

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

% *Judgment Reserved on : November 22, 2012*
Judgment Pronounced on : December 13, 2012

+ **RFA(OS) 41/2012**

MRS. LATA SETH & ORS. Appellants
Represented by: Mr.Jatinder Kumar Sethi, Advocate.

versus

NARINDER NATH SETH & ORS. Respondents
Represented by: Mr.Gaurav Puri, Ms.Geeta Anand and
Mr.Harsh Gupta, Advocates for R-1 to R-4.
Mr.K.B.Thakur, Proxy Counsel for R-5(a) to (d).
None for R-6(a) to (f) (service dispensed with vide
order dated April 20, 2012)

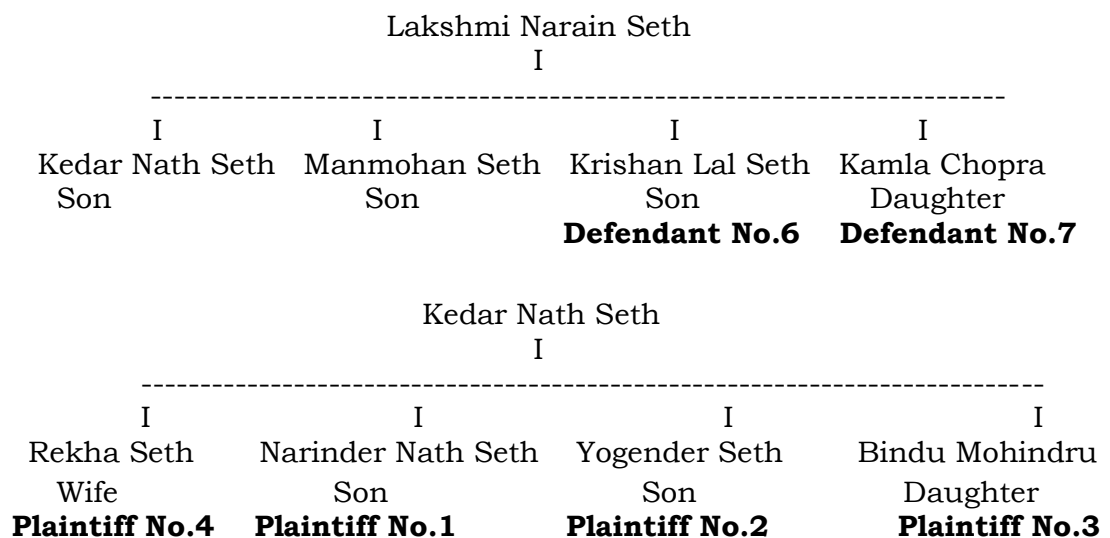
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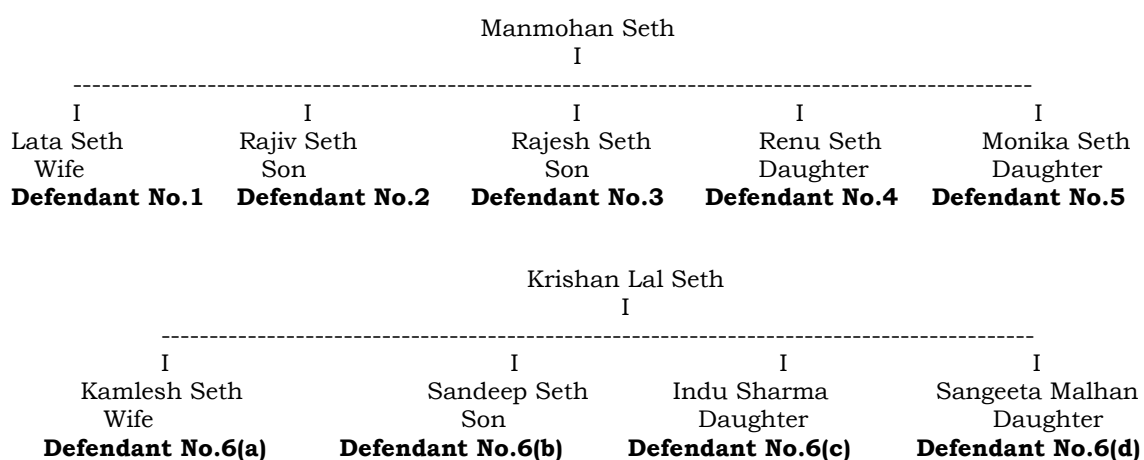
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J.

1. The ancestry of the litigating parties may be noted. The pedigree table is as under:-





2. The table would reveal that Lakshmi Narain Seth was blessed with three sons named Kedar Nath, Manmohan and Krishan Lal and a daughter named Kamla. When the suit was filed i.e. the litigation was commenced by the wife, sons and daughter of Kedar Nath, since Manmohan was also dead, his wife, sons and daughters were impleaded as defendants No.1 to 5; and being alive Krishan Lal was impleaded as defendant No.6. On his death, his wife, sons and daughters were substituted as defendants No.6(a) to 6(d). Kamla Chopra was impleaded as defendant No.7. We shall be referring to the parties as plaintiffs and defendants as afore-said.

3. In the year 1999 the plaintiffs filed a suit against the defendants praying that house bearing Municipal No.33/5, East Punjabi Bagh, New Delhi and the shop bearing Municipal No.48, Khursheed Market, Sadar Bazar, Delhi be partitioned on the plea that Late Sh.Lakshmi Narain Seth (hereinafter referred to as ‘the deceased’) was the owner of the said two properties and he died intestate on February 24, 1967, leaving behind three sons named, Kedar Nath Seth, Manmohan Seth and Krishan Lal Seth and a daughter Kamla Chopra as his legal heirs. It was pleaded that Kamla Chopra did not claim any right, title or interest in the said properties and thus the sons of the deceased are entitled to 1/3rd share each in the two properties as per the provisions of Section 8 of the Hindu Succession Act, 1956. It was pleaded that the eldest son, Kedar Nath died intestate on May

23, 1989, leaving behind his wife Rekha (plaintiff No.4), 2 sons named Narinder Nath Seth (plaintiff No.1) and Yogender Seth (plaintiff No.2) and a daughter Bindu Mohindru (plaintiff No.3) as his legal heirs. It was further pleaded that Manmohan Seth died intestate on June 21, 1990 leaving behind his wife Lata Seth (defendant No.1), 2 sons named Rajiv Seth (defendant No.2) and Rajesh Seth (defendant No.3) and 2 daughters named Renu Seth (defendant No.4) and Monika Seth (defendant No.5) as his legal heirs. The third son Krishan Lal Seth was impleaded as defendant No.6. Kamla Chopra was impleaded as defendant No.7.

4. Soon after the suit was instituted, defendant No.7 Kamla Chopra expired and her legal heirs were brought on record but they chose not to appear and contest the suit and hence were proceeded against ex-parte.

