

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

+ **RFA No. 906/2017**

% **21st March, 2018**

ONKAR NATH KAPOOR THROUGH LRS & ORS. Appellants

Through: Mr. G. Tushar Rao, Advocate
with Mr. Mayank Sharma,
Advocate.

versus

JAWAHAR LAL KAPOOR (DECEASED) THROUGH LRS. &
ORS. Respondents

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 38768/2017 (Exemption)

1. Exemption allowed subject to just exceptions.

CM stands disposed of.

CM No. 11124/2018 (U/o VI Rule 17 CPC)

2. This application for urging additional ground is allowed.

CM stands disposed of.

**RFA No. 906/2017 & CM Nos. 38767/2017 (interim direction),
38769/2017 (U/o XXVI Rule 10 CPC)**

3. This Regular First Appeal under Section 96 of the Code
of Civil Procedure, 1908 (CPC) is filed by the plaintiffs in the suit

impugning the judgment of the trial court dated 3.7.2017 by which the trial court has dismissed the suit for partition filed by the appellants/plaintiffs with respect to the property bearing no.10060-62, Gali Zamir Wali, Nawab Ganj, Pul Bangash, Delhi-110066 situated on a plot of land admeasuring 440 sq. yards.

4. The cause of action as stated in the plaint was that appellants/plaintiffs are the legal heirs of Sh. Onkar Nath Kapoor and which Sh. Onkar Nath Kapoor was the son of Sh. Muni Lal Kapoor. Sh. Muni Lal Kapoor was the son of Sh. Karam Chand and who was the original owner of the suit property. Appellants/plaintiffs therefore claimed to be the co-owners of the suit property on account of 1/3rd of the share of Sh. Karam Chand in the suit property devolving upon Sh. Muni Lal Kapoor and Sh. Muni Lal Kapoor had three sons namely Sh. Onkar Nath Kapoor/original plaintiff, Sh. Jawahar Lal/respondent no.1/defendant no.1 and Sh. Jagdish Kapoor/respondent no.2/defendant no.2. Sh. Karam Chand is stated to have expired intestate in the year 1964. The suit when was filed, it was filed by Sh. Onkar Nath Kapoor, son of Sh. Muni Lal Kapoor, and on the death of Sh. Onkar Nath *pendente lite* the present appellants/plaintiffs were

substituted as legal heirs of Sh. Onkar Nath Kapoor. The cause of action as stated in the plaint is therefore essentially the entitlement of the appellants/plaintiffs originating from the 1/3rd share of Sh. Muni Lal Kapoor as one of the three sons of Sh. Karam Chand who owned the suit property and that Sh. Muni Lal Kapoor had three sons of which one son was Sh. Onkar Nath Kapoor, the husband and father of the appellants/plaintiffs.

5. The relationship between the parties has been delineated in paras 1 and 2 of the impugned judgment and which paras read as under:-

“1. Brief facts of the case are that Sh. Karam Chand was the grandfather of the parties who expired in the year 1964. He was survived by his three sons i.e. Sh. Muni Lal Kapoor, Sh. Pyare Lal and Sh. Kunj Bihari. Sh. Muni Lal Kapoor who has three sons Sh. Onkar Nath Kapoor, plaintiff herein, Sh. Jawahar Lal, defendant no. 1 Sh. Jagdish Kapoor, defendant no. 2. Sh. Pyare Lal has two sons namely Sh. Jugal Kishore defendant no. 3 and Sh. Nawal Kishore defendant no. 4 and Sh. Kunj Bihar has also three sons namely Nand Kumar defendant no. 6, Sh. Ashok Kumar defendant no. 5 and Sh. Vijay Kumar, defendant no. 7. It has been stated that Late Karam Chand acquired custodian property bearing no. 10060-62, Gali Zamir Wali, Nawab Ganj, Pul Bangash, Delhi ad measuring 440 sq. yards in an open auction held by Custodian of Evacuee Properties on the basis of joint claims filed along with his sons and after acquiring of the said property they started living jointly in the aforesaid property along with their family members and continued to live together till the death of Karam Chand in the year 1964. It has been further stated that the said house is four storied building and while making unauthorised construction by Late Pyare Lal, the uncle of plaintiff, certain cracks and damages have been caused in the property as well as in the portion in possession of plaintiff.

