheed Market for his business activities as per the family settlement, however, at the instance of Mr. Kedar Nath Seth, the legal heirs of late Shri Lachmi Narain Seth did not give 'NOC' for transfer of shop No.48 in favour of Shri Manmohan Seth. The said shop after his death has devolved upon the defendant Nos.1 to 5. He proved on record the notices of the Sales Tax Officer for the period 1978-79 showing Shri Manmohan Seth conducting business at 48 Khursheed Market as Ex.D-1 and Ex.D-2, telephone bill dated 01.07.1985 as Ex.DW1/1 and the sales tax assessment order dated 14.03.1988 as Ex.DW1/2, the registration certificate dated 19.01.1980 and the demand letter issued by MTNL as Ex.DW1/3 and Ex.DW1/4 respectively, the property tax receipt in the name of the defendant No.1 as Ex.DW1/5 and the receipt issued by the MCD as Ex.D-5. Certain other documents, being Ex.DW1/7 and Ex.DW1/8, were filed by him to show that Shri Manmohan Seth had paid a sum of ₹

1,25,000/- to Grindlays Bank on account of the dues of M/s. S.L. Narain and Sons, which the plaintiffs did not discharge; and a few documents showing the defendant Nos.1 to 5 as occupiers of their portions of 33/5, East Punjabi Bagh, New Delhi were also filed, being a letter by Sanitary Engineers and Contractors dated 17.12.1982 and a DVB bill of December, 1997 in the name of the defendant No.1. It may be noted at this juncture that the evidence of this witness is entirely based on hearsay evidence as he has given his date of birth to be 30th April, 1967, whereas his grandfather late Shri Lachmi Narain Seth admittedly breathed his last on 24.02.1967.

32. Certain significant statements were made by DW1 in the course of his cross-examination deserve to be dwelt upon. On a query put to him in cross-examination as to who had informed him about the family settlement of the year 1966, he stated that it was his father and his uncles, Shri Krishan Lal Seth and Shri Kedar Nath Seth, who had informed him about the family settlement. On another query put to him as to whether the family settlement was in writing or oral, he stated that it was oral, thereby altogether falsifying the case of the defendant Nos.1 to 5 that a family settlement duly signed by all the

progeny of late Shri Lachmi Narain Seth had been entered into and the documents in relation thereto were in the possession of the plaintiffs. In the course of further cross-examination, he admitted that he did not know if Shri Manmohan Seth had disclosed that the properties were partitioned before the income-tax and wealth tax authorities. The following queries and their answers extracted from different portions of his cross-examination are also significant:-

“Q. Is it correct that the property no.48, Khursheed Market and property no.33/5, East Punjabi Bagh should have been devolved upon the legal heirs of Sh. Laxmi Narain Seth after his death?

A. Yes. Vol. He distributed the properties before his death including property no.123, Khursheed Market, Delhi.

Q. In which firm Sh. Laxmi Narain Seth was a partner?

A. What I know is that M/s. S.L. Narain & Sons was of Sh. Laxmi Narain Seth.

Q. Can you tell the status of your father and of Sh. Kedar Nath Seth in M/s. S.L. Narain & Sons?

A. I do not know.

Q. Is it correct that since you were not born in the year 1966 so whatever you say is hearsay?

A. The facts were told to me by my father and my uncle verbally.

Q. Whether you were informed as to in whose presence, the family settlement was arrived?

A. I was told that Sh. Laxmi Narain Seth had decided so and all were bound with the same.

Q. I suggest it to you that no portion of the property no.33/5, East Punjabi Bagh, New Delhi was marked and given to the parties to the family settlement. What have you to say?

A. I do not know.

Q. I suggest it to you that your portion was also not marked and given to you by way of alleged family settlement. What have you to say?