5. In the written statement filed by defendants Nos.1 to 5 i.e. the heirs of Manmohan Seth, it was pleaded that besides the two properties mentioned in the plaint, the deceased was also the owner of a shop bearing Municipal No.123, Khursheed Market, Sadar Bazar, Delhi, which fact was stated to have been concealed by the plaintiffs. It was pleaded that during the lifetime of the deceased, Manmohan Seth was running a business from the said shop i.e. bearing Municipal No.123, Khursheed Market, Sadar Bazar, Delhi under the name and style 'M/s.Angura Industrial Corporation'. Around the year 1968 the deceased partitioned the three properties owned by him between his three sons by way of a family settlement, which settlement was signed by the three sons of the deceased. It was pleaded that as per the family settlement, the shop bearing Municipal No.48 fell to the share of Manmohan Seth and Shop No.123 fell to the share of Kedar Nath Seth. As regards the property pertaining to property bearing Municipal No.33/5, East Punjabi Bagh, New Delhi, it was pleaded that as per the family settlement each son of the deceased got three rooms in the property. Whereas Kedar Nath Seth and Krishan Lal Seth got three

rooms each on the ground floor, Manmohan Seth got three rooms on the first floor. It was pleaded that since the third son of the deceased, Krishan Lal Seth, had no interest in business, the deceased did not give any share to him in the two shops owned by him but recompensed him by giving him cash and jewelry. Regarding the daughter of the deceased i.e. Kamla Chopra, it was pleaded that since the deceased had spent huge sum on her marriage he did not give any share to her in the properties owned by him. It was pleaded that pursuant to the family settlement, on February 24, 1967 Manmohan Seth, Krishan Lal Seth and Kamla Chopra signed no objection certificates to enable Kedar Nath to get transferred ownership of shop bearing Municipal No.123, Khursheed Market, Sadar Bazar, Delhi in his name and based thereon the shop was mutated in the name of Kedar Nath, who either in the year 1972 or 1973 took possession thereof from Manmohan and handed over possession of Shop No.48 to Manmohan. It was pleaded that Kedar Nath Seth, and after his death his family, did not honour the family settlement and did not sign the no objection certificates to enable Manmohan Seth to obtain transfer of ownership of shop No.48 in his name. They pleaded that the original papers pertaining to the settlement were with Kedar Nath Seth since he was the eldest son and made a grievance that the plaintiffs were retaining the same. This is a condensed extract of the written statement filed, but we feel that pleadings in para 8 of the preliminary submissions in the written statements and relevant parts of the reply on merits to paras 1, 3 and 7 of the plaint need to be extracted. They read as under:-

“8. That the plaintiffs cannot be allow to take advantages of their own wrongs and harass the defendant No.1 to 5 by concealing the material documents of Family Settlement and other original papers in their power and possession through their father late Sh. Kidar 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 since during his life time and now blackmailing the answering defendants with their dictates and malafide designs. Hence the suit is malafide and is untenable under the law, till the original documents are placed on record.

.....

ON MERITS:

1. The said Family Settlement was signed by all the parties and the original documents were in possession of Late Sh. Kedar Nath Seth – the predecessor-in-interests of plaintiffs and as such they are taking undue advantage of the said documents in their power and possession, and detrimental to the interest of other defendant No.1 to 5 and seeking repartition of the given properties to claim more share into that despite having lion's share already in their possession than other defendants.....

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3. Para 3 of the plaint is replied in this way that the plaintiff with clever designs have not included the property No.123, Khursheed Mkt., Sadar Bazar, Delhi, of the market value of more than Rs.26 lakh nor filed its Site Plan, for the purpose of repartition of the properties owned and left by deceased Sh. Laxmi Narain Seth at the time of his death on 24.2.1967, which have already been divided by the deceased Laxmi Narain during his lifetime through Family Settlement, the documents of which are in power and possession of plaintiffs through Sh. Kedar Nath Seth – the father of plaintiff No.1 to 3 and husband of plaintiff No.4 and the schedule of properties are thus incomplete till property No.123, Khursheed Mkt., is pooled and the cash and jewelry given to defendant No.6 are put together given in lieu of commercial property to him, and mentioned in the said Family Settlement. The plaintiffs be directed to place on record the said Family Settlement affected by late Sh. Laxmi Narain Seth and signed by the parties in token of its acceptance.

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7. Para 7 of the plaint as stated is wrong and denied. The answering defendants have repeatedly requested the plaintiffs to supply copy of the said Family Settlement time and again, but the plaintiffs flatly requested to oblige the answering defendants, to have separate assessment of H. Tax and other legal formalities but to no effect, and that is the main ground of animosity between the plaintiff and the answering defendants. The property is possessed individually in respect of separate portions under the Family Settlement but the whole of the property is till-date stand recorded in the name of late Sh. Laxmi Narain Seth since after his death on 24.2.1967.”

6. In the written statement filed by defendant No.6, he pleaded that besides the two properties mentioned in the plaint, the deceased was also the owner of shops bearing Municipal Nos.17, 123 and 123-A, Khursheed Market, Sadar Bazar, Delhi, which fact was alleged to have been concealed by the plaintiffs. It was stated that all the properties owned by the deceased including the shops bearing Municipal Nos.17, 123 and 123-A, Khursheed Market, Sadar Bazar, Delhi should be partitioned between the parties as per the provisions of Hindu Succession Act, 1956.

7. It would be relevant to highlight that defendant No.6 made no reference to any family settlement arrived at, as was pleaded by defendants No.1 to 5 i.e. the heirs of Manmohan Seth, but pleaded that the dispute pertaining to partition of the estate of the deceased had been referred to arbitration and that an award was published, which record was stated to be in the possession of the plaintiffs. We highlight the stand pleaded in paragraph 2 of the written statement, which reads as under:-

“2. That the plaintiff has otherwise not come to this Hon’ble Court with clean hands and has suppressed facts in regard to the arbitration proceedings and certain awards which are in his custody and control and for this reason also, the suit is not maintainable.”

8. The plaintiffs chose not to file replication(s) to the written statements filed by defendants Nos.1 to 6.

9. Relevant would it be to state that as per the plaintiffs, the estate of the deceased consisted of a residential house bearing Municipal No.33/5, East Punjabi Bagh, New Delhi and a shop bearing No.48, Khursheed Market, Sadar Bazar, Delhi and that the same required to be partitioned amongst the three sons of the deceased and with each branch of the three sons being entitled to one-third share each. Defendants No.1 to 5, the successors-in-interest of Manmohan Seth pleaded that apart from the two properties referred to in the plaint there was a third property being Shop No.123, Khursheed Market, Sadar Bazar, Delhi and pleaded a partition under a family settlement during the life time of the deceased, and as per their stand the suit had to be dismissed. The third son of the deceased i.e. Krishan Lal stated that the estate of the deceased comprised, not two, not three but four properties being three shops bearing Nos.7, 123 and 123A Khursheed Market, Sadar Bazar as also the residential house at Punjabi Bagh. He spoke about the dispute being settled before an Arbitrator, but made it clear that he had no documents to support the same alleging that the record was with his eldest brother i.e. Kedar Nath and hence with the plaintiffs since Kedar Nath had died. His plea therefore was that all four properties be partitioned.