2. It has been further stated that after the death of Karam Chand, the entire property in equal shares devolved upon his three sons namely Sh. Muni Lal Kapoor, Sh. Pyare Lal Kapoor and Sh. Kunj Bihari being the members of Joint Hindu Family and the said property was mutated in the record of MCD in equal ratio notwithstanding the fact that there was no partition of the property by metes and bound and all of them continued to reside in an unpartitioned condition of the property till such time. It has been further stated that property sought to be partitioned, but despite request and notice of the plaintiff, the property has not been partitioned.”

6. In the plaint, it is pleaded by the appellants/plaintiffs that in spite of repeatedly requesting the respondents/defendants for partition of the suit property since the year 1996, the suit property was not partitioned, and therefore after issuing a legal notice dated 2.5.1996, the subject suit for partition was filed.

7. Respondent nos. 1 to 13/defendant nos. 1 to 7 have filed a joint written statement and prayed for dismissal of the suit on the ground that there was no Hindu Undivided Family/Joint Hindu Family as was claimed by the appellants/plaintiffs and that the suit property was already partitioned among the three sons of Sh. Karam Chand who owned the property i.e between Sh. Muni Lal Kapoor, Sh. Pyare Lal and Sh. Kunj Behari Lal. It was stated by the respondent nos. 1 to 13/defendant nos. 1 to 7 in the written statement that the suit property had already been partitioned by metes and bounds and each of the

three sons and their branches of late Sh. Karam Chand were already in possession and enjoyment of their respective shares.

8. The suit was hence prayed to be dismissed.

9. It is noted that originally there were seven defendants in the suit but subsequently respondent nos. 14 to 28/defendant nos. 8 to 22 were also added as the successors-in-interest of different branches of the sons of late Sh. Karam Chand, however, these defendants did not file any written statement.

10. After pleadings were complete, the trial court framed issues and parties led evidence and which aspects are recorded in paras 8 to 13 of the impugned judgment and which paras read as under:-

“8. On the pleadings of the parties, following issues were framed by the Ld. Predecessor vide order dated 18.08.1998:

1. Whether the suit is maintainable? OPP.
2. Whether the plaintiff has a cause of action against the defendants? OPP.
3. Whether the property devolved upon 3 sons of Sh. Karam Chand Kapur after his death? OPP.
4. Whether the parties are in possession of their respective portions of the property in accordance with the Will dated 25.05.65? OPP.
5. Whether proper court fees has been affixed on the plaint? OPP.
6. Whether the plaintiff is entitled to 1/9th share of the property? OPP.
7. Whether the property has already been partitioned after the death of Sh. Karam Chand Kapur, if so, its effect? OPD.
8. Whether the plaintiff is entitled to the decree of partition as claimed in the suit? OPP.

9. Relief.

9. In order to prove plaintiffs' case, plaintiff Sh. Onkar Nath Kapoor examined himself as PW-1 and deposed on the lines of plaint in his examination chief and did not rely upon any document.

10. PW-2 is Mumtaz Chawla who deposed that he knew plaintiff and his uncle Pyare Lal and Kunj Bihar and stated that he used to reside in front of the house of the parties and he had visiting terms with the parties. He deposed that there were four portions of the property i.e. 2 on the front side and 02 on the back side and there was a dispute about the partition of the property between the plaintiff on one hand and his uncles on the other hand. He further stated that Sh. Pyare Lal assured the plaintiff to settle the matter and Sh. Pyare Lal told that plaintiff and his brother jointly have 1/3rd share in the property. He further deposed that after the death of uncle of plaintiff, defendant refused to partition the property. The plaintiff has a portion of 20-25 sq. yards. He was cross examined by Ld. Counsel for defendants.

11. PW-3 (wrongly mentioned as PW-2) is Sh. Arjun Singh, Record Keeper, House Tax, Department who brought the summoned record in respect of property no. 10060 to 10062, Nawab Ganj, Delhi and proved the survey report Ex. PW-2/1 of Sh. Munni Lal in respect of 1/3rd of the above property. He also proved the survey report of Sh. Kunj Bihari Lal and Sh. Pyare Lal which is Ex. PW-2/2 and Ex. PW-2/3. He was also cross examined by Ld. Counsel for defendants.

12. Defendant examined Sh. Jawahar Lal Kapoor as DW-1 who deposed on the lines of written statement, however before he could be cross examined both parties expressed their desire to get their dispute adjudicated through Arbitral Tribunal and matter was referred to appointed arbitrators. However even there matter could not proceed further and Ld Arbitrators recused themselves and such again parties came before the court to get their dispute adjudicated through court of law. But by that time witness Jawahar Lal Kapoor expired and as such he could not be cross examined at all. Hence, his testimony cannot be read in evidence.