A. I do not know.

Q. Is it correct that your father relinquished his rights in the property no.123, Khursheed Market, Sadar Bazar, Delhi?

A. It is correct."

33. The legal representatives of the defendant No.6 to prove their case led the evidence of DW2 Mr. Sandeep Seth, who filed affidavit by way of evidence Ex.DW2/A and proved documents Ex.DW6/1 to Ex.DW6/8. In paragraph 4 of his affidavit by way of evidence, the witness stated that late Shri Lachmi Narain Seth had died leaving behind the following immovable properties:-

- (i) 33/5, East Punjabi Bagh, New Delhi;

- (ii) Shop No.48, Khurshid Market, Sadar Bazar, Delhi;
- (iii) Shop No.17, Khurshid Market, Sadar Bazar, Delhi;
- (iv) Shop No.123, Khurshid Market, Sadar Bazar, Delhi;
- (v) Godown rented by M/s. S.L. Narain & Sons HUF at Gali Barna, Delhi.

34. DW2 Sandeep Seth further stated in his affidavit that the disputes had been referred to a sole arbitrator by mutual consent of all the three sons vide Deed dated 17/27.07.1978 (Ex.DW6/1). He relied upon a declaration made by late Shri Kedar Nath Seth to the effect that he did not desire any other property except property bearing No. 123, Khursheed Market (Ex.DW6/2), the copy of the award rendered by the sole arbitrator (Ex.DW6/3), the Re-Conveyance Deed of property No.33/5, Punjabi Bagh (Ex.DW6/4), copy of the legal notice dated 08.04.1986 issued by Shri Manmohan Seth to Shri Kedar Nath Seth and Shri Krishan Lal Seth (Ex.DW6/5), letter dated 12.09.1988 of Shri Krishan Lal Seth to the sole arbitrator for implementation of the award (Ex.DW6/6) and Deed of Agreement between the parties to the arbitration (Ex.DW6/7). He stated that as of today, the properties available for partition are as follows:-

- (i) 33/5, East Punjabi Bagh, New Delhi;
- (ii) Shop No.48, Khurshid Market, Sadar Bazar, Delhi;
- (iii) Shop No.17, Khurshid Market, Sadar Bazar, Delhi;

35. Significantly, the witness prayed that a decree be passed for partitioning the aforesaid properties in three equal shares thereby dividing them in the ratio of 1:3 each, whereby the plaintiffs should become owners of their one-third share, the defendant Nos.1 to 5 owners of their one-third share and defendant Nos.6(a) to (d) owners of their one-third share. Significantly also, in paragraph 10 of his affidavit, the witness made the following assertion:-

“10. I state that a perusal of the Reconveyance Deed dated 16.6.1984 will demonstrate that property no.33/5, Punjabi Bagh, New Delhi was never partitioned or divided, amongst the sons of Late Laxmi Narain Seth. The Reconveyance Deed clearly states that the same is executed in favour of Sh. Kedar Nath Seth in his capacity as having become KARTA of the HUF. The same is marked as Exhibit DW6/4.”

36. In the course of his cross-examination by the learned counsel for the plaintiffs, the witness candidly admitted that no execution petition had been filed after the award of the arbitrator nor any objections were filed by any of the parties. He affirmed his father's

signatures on Ex.PW1/D4, being the affidavit given by his father relinquishing his share in property No.123, Khursheed Market. In further cross-examination, he admitted that his family including his mother and two sisters had given up their share in property No.123 and 123A, Khursheed Market, Sadar Bazar, but stated that he did not think any consideration was received for giving up their share in the said properties by his family.

37. The aforesaid evidence, in my opinion, clearly establishes that there was no partition of the properties during the lifetime of late Shri Lachmi Narain Seth, thirty two years before the filing of the present suit for partition as alleged or at all. The whole story concocted by the defendant Nos.1 to 5 that a family settlement was entered into between the sons of late Shri Lachmi Narain Seth during the latter's lifetime and the said family settlement has been acted upon is not supported by a single document. The further story that the original papers/documents relating to the family settlement including site plan were with Shri Kedar Nath Seth is also not worthy of credence. DW1 Shri Rajeev Seth in the course of his cross-examination has stated that the family settlement was *“oral”*, thereby falsifying the written

statement filed by the defendant Nos.1 to 5 wherein time and again it has been stated that the said family settlement was signed by all the parties and the original documents were in possession of late Shri Kedar Nath Seth – the predecessor-in-interest of the plaintiffs. Then again, there is not a word in the written statement filed by the defendant Nos.1 to 5 or in the evidence adduced by them with regard to property No.17, Khursheed Market or any other property. The defendant No.6 in his written statement, however, has staked a claim to one-third share of shop No.17, Khursheed Market. Though DW2 Sandeep Seth has reiterated the claim, in the course of his evidence there is nothing to suggest that property No.17, Khursheed Market was one of the properties left behind by late Shri Lachmi Narain Seth. Not even a suggestion to this effect has been given by the defendant Nos.6(a) to (d) either to PW1 Narender Seth or to DW1 Rajeev Seth, i.e., the witnesses representing the other scions of the family.