10. On the basis of pleadings of the parties, vide order dated February 25, 2007 following issues were settled by the learned Single Judge:-

“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)”**

11. In support of their case, the plaintiffs examined plaintiff No.1 Narinder Nath Seth as PW-1; and the sole witness.

12. In his testimony PW-1 essentially reiterated the averments made in the plaint. Additionally, he deposed that no family settlement was ever arrived at between the parties. With respect to shop bearing Municipal No.123, Khursheed Market, Sadar Bazar, Delhi he deposed that though the ownership of said shop earlier stood recorded in the name of the deceased Laxmi Narain Seth but his father was the true owner of said shop since the sale consideration for the said shop was paid by his father from his own funds. He deposed that after the demise of the deceased, his legal heirs issued no objection certificates to enable transfer of ownership of the said shop in the name of Kedar Nath Seth. He deposed that in view of the no objection certificates issued, on February 13, 1967 the ownership of the said shop was transferred in the name of his father Kedar Nath Seth.

13. PW-1 was cross-examined by the legal heirs of defendant No.6 and it would be relevant to note the following portion of his cross-examination:-

“It is wrong to suggest that there was any other family property No.123, Khursheed Market, Sadar Bazar, Delhi. This property was owned by my late father Sh.Kedar Nath Seth. My late father Sh. Kedar Nath Seth purchased this property in the year 1969. My late father was self employed during his life time. He was doing business with his younger brother Sh. Man Mohan Seth at shop No.48, Khursheed Market, Sadar Bazar, Delhi.

I do not know exactly but the property No.17, Khursheed Market, Sadar Bazar, Delhi was under the ownership of late Sh. Man Mohan Seth.

Parties to suit residing at 33/5 Punjabi Bagh, Delhi are not possessing independent portions and the arrangement is haphazard. No arrangement has been made between the parties to occupy their separate portions in 33/5 Punjabi Bagh, Delhi.

After the demise of my grandfather in the year 1967, there was no settlement and the house was used commonly and jointly by all the families.

Q. Who was doing the business from the shop at 48, Khursheed Market, Sadar Bazar after the death of your father in the year 1989?

A. The shop was occupied and worked by defendant No.1 to 5 and their families.

Q. Did you ever or your brother sit on that shop?

A. No.

Q. What happened to the shop after the death of your uncle in the year 1990?

A. The family members of Mr.Manmohan Lal Seth continued the work on that said shop.

Presently family of defendant No.1 to 5 is occupying the said shop. The partnership firm by the name of S.L.Narang & Sons was operated till 1978-79 under the partnership of my father and uncle. The shop was purchased in the mid 1950's or 60's."

14. PW-1 was also cross-examined by the legal heirs of the defendants Nos.1 to 5 and it would be relevant to note the following portion of his cross-examination:-

"Q. Is it true that you have no personal knowledge about the family partition which took place during the lifetime of your grandfather except what has been told to you by your father?

A. It is wrong. Vol. I am having documents to show that no family partition took place ever.

I am relying upon Lease Deed of the house in the name of my grandfather. It is correct that Lease Deed is of 1961. Again said, it is a Sale Deed. It is wrong to suggest that any family partition took place of the house in the year 1966 during the lifetime of my grandfather.

Q. Do you have any knowledge of any partition in the year 1966 in respect of the house.

A. No partition took place.

Q. What properties were left behind by your grand father when he died in the year 1967?

A. one property at 48, Khursheed Market, Sadar Bazar, Delhi and another property 33/5 East Punjabi Bagh, Delhi.

Q. Whether any other property was left behind beside the abovesaid properties by your grandfather?

A. As per my knowledge, no other property was left behind except the abovesaid.

Q. I suggest it to you that your grandfather also left behind one property at 123, Khursheed Market, Sadar Bazar, Delhi. What have you to say?

A. According to my knowledge, this property was purchased by my father but the same could not be in his name, hence it was purchased in the name of my grandfather which was later on transferred in the name of my father and all other partners relinquished their shares.

Q. When the property 123, Khursheed Market, Sadar Bazar was purchased?

A. It was purchased in the early 1960's.

Q. Do you remember when this property was transferred in the name of your father?

A. It was transferred in the year 1967.

Q. Whether this transfer was effected during the lifetime of your grandfather or after his death?

A. It was transferred subsequent to the death of my grandfather.

Q. What was the reason in the family for transferring this property in the name of your father?

A. As it was purchased by my father and it was not in his name earlier, hence it was got transferred in the year 1967.

Q. Why the property was not got transferred before the death of your grandfather?

A. There were some reasons that the property could not be transferred in the name of my father before the death of my grandfather.

Q. Can you give and explain the reasons?

A. I cannot.

It is wrong to suggest that the property No.123, Khursheed Market, Sadar Bazar, Delhi was not purchased by my grandfather. It is also wrong to suggest that this property was purchased by my grandfather. The shop bearing No.48, Khursheed Market was purchased by my grandfather in the late 1950's and was in his name. It is correct that according to lease deed, which is now exhibited as Ex.PW1/D5, this property was acquired by my grandfather in the year 1964. The property No.48, Khursheed Market, Sadar Bazar is in the possession of defendant no 1 to 5. Still this property in the name of my grandfather.

Q. I suggest it to you that a family partition took place during the lifetime of your grandfather and as per the partition, property No.48, Khursheed Market was given to predecessors of defendant No.1 to 5 and the property No.123, was given to your father. What have you to say?

A. It is wrong to suggest.

Q. I suggest it to you that in furtherance of family settlement, property No.123, Khursheed Market was transferred in the name of your father on the basis of Ex.PW1/D1 to ExPW1/D4. What have you to say?

A. It was not transferred in furtherance of family settlement but otherwise. Vol. Had it been the case, then 48 Khursheed Market could have also been transferred in the name of predecessors of defendant No.1 to 5.

We have sold property No.123, Khursheed Market, Sadar Bazar, Delhi in the year 2003. I am not possessing any original document of family settlement because no such family settlement was arrived at between the parties at any time. It is wrong to suggest that the family settlement was reduced in writing and it was retained by my father being the elder member of the family. It is correct that I am possessing original papers of 48, Khursheed Market.

Q. What your father was doing in his lifetime?

A. He was self employed and was doing business and trading activities.

Q. Can you tell the details of the business, which he was doing?

A. He was doing business of general merchandise.

Q. In which year, your father started business?

A. I do not remember the year but I have seen my father doing business since my childhood.

Q. What your grandfather was doing in his lifetime?

A. He was also doing business with my father and it was a joint business.

Q. Can you tell from which premises or shop number, the aforesaid business was being done?

A. It was being run from 48, Khursheed Market, Delhi.

Q. Do you remember the name of the firm?

A. It was M/s S.L. Narain & Sons.

Q. Do you remember what business late Sh. Manmohan Seth, predecessor of defendant No.1-5 was doing?

A. late Sh. Manmohan Seth was also doing business with my father and grandfather.

Q. Do you remember from which premises, Mr. Manmohan Seth was doing business?

A. From the same shop i.e. 48, Khursheed Market, Sadar Bazar, Delhi.

Q. I put it to you that late Sh. Manmohan Seth was not doing his business from 48, Khursheed Market, Sadar Bazar but was doing his business from 123, Khursheed Market under the name and style of Angura Industrial Corporation. What have you to say?