13. Defendants thereafter examined defendant No.3 Sh. Jugal Kishore as DW-2 who tendered his evidence by way of affidavit Ex. DW- 2/A and relied upon the documents i.e. Site plan of the property under the possession of deponent and Nawal Kishore and his son Ex. DW-2/1(in affidavit Ex. DW-1/1), notice dated 13.05.1996 Ex. DW-2/2 (in affidavit Ex. DW-1/2), Will dated Ex. DW-2/3(in affidavit Ex. DW-1/3). He was cross examined by Ld. Counsel for plaintiff. Thereafter, defendants closed his defendant's evidence.”

11. As the trial court has noted in para 16 of the impugned judgment there is no dispute that the original plaintiff Sh. Onkar Nath

Kapoor was the grandson of Sh. Karam Chand, the original owner of the property. There is no dispute that Sh. Karam Chand had three sons and on the death of Sh. Karam Chand these three sons inherited the suit property in equal shares. It was also not in dispute that on the death of Sh. Karam Chand the suit property was got mutated in the house tax records to the extent of 1/3rd each by each of the three sons of Sh. Karam Chand and each of the three sons were regularly paying house tax with respect to their shares in their individual names. Trial court also notes another admitted fact in para 17 of the impugned judgment that Sh. Karam Chand died leaving behind his Will dated 26.05.1965 and as per this Will the suit property of Sh. Karam Chand devolved equally upon his three sons, namely, Sh. Muni Lal Kapoor, Sh. Pyare Lal and Sh. Kunj Behari Lal.

12. The only issue to be decided by this Court is as to whether the suit property stood already partitioned and therefore the suit seeking partition was liable to be dismissed. Trial court has dealt with this issue under issue nos. 4 and 7 from paras 20 to 31 of the impugned judgment holding that partition had already taken place, and these paras read as under:-

“20. Both issues are taken up together as they are inter- connected requiring appreciation of same facts and evidence. Onus to prove both these issues is upon the defendant though onus to prove issue No.4 has been shown to be on plaintiff but the way issue has been framed leaves no one in doubt that onus to prove the said issue is upon the defendant.

21. Claim of the defendants is that suit property was already partitioned between the sons of the Late Shri Karam Chand in accordance with the Will of late Shri Karam Chand which fact was denied by the plaintiff. It has already been noted above that plaintiff not only admitted the existence of Will dt 26.05.1965 but himself volunteered and identified the Hindi version of the said Will as Mark-X.

22. In chief examination PW1 had deposed that after the death of Shri Karam Chand three rooms each were acquired by all the three sons of Late Karam Chand. Further, in cross examination plaintiff deposed that house tax in respect of the suit property was being raised in three names i.e. Muni Lal, Pyare Lal and Kunj Bihari Lal, the three sons of Late Shri Karam Chand Kapoor and each bills were in respect of 1/3rd of the suit property. He also admitted that house tax bill in respect of portion under his possession comes in the name of his father. He admitted that portion under the possession of the Kunj Behari Lal and Pyare Lal had been raised up to two storey. He volunteered that same was three storeyed and unauthorised. He also admitted that one year ago (from the date of testimony) one room was demolished in the portion of Pyare Lal and his family. He also admitted that Munni Lal, Pyare Lal and Kunj Behari Lal had their own families and used to reside in their own portion since partition. He also admitted that all the said three persons used to reside along with family members in their portion since the day the property was acquired. He also admitted that family of Pyare Lal and Kunj Behari Lal had raised construction in their own portion. He admitted that every portion has got their independent passage for ingress and outgress. He admitted that his brothers have not filed any case for partition against the family members of Pyare Lal and Kunj Behari Lal.

23. DW-2 in cross examination deposed that property had already been partitioned as per Will Ex DW-2/3. He further deposed that as per Will, Late Shri Munni Lal Kapoor received three portion out of eight of the total building as his share. He further deposed that total area of the suit property was 440 sq. yds and plaintiff was in possession of the half of the ground floor as per the Will. He did not the exact area in possession of the plaintiff. He further deposed that portion on the ground floor shown in black in Ex DW-1/P1 was in the possession of the plaintiff. He further deposed that portion in possession of the plaintiff was out of the distribution of shares between the brothers of the plaintiff i.e. Late Shri Jawahar Lal, Late Jagdish Lal Kapoor and plaintiff. He further deposed that unmarked portion in Ex DW1/P1 was in occupation of tenant Mr Chopra and which portion as pr Will had fallen to share of the Kunj Behari. He