38. In view of the above evidence adduced by the parties on record, I have no hesitation in holding that the defendant Nos.1 to 5 have failed to prove that there was a family partition and settlement between the parties about 32 years before the filing of the instant suit.

I have also no difficulty in holding that there is nothing on record to suggest that the parties had acted upon any family settlement and were in possession of their respective shares in pursuance thereto. As a matter of fact, PW1 categorically stated in the witness box that parties to the suit residing at 33/5, Punjabi Bagh, Delhi were not possessing independent portions and the arrangement was haphazard. He stated that no arrangement has been made between the parties to occupy their separate portions in 33/5, Punjabi Bagh, Delhi. Even otherwise, to my mind, had any family settlement been entered into during the lifetime of late Shri Lachmi Narain Seth, there would have been no occasion for the parties to issue relinquishment deeds with regard to property No.123, Khursheed Market in favour of Shri Kedar Nath *after the demise of Shri Lachmi Narain*. The admitted position as it emerges from the evidence of the parties is that it was after the demise of Shri Lachmi Narain Seth, relinquishment deeds were issued by Smt. Dhanwanti Seth, Smt. Kamla Chopra, Shri Manmohan Seth and Shri Krishan Lal Seth (Ex.PW1/D1 to Ex.PW1/D4) relinquishing their respective shares in the Shop No. 123, Khursheed Market in favour of Shri Kedar Nath Seth. Further, letter dated 13.12.1967,

which though not formally exhibited in evidence, is not in dispute
reads as follows:-

*“No.RSCD/GBP/MO(MG)/7041
Government of India
Ministry of Labour, Employment &
Rehabilitation
Office to the Regional Settlement Commissioner
Jamnagar House, New Delhi.
Dated the 13.12.1967*

To

*Shri/Smt. Kidar Nath
Shop No.123, Khurshid Market,
Delhi.*

*Subject: Transfer of allotment of
Quarter/shop/shed No.123, Block
No._____ in Khurshid Mkt.,
Delhi/New Delhi.*

MEMORANDUM.

*With reference to his/her application on
the subject noted above, Shri/Shrimati Kidar
Nath is hereby informed that allotment of the
above mentioned property has been transferred
in his/her name from the name of Shri/Shrimati
Laxmi Narain on the same terms and conditions
guaranteed to the ex-allottee. A copy of the
order can be had after payment of usual fee.*

*sd/-
(D.D. Purie)
Managing Officer (MG)*

Copy to

1. Accounts Section (M) for necessary amendment in the ledger.

sd/-

Managing Officer (MG)”

39. Further, had the family settlement been acted upon, shop No.48, Khursheed Market would also have been transferred to the name of Shri Manmohan Seth by Smt. Dhanwanti Seth and the remaining legal heirs of late Shri Lachmi Narain Seth by executing relinquishment deeds in favour of Shri Manmohan Seth and no objection certificates. Admittedly, this was not done and the shop No.48, Khursheed Market is not in the name of Shri Manmohan Seth as on date, though admittedly he is running his business from the said premises for the last several years. The title deeds of 48, Khursheed Market were also admittedly in the possession of Shri Kedar Nath Seth and are now in the possession and control of the plaintiffs.

40. As regards the residential house of the parties, it has emerged in the evidence of DW2 Sandeep Seth that the Re-Conveyance Deed relating to the aforesaid property demonstrates that property No. 33/5, East Punjabi Bagh, New Delhi was never partitioned or divided amongst the sons of late Shri Lachmi Narain Seth. The said Re-

Conveyance Deed which is dated 16-06-1984 clearly states that the same is executed in favour of Shri Kedar Nath Seth in his capacity as Karta of the HUF (Ex.DW6/4). Thus, the whole yarn of the story that the plaintiffs are seeking re-partition of property which was partitioned by a family settlement before the demise of late Lachmi Narain Seth falls to the ground.