A. I do not know about that.

Q. Do you know who was doing business and of what type in 123, Khursheed Market, Sadar Bazar, Delhi?

A. From the year 1978, I have been doing my all business in that shop.

Q. Who was doing business in this shop before 1978?

A. I do not remember.

Q. I suggest it to you that upto 1972-73 Mr. Manmohan Seth was doing business in this shop under the name and style of Angura Industrial Corporation. What have you to say?

A. I do not know anything about that.

Q. I put it to you that in the year 1972-93, the possessions of shops No.123, Khursheed Market and Shop No.48, Khursheed Market were exchanged between your father Mr. Kedar Nath Seth and your uncle Mr. Manmohan Seth. What have you to say?

A. No. It is wrong. The shop No.123, Khursheed Market was under the ownership of my father since late 60's.

Q. I suggest it to you that the shop No.123, Khursheed Market, Sadar Bazar, Delhi remained in possession of Mr. Manmohan Seth since the date when it was purchased by Mr. Laxmi Narain Seth till the possession of the same was given to your father. What have you to say?

A. I do not know anything about that.

Q. Do you know who was in possession of the shop No.123, Khursheed Market, Sadar Bazar, Delhi?

A. I know only that my father was the owner of this shop since late 60's and the shop was in his possession.

Q. What was your father was doing in shop No.123, Khursheed Market, Sadar Bazar, Delhi if the possession of the same was with your father as stated by you?

A. I do not know anything about that.

Q. I put it to you that in the year 1972-73, the possessions of shops No.123, Khursheed Market and Shop No.48, Khursheed Market were exchanged between your father Mr. Kedar Nath Seth and your uncle Mr. Manmohan Seth and this exchange took place in view of the family settlement wherein shop No.123, Khursheed Market had fallen into the share of your father and shop No.48, Khursheed Market had fallen in the share of Mr.Manmohan Seth. What have you to say?

A. It is wrong. Vol. No family settlement was arrived at all. Had it been then 48, Khursheed Market also could have been in the name of Mr. Manmohan Seth. My father owned shop No.123, Khursheed Market since late 60's.

Q. I put it to you that the shop No.48 Khursheed Market could not have been transferred in the name of Mr. Manmohan Seth since your father had himself and also influenced other family members not to give NOC for effecting the transfer of title in favor of Mr.Manmohan Seth. What have you to say?

A. I do not know about that but if it had been settled, both the properties would have been transferred.”

15. As regards documentary evidence, amongst other documents, PW-1 proved four affidavits dated August 19, 1967, Ex.PW-1/D1, Ex.PW-1/D2, Ex.PW-1/D3 and Ex.PW-1/D4 executed by Dhanwati Seth, the wife of the deceased, Kamla Chopra, the daughter of the deceased, Man Mohan Seth and Krishan Lal Seth, the sons of the deceased, respectively, which affidavits record that the deponent(s) are relinquishing their share in the shop bearing No.123, Khursheed Market, Sadar Bazar, Delhi in favor of Kedar Nath Seth.

16. Defendants No.1 to 5 examined defendant No.2, Rajeev Seth as DW-1, who in his testimony essentially reiterated the averments made in the

written statement filed by defendants No.1 to 5, but it would be relevant to note following portion of his examination-in-chief:-

“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 Kidar 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.”

17. DW-1 was cross-examined by the plaintiffs and it would be relevant to note the following portion of his cross-examination:-

“Q. Who informed you about the family settlement of the year 1966?

A. My father Sh. Manmohan Lal Seth, Kishan Lal Seth and Mr. Kedar Nath Seth.

Q. What all did they inform you about the alleged family settlement?

A. They told me that the shop No.48, Khursheed Market is in the share of defendant No.1 to 5 and the shop No.123 and 123A, Khursheed Market, Delhi is of the plaintiff. The ground floor of the property 33/5 East Punjabi Bagh, Delhi is of plaintiff and defendant No.6 (half each). The first floor and above and the roof is of defendant No.1 to 5. Defendant No.6 received cash and jewelry from grandfather Sh. Laxmi Narain Seth. Nothing was given to defendant No.7 as sufficient money was spent on her marriage.

Q. Is it correct that nothing else was told to you except the above as replied by you?

A. It is correct.

Q. What do you mean by 'family settlement'?

A. It means that the properties were distributed among the parties.

Q. Was this family settlement in writing or oral?

A. It was oral.

Q. Did late Sh. Manmohan Seth file income tax and wealth tax?

A. He used to file both.

Q. Did he disclose that the properties were partitioned, in the income tax and wealth tax documents?

A. I do not know.

Q. Do you file wealth tax and income tax?

A. I file only income tax returns.

Q. Have you disclosed the partition of property in income tax returns?

A. No.

Q. Is it correct that the shop No.123, Khursheed Market was initially allotted in the name of Sh. Laxmi Narain Seth and after his death, the shop was transferred in the name of Sh. Kedar Nath Seth?

A. This shop was transferred in the name of Sh. Kedar Nath Seth on the basis of NOC given and signed by all the parties and similarly such NOC was given for shop no 48, Khursheed Market, Delhi.

Q. Why the shop No.48, Khursheed Market, New Delhi was not mutated in the year 1967 when the shop No.123, Khursheed Market, Delhi was mutated at the same time?

A. Because all the documents were in possession of plaintiff's father.

Q. Can you tell the source of income of Sh. Kishan Lal Seth during his lifetime?

A. He was in service.

Q. Whether you were informed by both of your uncle and your father about the distribution of assets and profits of the partnership business of late Sh. Laxmi Narain Seth alongwith the family settlement?

A. When I was informed in the year 1978, everything had already been distributed.

Q. Is it correct that since you were not born in the year 1966 so whatsoever you say is hear-se?

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.” (*Emphasis Supplied*)

18. DW-1 was cross-examined by the legal heirs of defendant No.6 and it would be relevant to note the following portion of his cross-examination:-

“Q. Please see para No.7 of your affidavit in evidence of DW1/A and tell, how the defendant No.6 was compensated in terms of alleged family settlement?

A. Jewelry and cash were given to defendant No.6 in terms of family settlement.

Q. Can you tell, what was the total value of the cash and jewelry which were given to defendant No.6 as compensation in terms of alleged family settlement?

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.

Q. Please see documents regarding appointment of an Arbitrator, dated 17.07.1978 and tell whether this document bears signature of your father?

A. (Witness has replied the question after going through the document.) I cannot say whether the signature appearing at point X-1 are of my father but name of my father is appearing at point X-2. The same is marked as Mark X.

Q. Please see Ex.PW1/D-3 and tell whether this document bears the signature of your father?

A. (Witness has replied the question after going through the document.) I am unable to identify the signatures of my father on this document.

Q. At this stage, attention of witness has been drawn to the para No.11 of his affidavit of evidence Ex. DW1/A and he has been asked as to whether the averments in para No.11 are correct?

A. It is correct.

The family settlement was not in writing.”