further deposed that as per Will at the time of partition there were two portion on the first floor and one portion on the first floor was voluntarily given to late Shri Kunj Behari Lal Kapoor. He further deposed that portions shown in green in the ground floor and first floor in Ex DW- 1/P1 fell to his share. The portion marked Orange in the first floor in Ex DW- 1/P1 was the one voluntarily given to Late Kunj Behari Lal Kapoor. He further deposed that portion marked in Blue in the first floor was in possession of the late Shri Jawahar Lal Kapoor as per distribution amongst the sons of late Munni Lal. He further deposed that he had constructed two floors above the first floor portion in my possession and one room on the 4th floor. He denied the suggestion that property had never been partitioned. He admitted that as per Ex DW1/P1 the portion on the ground floor marked in orange and that unmarked portion on the ground floor in the possession of tenant Late Shri P.L.Chopra falls to the share of Late Kunj Behari Lal and his sons.

24. Some suggestion given by the plaintiff to DW2 is noteworthy. It was suggested to the DW2 to there was a common wall between the portion occupied by him in relation to the portion occupied by plaintiff. It was further suggested that due raising of unauthorised construction on common wall by him cracks had developed in the property of the plaintiff. It was further suggested that plaintiff had not got his full share in the suit property. It was further suggested to DW2 that as per Ex DW1/P1 the portion on the ground floor marked in orange and that unmarked portion on the ground floor in possession of the tenant late Sh P.L.Chopra fell to the share of late Sh Kunj Behari Lal and his sons.

25. It has been argued by Ld. Counsels for defendants that plaintiff in his cross examination admitted that Munni Lal, Pyare Lal and Kunj Behari Lal had their own families and used to reside in their own portion since partition. He had laid strong stress upon the expression "since partition" in the above testimony to convey that there is admission of the plaintiff about the property having been partitioned and respective stake holders are in possession of their respective shares. Per contra it has been argued by Ld. Counsel for plaintiff that word partition has been used by the plaintiff in the sense of partition of the country in the year 1947 as there is no dispute that Karam Chand migrated to Indian side after creation of Pakistan in 1947.

26. The contention of the Ld. Counsel for plaintiff does not appear to be sound for the reason that admittedly, as per plaintiff himself, plaintiff and his father along with other family member came to reside in the suit property in the year 1962 and therefore, PW1 cannot be held to have meant separate possession of respective share "since partition of the country" because admittedly parties are not in possession of the suit property since partition of the country. PW1 did not mean partition of the country by the word "partition" is also clear from the very next deposition of PW1 wherein he admitted that all the said three persons used to reside

along with family members in their portion since the day the property was acquired. Hence by partition he meant partition of the property.

27. Plaintiff has not been successful in proving that suit property was joint hindu family property or that late Shri Karam Chand was the karta or after his death any of his son acted as karta. PW1 in his examination in chief also deposed that suit property was acquired by Karam Chand. No evidence was led by plaintiff that any contribution in purchase was made by any of the sons of Karam Chand, though he deposed that suit property was purchase by Karam Chand against joint claims of Karam Chand and Sons. He did not depose whether Karam Chand and Sons was name of firm or HUF or he meant Karam Chand and his sons. But he categorically deposed that suit property was purchased by Karam Chand. Thus, property so acquired by Karam Chand was his self acquired property and upon his demise property devolved upon his first class legal heir who acquired them as their separate property qua their respective wards. Moreover, not a single a word was deposed by plaintiff about their being joint family or coparcenary property or plaintiff or his father was ever coparcener. Joint status cannot be presumed as in the Will of Late Shri Karam Chand it is mentioned that sons of the Karam Chand were having separate mess and source of income ever since they were in undivided India.

28. Since plaintiff has not been able to prove the suit property as coparcenary property, therefore, plaintiff's claim to 1/9th share must be based on Will of Karam Chand which plaintiff subsequently admitted. Plaintiff has claimed 1/9th share in the suit property as his father Shri Muni Lal had inherited 1/3rd share in the afore said property and Muni Lal had left behind three sons, therefore, as per his calculation his share was 1/9th in the aforesaid suit property but Shri Muni Lal would have 1/3rd share in the suit property only in three situations. Firstly if Karam Chand had no daughter and wife had predeceased him. Secondly if all daughters have relinquished their share in favor of sons assuming wife has predeceased Karam Chand. Thirdly, Karam Chand left behind a Will bequeathing one third share to each of his three sons. There is no dispute that Karam Chand had four daughters and it is not the claim of the plaintiff that any of the daughters have relinquished their share in the suit property in favour of three sons of Karam Chand. This implies that plaintiff's claim to 1/9th share is based on the Will of Karam Chand which plaintiff initially denied but subsequently in cross examination not only admitted but also voluntarily identified the Hindi version of the Will as Mark-X.