41. In the case of *Jagdish Rai vs. Tek Chand & Ors., 2002 (61) DRJ 821*, the facts were somewhat identical as in the present case, in that an issue arose as to whether the property in question already stood partitioned by means of a family settlement dated 05.09.1986. Reliance was placed on a document marked 'X' titled "Compromise Deed-Family Settlement Deed". The said document, however, did not refer to any oral partition. A learned Single Judge of this Court held that the necessary corollary would follow that it cannot be that there was an oral partition followed by recording of memorandum of the same. The original of the document was also not forthcoming. It was pointed out that the original was in possession of the plaintiff and he was not producing the same. The Court held that before a copy of the document could be taken into consideration, the loss or failure to

produce the original must be established and even if for the sake of argument the document marked 'X' is taken into consideration, this document could not be read in evidence because it was not a registered document.

42. In the present suit, the case set up by the defendant Nos.1 to 5 in the written statement was that the original document of family settlement was in the possession of the plaintiffs. No copy of the same was produced. Subsequently in the course of cross-examination, DW1 was compelled to admit that there was no document in existence and it was an oral partition. This kind of somersault demonstrates the complete falsity in the earlier stand of the defendant Nos.1 to 5 that a written family settlement signed by the parties was in the possession of the plaintiffs.

43. In *Hari Ram vs. Lala Om Prakash, 2003 IV AD (DELHI) 124*, the following pertinent observations were made in a case where the parties were living together in demarcated portions of the same property:-

“14. Admittedly partition of the property particularly amongst the brothers has to be rational, practical and enforceable. By way of oral agreement, the parties may decide to live

in such portions which are not worthy of partition by metes and bounds but such oral arrangement for that purpose, the agreement between the parties is nothing more than an arrangement of convenience and not an agreement of partition of property. The partition of the property particularly where there is a plea of oral family agreement should be workable and each portion should be identifiable in such a manner that may entitle either of the parties to sell or dispose of the same in case any of the parties either out of any need or financial crunch decides to sell.

15. In the instant case the plaintiff is in occupation of certain portion on the ground floor and some portion on the first floor and same is the situation of the premises with the defendant. More so, the portion which was in occupation of the mother have also fallen for being divided between the parties. Over and above, the implication of an agreement by living in their respective portion for more than 30 years does not mean that the oral agreement has been implemented particularly when the property continues to be in joint name and has not been mutated till date in their respective names. Inaction on the part of the parties for getting the portion in their occupation mutated in their own names for the purpose of paying house tax shows that it is nothing but an arrangement between the two brothers that they should continue living in the portion which they have occupied when their father was alive. This nature of arrangement of living in convenient portions of the suit property at relevant time is borne out from the fact that they had one common kitchen for a long period.

18. The parties are in possession of portions on ground floor, first floor, second floor and terrace and suit property cannot be partitioned as these are not vertically or otherwise single unit. All these facts when taken in totality make out a case of two brothers living peacefully in their respective portions but not a case of oral family agreement of partition of the property. Had there been any intention on the part of father of the parties to give equal shares in the property, there was no difficulty in executing the Will. Merely because parties have been living for more than 30-40 years in different portions of the house separately does not mean that such an agreement tantamounts to agreement for partition of property.”

44. In *Lala Om Prakash vs. Hari Ram*, AIR 2005 DELHI 190, a Division Bench of this Court affirmed the findings of the learned Single Judge in the aforesaid case and held:-

“Therefore, the finding of the learned single Judge that it was only in the nature of arrangement of living in respective portion of the suit property and living without disputes earlier cannot be construed too mean and reach the conclusion that there was an oral agreement. Once they live in their respective portions and the property being so owned and the same has been constructed, renovated or altered in respect of their respective portions, will not lead to a conclusion that there had been an oral agreement or any independent right emerged in relation to the said property.