(Emphasis Supplied)

19. We highlight that DW-1 proved exhibits D-1 and D-2 as also DW-1/1 to Ex.DW-1/12, and put in a tabular form, the description and particulars of the documents would be as under:-

S. No.	Description of Document	Particulars of Document
1.	Assessment order dated March 14, 1988 Ex.DW-1/2 passed in respect of the shop bearing Municipal No.48, Khursheed Market, Sadar Bazar, Delhi.	The order records that M/s Monica Enterprises (firm of Late Manmohan Seth) is carrying on business in the said shop.
2.	Notice dated September 26, 1984 Ex.D-1 issued by Sales Tax Officer in respect of the shop bearing Municipal No.48, Khursheed Market, Sadar Bazar, Delhi.	The notice records that Late Manmohan Seth is carrying on business in the said shop.

3.	Notice Ex.D-2 issued by Sales Tax Office in the year 1984 respect of the shop bearing Municipal No.48, Khursheed Market, Sadar Bazar, Delhi.	The notice records that M/s S.L. Narain & Sons is carrying on business in the said shop.
4.	Telephone bill dated July 1, 1985 Ex.DW-1/1.	The bill records that a telephone was installed in the name of wife of Late Manmohan Seth in the shop bearing Municipal No.48, Khursheed Market, Sadar Bazar, Delhi.
5.	Registration Certificate dated January 19, 1980 Ex.DW-1/3	The certificate records that Lata Seth, wife of Late Manmohan Seth is the occupier of the shop bearing Municipal No.48, Khursheed Market, Sadar Bazar, Delhi.
6.	A demand letter Ex.DW-1/4 issued by MTNL to Lata Seth, the wife of Manmohan Seth.	The letter records that a telephone is installed in the name of wife of Manmohan Seth in the shop bearing Municipal No.48, Khursheed Market, Sadar Bazar, Delhi.
7.	A communication Ex.DW-1/9 issued by MCD	The communication records that Manmohan Seth is the occupier of the property bearing Municipal No.3/55, East Punjabi Bagh, New Delhi.
8.	Water and electricity bills Ex.DW-1/10, DW-1/11	The bills record that the wife of Manmohan Seth

	and Ex.DW-1/12 respectively issued in respect of the property bearing Municipal No.3/55, East Punjabi Bagh, New Delhi.	is the occupier of the said property.
9.	A property tax receipt dated March 21, 2005 Ex.DW-1/6 issued in respect of the shop bearing Municipal No.48, Khursheed Market, Sadar Bazar, Delhi.	The receipt records that the wife of Manmohan Seth is the occupier of the said shop.

20. The legal heirs of deceased defendant No.6 examined Sandeep Sethi [defendant No.6(b)] as DW-2 who in his testimony essentially reiterated the averments made in the written statement filed by defendants No.6. Additionally, he deposed that since the ownership of shop bearing Municipal No.123, Khursheed Market, Sadar Bazar, Delhi owned by the deceased was transferred in the name of Kedar Nath Seth, on July 10, 1978 Kedar Nath Seth wrote letter Ex.DW-6/2 wherein he declared that he does not want any other property out of the estate of the deceased. He deposed that thereafter vide deed dated July 17/27, 1978, Ex.DW-6/1, the three sons of the deceased referred the disputes relating to division of the estate of the deceased to a sole arbitrator. On January 5, 1979 an arbitral award Ex.DW-1/3 was pronounced by the arbitrator pertaining to the division of the estate of the deceased between his three sons but stated that said award was not acted upon by the parties. He deposed that on August 16, 1984 the President executed a reconveyance deed Ex.DW-6/4 (also exhibited as Ex.D-8) in respect of the property bearing Municipal No.3/55, East Punjabi Bagh, New Delhi in favor of Kedar Nath Seth, expressly recording that this was because of he being the '*Karta of HUF*'. On September 12, 1988

Krishan Lal Seth wrote a letter Ex.DW-6/6 to the arbitrator regarding implementation of the award dated January 5, 1979. The three sons of the deceased had also entered into a deed of agreement Ex.DW-6/7 regarding the division of estate of the deceased, which deed was never acted upon by them i.e. 3 sons of the deceased.

21. DW-2 was cross-examined by the plaintiffs and it would be relevant to note the following portion of his cross-examination:-

“I did not file any execution petition after the award of the Arbitrator. To my knowledge, objections were not filed by any of the parties.

At this stage, attention of the witness has been drawn to the document Ex.PW1/D4 and the witness is asked as to whether the same bears the signature of his father at points “A” and “B”. The witness has replied in affirmative stating that the same are his father’s signatures.”

22. It needs to be highlighted that the plaintiffs did not put any question or suggestion to the witness regarding the letters dated July 10, 1978 Ex.DW-6/2, deed dated July 17/27, 1978 Ex.DW-6/1 and deed of agreement Ex.DW-6/7 and thus the testimony of the witness with respect to said document remains unchallenged.

23. DW-2 was also cross-examined by defendants Nos.1 to 5 and it would be relevant to note the following portion of his cross-examination:-

“My father gave me the documents relating to the Arbitration Award referred by me in my affidavit. I do not remember as to in which year the said documents were given to me by my father. So far as I have learnt, my father participated in the Arbitration proceedings. I learnt this through my father as well as after going through the documents. I do not remember if the documents relating to the Arbitration proceedings have been reflected in the written statement filed by my father

or that the same were relied upon by him or not. It is incorrect to suggest that I am deposing falsely.

Q. It is put to you that the documents relating to the arbitration proceedings were never with your father but the same were with the plaintiffs. What have you to say?

A. I have seen the document with my father as well as with the plaintiff.

Q. Why did you give up your families claim and claim of all the legal heirs of defendant No.6 for their share in property No.123 & 123A, Khursheed Market, Sadar Bazar, Delhi?

Ans. Because I saw a document that relinquishes the defendant No.6's right for the property No.123 & 123A, Khursheed Market, Sadar Bazaar, Delhi.

Q. In what all properties, you are claiming, 1/3 share of your family?

A. H.No.33/5, Punjabi Bagh, Delhi, (2) Shop No.48, Khursheed Market, Delhi and (3) Shop No.17, Khursheed Market, Delhi.

My family including my mother and two sisters and given up their share in property No.123 & 123A, Khursheed Market, Sadar Bazar, Delhi. I do not think whether any consideration was received by us for giving up our share in the said two properties i.e., 123 & 123A, Khursheed Market, Delhi”

24. As regards the documentary evidence, DW-2 proved Ex.DW-6/1 to Ex.DW-6/7 and put in a tabular form highlighting the description of the documents and the particulars thereof, the chart would read as under:-

S. No.	Description of Document	Particulars of Document
1.	A handwritten note dated July 10, 1978 Ex.DW-6/2 purportedly written by	The note records that <i>'Kedar Nath Seth relinquishes all his rights in the estate of the</i>