In the absence of any actual partition having taken place and for the aforesaid reasons, we do not see any infirmity with the impugned order by which a preliminary decree for partition was passed and a local commissioner was appointed for suggesting ways of partition of the property by metes and bounds.”

45. In the aforesaid legal and factual scenario, the contention of the defendant Nos.1 to 5 that there was a family settlement which had been acted upon by the parties which was evidenced from the fact that they were living in their demarcated portions of the property is devoid of merit. Merely because the parties have lived together in their individual portions of the property for the last several decades does not mean that a partition of the property has been effected and has no significance so far as the suit for partition is concerned. More so, when the so-called division is wholly inequitable as two branches of the family are living on the ground floor and the entire first floor and the portion above it is in the sole occupation of the third branch of the family, who is also in occupation of the shop owned by the family, being shop No.48, Khursheed Market.

46. Issue Nos.1 and 4 are accordingly decided against the defendant Nos.1 to 5 and Issue No.3 is decided in favour of the

plaintiffs by holding that the plaintiffs are entitled to partition of the properties mentioned in the suit.

47. ISSUE NO.2

*“2. Whether late Sh. Lakshmi Narain Seth left behind other properties than those mentioned in the plaint, if so, whether they are liable to be partitioned or not? **OPD (1 TO 6).**”*

48. The onus of proving this issue was upon the defendant Nos.1 to 6, who have miserably failed to discharge the same. The case of the defendant Nos.1 to 5 was that apart from property No.33/5, Punjabi Bagh and shop No.48, Khursheed Market, shop No.123 was also liable to be partitioned. The entire case of the defendant Nos.1 to 5, however, falls to the ground on account of the admission made by DW1 Mr. Rajeev Seth that his father had relinquished his rights in property No.123, Khursheed Market, Sadar Bazar, Delhi. This is reflected in the following question and answer, which is being reproduced verbatim:-

*“Q. Is it correct that your father relinquished his rights in the property no.123, Khursheed Market, Sadar Bazar, Delhi?
A. It is correct.”*

49. Likewise, DW2 Shri Sandeep Seth in the course of his cross-examination admitted that his family including his mother and two sisters had given up their share in 123 and 123A, Khursheed Market, Sadar Bazar. The relinquishment deeds, as stated above, have been proved on record which were executed by Smt. Dhanwanti Seth, Smt. Kamla Chopra, Shri Manmohan Seth and Shri Krishan Lal Seth (Ex.PW1/D1 to Ex.PW1/D4).

50. Adverting now to the claim of the defendant No.6 that shop No.17, Khursheed Market, Sadar Bazar, Delhi is also liable to be partitioned, there is not an iota of evidence in this regard.

51. In view of the aforesaid, I have no hesitation in holding that Issue No.2 must be decided in favour of the plaintiffs and against the defendant Nos.1 to 6. As a necessary corollary, it is held that the only two properties which are liable to be partitioned between the parties are House No. 33/5, East Punjabi Bagh, New Delhi and Shop No.48, Khursheed Market, Sadar Bazar, Delhi.

52. Resultantly, a preliminary decree of partition is passed holding that one-third share of the aforesaid properties is liable to devolve upon the plaintiff Nos.1 to 4, one-third share upon the defendant

Nos.1 to 5 and one-third share to the defendant Nos.6(a) to (d). Mr. Janardan Tripathi, Deputy Registrar of this Court (Mobile No.9717394839) is appointed as Local Commissioner to explore the possibility of the partition being effected by metes and bounds or by any other legally permissible mode. The Local Commissioner shall be entitled to take assistance of a draftsman for the purpose of taking the measurement and dimensions of the suit property, if required. The expenses of the draftsman shall be borne by the plaintiffs. The Local Commissioner shall be paid a fees of ₹ 1 Lac in the first instance, which shall be paid by the plaintiffs.

53. A decree sheet shall be drawn up by the Registry on the stamp paper to be furnished by the plaintiffs herein.

54. CS(OS) 2658/1999 and IA Nos.12214/1999, 6640/2001 and 2233/2006 stand disposed of accordingly.

**REVA KHETRAPAL
(JUDGE)**

February 08, 2012
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