	Kedar Nath Seth	<i>deceased</i> '.
2.	An agreement for appointment of arbitrator dated July 17/27, 1978 Ex.DW-6/1 purportedly executed by the 3 sons of the deceased.	The contents of said agreement shall be noted in detail in the subsequent part of the judgment.
3.	A reconveyance deed dated June 16, 1984 Ex.DW-6/4 (also exhibited as Ex.D-8) executed in respect of the property bearing Municipal No.3/55, East Punjabi Bagh, New Delhi.	The deed records that the President has reconveyed the property in question in favor of ' <i>Kedar Nath Seth, Karta of HUF</i> '.
4.	A letter dated September 12, 1988 Ex.DW-6/6 written by Krishan Lal Seth to I.R. Chopra, the sole arbitrator.	The letter records that Krishan Lal Seth is aggrieved with the award dated January 5, 1979 passed by the arbitrator and thus the arbitrator should file the award in the court for the purposes of making it rule of the court.
5.	A deed of agreement Ex.DW-6/7 regarding division of estate of the deceased executed by 3 sons of the deceased.	The deed is largely illegible and its date is also not discernible. But it would show that the three brothers have referred to Shop No.17, 48 and 123 Khursheed Market and the house at Punjabi Bagh as the subject matter of dispute and acknowledges that Shop No.17 in the name of Manmohan and Shop No.123 in the name of

		Kedar Nath Seth are properties of the joint family requiring to be partitioned.
6.	An arbitral award dated January 5, 1979 Ex.DW-6/3 passed by I.R. Chopra, sole arbitrator.	The contents of said award shall be noted in detail in the subsequent part of the judgment.

25. Vide impugned judgment and decree dated February 8, 2012, the learned Single Judge has held that the plaintiffs are entitled to properties bearing municipal No.3-55, East Punjabi Bagh, New Delhi and shop No.48, Khursheed Market, Sadar Bazar, Delhi to be partitioned and that the share of the three branches of the three sons of late Lakshmi Narain Seth was 1/3rd each. A preliminary decree has been passed to said effect.

26. In reaching the conclusion, with respect to the evidence led the learned Single Judge has held :-

(i) Whereas the case set up by defendants Nos.1 to 5, as discernible from the written statement filed by them and the examination-in-chief of their witness Rajeev Seth DW-1 (defendant No.2), was that a family settlement was arrived at between the 3 sons of the deceased around the year 1966 and the same was signed by the 3 sons of the deceased; Rajeev Seth DW-1 stated, at a variance therewith, in his cross-examination by stating that an oral family settlement was arrived at between the 3 sons of the deceased; which discrepancy completely falsifies the case pleaded by defendants Nos.1 to 5 that a family settlement was arrived at between the 3 sons of the deceased;

(ii) The fact that the witness of the defendants Nos.1 to 5 i.e. Rajeev Seth DW-1 (defendant No.2) had no personal knowledge about the alleged family settlement but claimed to have derived knowledge about the same

from his father and uncle and that Rajeev Seth pleaded ignorance when questioned whether his father Manmohan Seth had disclosed the factum of division of the estate of the deceased by way of family settlement to the income-tax and wealth-tax authorities, belied the case of defendants No.1 to 5 that a family settlement was arrived between the 3 sons of the deceased around the year 1966;

(iii) The reconveyance deed dated June 16, 1984, Ex.DW-6/4, which records that the property bearing Municipal No.3/55, East Punjabi Bagh, New Delhi has been reconveyed in favor of Kedar Nath Seth in his capacity as Karta of HUF coupled with the fact that the witness of the defendant No.6/legal heirs of defendant No.6, Sandeep Seth DW-2 (defendant No.6(b)) admitted that his father Kishan Lal Seth had executed an affidavit relinquishing his rights in the shop bearing Municipal No.123, Khursheed Market, Sadar Bazar, Delhi and that defendants Nos.1 to 5 did not produce a single document to establish that a family settlement was arrived between the 3 sons of the deceased, falsifies the case set up by defendants Nos.1 to 5;

(iv) Had any family settlement been arrived at between the 3 sons of the deceased, there was no occasion for the parties to sign the relinquishment deeds in respect of property bearing No.123, Khursheed Market, Sadar Bazar, Delhi in favor of Kedar Nath Seth;

(v) Had there been any family settlement between the 3 sons of the deceased as claimed by defendants Nos1 to 5 the parties would have executed relinquishment deeds in respect of property bearing Municipal No.48, Khursheed Market, Sadar Bazar, Delhi in favor of Manmohan Lal; but the same was not done;

(vi) The mere fact that the parties have been living in different portions in property bearing Municipal No.3/55, East Punjabi Bagh, New Delhi since last several decades is not sufficient to establish that a family settlement

was arrived at between the 3 sons of the deceased; particularly when the alleged family settlement as alleged was wholly inequitable; and

(vii) The claim made by the defendant No.6/legal heirs of defendant No.6 that the deceased was the owner of property bearing Municipal No.17, Khursheed Market, Sadar Bazar, New Delhi at the time of his death had to fail in view of the fact that no evidence was led by the defendant No.6/legal heirs of defendant No.6 to prove the ownership of the deceased of the said property and no suggestion to said effect was given to the witnesses of the plaintiffs and defendants Nos.1 to 5 in their cross-examination.

27. Aggrieved by the impugned judgment and decree dated February 8, 2012 passed by the learned Single Judge the defendants Nos.1 to 5 have filed the present appeal under Section 96 of the Code of Civil Procedure.

28. In support of the present appeal, learned counsel for the defendants Nos.1 to 5 had argued that:-

A) That the conclusion arrived at by the learned Single Judge that no family settlement was arrived at between the 3 sons of the deceased around the year 1966 is erroneous since it is based upon faulty appreciation of evidence led by the parties. It was argued that the learned Single Judge failed to appreciate the fact that the factum of execution of relinquishment deeds by the legal heirs of the deceased in respect of the shop bearing Municipal No.123, Khursheed Market, Sadar Bazar, Delhi in favor of Kedar Nath Seth in the year 1967 pursuant to which the ownership of said shop was transferred in the name of Kedar Nath Seth is a clear pointer to the fact that a family settlement was arrived at between the 3 sons of the deceased around the year 1966 as per which shop bearing Municipal No.123, Khursheed Market, Sadar Bazar, Delhi fell to the share of Kedar Nath Seth, particularly when no evidence was led by the plaintiffs to establish that the deceased was a benami owner of said shop and Kedar Nath Seth was the true owner of the said shop. Counsel highlighted that the

learned Single Judge has ignored the evidence that said shop was with Manmohan Seth and shop No.48 Khursheed Market, Sadar Bazar was with Kedar Nath Seth and the two brothers had exchanged possession of the shops, which would only be possible if there was a family settlement as alleged.

B) Alternatively, it was argued by learned counsel for the defendants Nos.1 to 5 that the learned Single Judge ought to have held the deceased to be as the owner of the shop bearing Municipal No.123, Khursheed Market, Sadar Bazar, Delhi and directed partition of said shop in 3 equal shares between the plaintiffs, defendants Nos.1 to 5 and legal heirs of defendant No.6 in view of the fact that the deceased was earlier the recorded owner of said shop and the plaintiffs had led no evidence whatsoever to establish that the deceased was the benami owner of said shop and Kedar Nath Seth was the true owner of the shop having paid sale consideration thereof.

29. Per contra, learned counsel for the plaintiffs contended that the impugned judgment and decree dated February 8, 2012 passed by the learned Single Judge is perfectly legal and valid which plea was supported by the legal heirs of deceased defendant No.6.

30. As noted by us in paragraph 9 above, as per the plaintiffs the estate of late Shri Laxmi Narain Seth consisted of a residential house No.33/5, East Punjabi Bagh, New Delhi and shop No.48, Khursheed Market, Sadar Bazar and that the same were liable to be partitioned amongst the branches of his three sons. As per defendants No.1 to 5, the successors-in-interest of Manmohan Seth, they pleaded that apart from the said two properties, Shop No.123 Khursheed Market, Sadar Bazar, Delhi was also owned by the deceased and that the estate had been partitioned in the year 1966. The third son i.e. Krishan Lal pleaded that apart from the residential house and Shop No.48 Khursheed Market, the deceased also owned Shop No.17, 123 and 123A Khursheed Market, Sadar Bazar and pleaded that the disputed

had been settled before an Arbitrator and simultaneously highlighted that he could not make good the plea since he had no papers relating to arbitration; thus he pleaded that not two, not three, but four properties be partitioned.

31. It is unfortunate that neither before the learned Single Judge nor before us, and for which we have proof through the medium of the written submissions filed by learned counsel for the three warring groups, Ex.DW-6/1 and Ex.DW-6/3, which are very vital documents were not even referred to. Similarly, nobody referred to Ex.DW-6/7 which is also a vital document, but unfortunately is in tatters, but whatever can be read therein would be relevant.

32. Ex.DW-6/1 dated July 17/27, 1978 reads as under:-

“APPOINTMENT OF ARBITRATOR

WE, the three brothers, Sarvashri Kidar Nath Seth, Kishan Lal Seth and Man Mohan Lal Seth sons of Late L. Lachhmi Narain Seth and carrying on business in the name of Messers. S.L. Naran & Sons, Khursheed Market, Sadar Bazar, Delhi – 110 006.

AND WHEREAS certain disputes in business have arisen and all the three brothers named above have decided to part company and have decided to appoint Shri Amar Nath Khanna, r/o 562, KatraNeel, Delhi – 110 006 as the sole arbitrator in connection with the under noted disputed matters :-

- i) Dissolution of H.U.F.
- ii) Checking of accounts of business being carried on by the firm.
- iii) Division of undernoted property/ies inherited from our late father L. Lachhmi Narain Ji Seth, namely:-
 - a. One house situated at 33/5, Punjabi Bagh, New Delhi – 110 006.
 - b. Two shops situated at 48 and 123, Khursheed Market, Sadar Bazar, Delhi – 110 006.
 - c. One shop situated at 17, Galli Burnawali, Sadar Bazar, DELHI- 110 006.

3. THAT THE AWARD OF Shri Amar Nath, Sole Arbitrator should be final and binding on all the three brothers named above.”(*Emphasis Supplied*)

33. The relevant portion of the arbitral award dated January 5, 1979 Ex.DW-6/3 reads as under:-

“ARBITRATION CASE

In the matter of Arbitration between
Shri Kidar Nath Seth s/o. Late Shri Lachhmi Narain Seth,
Resident of 33/5, Punjabi Bagh, New Delhi

...Party No.1.

Vs.

Shri Man Mohan Lal Seth s/o. Late Shri Lachhmi Narain
Seth, Resident of 33/5, Punjabi Bagh, New Delhi

...Party No.2.

and

Shri K.L. Seth s/o. Late Shri Lachhmi Narain Seth,
Resident of 33/5, Punjabi Bagh, New Delhi

...Party No.3.

WHEREAS dispute having arisen between the parties, Shri Kidar Nath Seth s/o. Late Shri Lachhmi Narain Seth referred the same for Arbitration of Shri I.R. Chopra on 9.10.78. Shri Man Mohanlal Seth s/o. Late Shri Lachhmi Narain Seth and Shri K.L. Seth s/o. Late Shri Lachhmi Narain Seth also consented vide Court Paper of Rs.2/- brought by Shri Narinder Seth s/o Shri Kidar Nath Seth signed by all of them on 12.10.78 and 13.10.78.

I, I.R. Chopra, the Arbitrator in the dispute fixed hearing dates to which all the three consenting parties scrupulously complied. Last hearing date was fixed on 8th November, 1978 when all the concerned parties were present. All evidence produced before me was examined.

Having fully considered the matter in dispute and all oral and documentary evidence produced before my the Plaintiff and the Defendants, I hold that Shri Kidar Nath Seth will keep the firm with him in his individual

capacity. Mr. Man Mohanlal Seth and Shri K.L. Seth will therefore sign a dissolution deed and Shri Kidar Nath Seth will be responsible to deposit dissolution deed with the appropriate authorities. The entire liabilities of the firm: M/s S.L. Narain & Sons shall be undertaken by the Plaintiff. To discharge such liabilities he is allowed to retain shop No.123 & 123A and Shop No.17. (For Shop No.17: transfer deed shall be signed in favor of the Plaintiff by the 1st Defendant).

The 1st Defendant is presently the sole owner of the Shop No.17, which ultimately belonged to the HUF. The Plaintiff shall have to exclusive right to enjoy, mortgage, alienate or sell this property. The first Defendant, his successors, attorneys or representatives shall not cause any hindrance or otherwise to the exclusive use of this property by the Plaintiff or his successors.

The Plaintiff and the 1st Defendant shall vacate their part of the House at 33/5, Punjabi Bagh by 20th January, 1979. They will relinquish all their rights in this property in favor of IInd Defendant. The Second Defendant shall have the exclusive ownership right to this property.

Shop No.48, Khursheed Market, Sadar Bazar, Delhi is given to Shri Manmohan Lal Seth, the 1st Defendant. The Plaintiff and the IInd Defendant will relinquish all their rights in this property in favor of Ist Defendant. The Ist defendant shall have the exclusive ownership right to use this shop, alienate it, give the whole or part of it on rent, mortgage it or sell it.” (*Emphasis Supplied*)

34. As regards Ex.DW-6/7, which bears a date, but unfortunately over which, while putting the exhibit mark an overwriting has taken place thereby resulting in the date being illegible, we find that the document is in tatters, but its caption records that it is a deed of agreement executed between Kedar Nath Seth, Manmohan Seth and Krishan Lal Seth. Para 1 notes that Shops No.17, 48 and 123 Khursheed Market, Sadar Bazar and House No.33/5 Punjabi Bagh are the joint properties and that Shop No.17

is in the name of Manmohan and Shop No.123 is in the name of Kedar Nath, but have to be treated as joint properties belonging to the coparceners. The document appears to be a memorandum of a family partition and certainly suggests that the three brothers agreed that Shop No.48 Khursheed Market would be the exclusive property of Manmohan Seth and Shops No.17 and 123 Khursheed Market shall be those of Kedar Nath Seth. But unfortunately since the document has got damages and mutilated and there is no clarity with respect to what the brothers agreed with respect to the property at Punjabi Bagh, we would be constrained to hold that it would be unsafe to rely upon the document as conclusive proof that the brothers had partitioned the joint family properties. However, reference can be made to the document with respect to the admissions that three shops No.17, 48, and 123 and the house at Punjabi Bagh were to be partitioned.

35. The finding returned by the learned Single Judge that there is no evidence to establish that the deceased owned Shop No.17 is a result of learned counsel for the parties not drawing the attention of the learned Single Judge, and unfortunately even before the Division Bench, that as late as July 1978, evidenced by Ex.DW-6/1 the three sons of the deceased had made a reference to the Arbitrator and therein had clearly indicated that the estate of the deceased which had to be partitioned consisted of House No.33/5 East Punjabi Bagh, New Delhi, Shop No.17, 48 and 123, Khursheed Market, Sadar Bazar, Delhi. Even the award Ex.DW-6/3 made a reference to the three shops and the house and the manner in which the same would be partitioned. Ex.DW-6/7 has also been overlooked.

36. Now, the plaintiffs did not dispute that Kedar Nath Seth was carrying on business from Shop No.48 and Manmohan Seth was carrying on business from Shop No.123 and that the two brothers exchanged possession somewhere around the year 1972 or 1973. Prior thereto the No

Objection Certificates signed by Manmohan Seth and Krishan Lal Seth were used by Kedar Nath to get mutated in his name Shop No.123. Something did happen within the family occasioning the two brothers to exchange possession of the respective shops in their occupation. Something happened within the family which led to the No Objection Certificates being issued. There is evidence that the brothers did discuss something pertaining to the estate of their father, but the evidence is scattered and hazy. It is fuzzy and therefore a judicial eye is unable to discern what exactly was decided amongst the brothers. However, one thing is clear. There being no evidence that Kedar Nath Seth had paid the sale consideration when Shop No.123 Khursheed Market was purchased in the name of Laxmi Narain Seth, the plea set up by the plaintiffs that the relinquishment deeds/No Objection Certificates were executed because Kedar Nath Seth was the benami owner of the said shop cannot hold true.

37. As noted by us hereinabove defendant No.6 in his written statement had referred to the disputes being referred to arbitration. The plaintiffs did not rebut the plea by filing a written statement. Defendant No.6(b), Sandeep Sethi, who appeared as DW-2 deposed that the three sons of the deceased had referred the dispute to arbitration as per reference document Ex.DW-6/1 dated July 17/27, 1978 resulting in the award Ex.DW-6/3 being pronounced on January 05, 1979. Neither the plaintiffs who cross-examined him nor the other defendants challenged his testimony nor the genuineness of the two exhibits proved by him.

38. The said two documents would evidence that the dispute between the brothers pertaining to the partition of the estate of their father kept on simmering till the year 1978 and the three brothers, while making the reference clearly acknowledged that their father owned Shop No.17, 48 and 123 and the residential house bearing No.33/5 East Punjabi Bagh, New Delhi. We find that the award deals with the three properties.

39. It may be true that the award cannot be enforced because it was not made a Rule of the Court, a requirement under the Arbitration Act 1940, but the contents of the award and the letter referring the dispute to arbitration establish beyond reasonable doubt that three shops and a residential house was admitted by the three sons as belonging to their father, requiring the same to be partitioned.

40. It cannot be lost sight of that Kedar Nath was the eldest brother and thus there is a grain of truth in the stand taken by defendants No.1 to 5 that he had been selectively using documents to suit his convenience.

41. We apply the rule of the last conduct of the parties as good evidence of what the parties acknowledged inter-se each other. Had Shop No.123 been conveyed in the name of Kedar Nath Seth on account of the relinquishment deeds/No Objection Certificates signed by his brothers in acknowledgment of he being a benami owner thereof, we see no reason why in the year 1978 Kedar Nath Seth would join in signing Ex.DW-6/1 in July 1978. What about his note Ex.DW-6/2 dated July 10, 1978 in which he wrote that he relinquishes all his rights in the estate of the deceased? Now, the reconveyance deed Ex.DW-6/4 dated July 16, 1984 makes a reference to the reconveyance deed in favour of Kedar Nath Seth, *Karta* of HUF. But, which HUF? The larger one when his father was alive or the lesser consisting of he and his sons? These are unanswered questions because, as already noted by us, the evidence is scattered, hazy and fuzzy.

42. The latest conduct of the three brothers of the year 1978 to refer the matter to arbitration consists of unequivocal admissions that neither the residential house nor three shops were partitioned to the satisfaction of the three brothers, and Ex.DW-6/1 as also Ex.DW-6/3 shine like bright stars, guiding the Court to the destination, which obviously is that the estate of the deceased which requires to be partitioned is the one pleaded by defendant No.6 and we highlight that Ex.DW-6/1, the document appointing

an arbitrator makes reference to the arbitrator to partition Shops No.17, 48, and 123 and House No.33/5 East Punjabi Bagh, New Delhi.

43. The appeal stands disposed of modifying the impugned judgment and decree dated February 08, 2012. With respect to Issue No.2 it is held that late Shri Laxmi Narain Seth left behind properties No.17, 48 and 123 Khursheed Market, Sadar Bazar, Delhi which are shops and a residential house bearing No.33/5 East Punjabi Bagh, New Delhi. On Issue No.1 the finding returned by the learned Single Judge is affirmed and so is the decision with respect to Issue No.4 i.e. that evidence does not establish a partition or the brothers having acted there-under. But with respect to the conclusion arrived at, the impugned judgment and decree is modified : declaring that the estate of the deceased consisting of Shop No.17, 48 and 123 Khursheed Market, Sadar Bazar, Delhi and House No.33/5 East Punjabi Bagh, New Delhi is liable to be partitioned and that share of the plaintiffs therein is jointly one-third; the share of defendants No.1 to 5 jointly therein is one-third and that of defendants No.6(a) to 6(d) jointly therein is one-third. We reinforce our reasoning with reference to Ex.DW-6/7, a truncated document, but whatever survives is throwing good light on the subject and which aspect has been discussed by us herein above in paragraph 34.

44. We note that a stand has been taken by PW-1 that Shop No.123, Khursheed Market, Sadar Bazar, Delhi has been sold by the plaintiffs after the suit was instituted resulting in third party rights being created, and thus we declare that while partitioning the estate, since the current values of the properties would be identified/determined by the learned Local Commissioner whom we propose to appoint, the value of the said property would be assigned to the share of the plaintiffs.

45. A preliminary decree be drawn as per our decision.

46. We appoint Ms.Saahila Lamba, Advocate, Mobile No.9818153010 as the Local Commissioner to record evidence pertaining to the valuation of the three shops and the residential house and submit a report regarding the same as also to submit a report whether the three properties which are within the family can be partitioned by metes and bounds in a manner where after satisfying the value of Shop No.123 Khursheed Market, Sadar Bazar, Delhi assignable to the plaintiffs, the remainder three can be partitioned by metes and bounds.

47. The report shall be submitted in the suit within a period of six months from today. The parties are directed to co-operate before the learned Local Commissioner whose fee is fixed at ₹1,50,000/- (Rupees One Lakh Fifty Thousand only) to be paid in equal share by the three branches of the sons of late Lakshmi Narain Seth. Other out of pocket expenses incurred by the learned Local Commissioner shall be borne by the parties in equal proportion as aforesaid.

48. Parties shall bear their own costs in the appeal.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

DECEMBER 13, 2012
dk