29. In the light of above situation the contention of the Ld. Counsel for plaintiff that admission of the Will does not prove the contents of the Will and his further reliance on case laws cited as *Bishwanath v. Sachhidanand Singh*, 1972(4) SCC 707, *Sir Mohd. Yusuf & Anr v. D and Anr.*, AIR 1968 Bom 112; *LIC v. Narmada Agarwalla & Ors*, AIR 1993 Orissa 103; *LIC & Anr v. Rampal Singh Bishen*, (2010) 1 SCC(L&S) 1072; *Kripashankar Mukundlal Sahu & Ors v. Tilakraj*

Khushalchandra Wadhawan, 2010(6) Mh.L.J. 940, ***Brij Mohan Bakshi v. Amar Nath Bakshi and Ors.***, AIR1980 J7K 54; does not survive as the plaintiff himself not only admitted but also identified the Hindi version of the Will mark-X which did away the requirement to prove the contents of the Will. Subsequently, at no stage the contents of the Will was disputed. The original Will is in Urdu and DW1 was not conversant with Urdu reading and writing but plaintiff volunteered and identified the Hindi version of the Will mark-X. It was not that he was asked any question and in response he identified the Hindi version of the Will. It was his voluntary act and therefore said document can definitely be read against him if the contents thereof goes against him. In all the above case laws relied upon the by the plaintiff witness therein were made to admit and in that circumstance Court held that mere admission was not sufficient to prove the contents of the documents but the present case is distinguishable as here plaintiff himself voluntarily identified the Hindi version of the Will which dispensed the defendants of requirement to prove the contents and which opened the avenue for reading the contents thereof against the plaintiff.

30. Partition does not always mean partition by raising dividing wall between the demarcated share. Same can also be achieved if parties have identified their respective share in the property on drawing or otherwise agreeing to treat a particular portion as belonging one or other. Partition need not be equal too. Parties may agree among themselves to take slightly big or small share in the property or may agree to leave parcel of land in lieu of money or other worthy item or may entirely relinquish his/her claim for nothing. Simply because predecessor of a claimant has not been given equal share will not entitle him to seek re- opening of the partition and disturb the otherwise peace and harmony in the family.

31. It is settled proposition of law that civil cases are decided on preponderance of probability. Plaintiff's claim about 1/9th share, mutation of the suit property separately in the name of three sons of Karam Chand in house tax to the extent of 1/3rd share each, subsequent admission of the Will of Karam Chand, mentioning of demarcation of the portion of each sons in the Will, admission of PW1 about separate portion and possession by the three sons of Karam Chand, admission of PW1 about separate ingress and outgress of respective portion, admission of PW1 about raising of construction in separate portion by other defendants, admission of PW1 about the separate electricity, water connection in separate names and separate ration cards, suggestion given to DW2 to the effect that orange color and unmarked portion in Ex DW1/P1 fell to the share of Kunj Behari Lal and suggestion given to DW2 that plaintiff had not been given full share, all go to show that suit property was partitioned between the sons of the late Shri Karam Chand. Therefore, reliance by the Ld Counsel for plaintiff on Chintamani Ammal v. Nandgopal Gounder and Anr, (2007) 4 SCC 163 is also misplaced as it is not only the separate possession but

other factors which taken together leads to same conclusion.”
(underlining added)

13.(i) I completely agree with the aforesaid discussion, conclusion and reasoning of the trial court because it is undisputed that in terms of the Will certain shares were divided and given to the three sons of Sh. Karam Chand and that each of the three sons of Sh. Karam Chand thereafter got mutated his share of the property to the extent of 1/3rd share in his name and have been paying property taxes of their shares individually. Separate three portions have separate electricity and water connections and separate passages for ingress and egress. Clearly therefore parties were in enjoyment and possession of their respective shares only because partition had already taken place. Trial court has rightly noted above facts for partition already having taken place between the parties not only because of mutation but also because of separate electricity connection, separate water connection, separate names with separate ration cards. Different portions were marked in different colours in the site plan. Suggestions were given by the appellants/plaintiffs themselves of partition taking place with orange colour and the unmarked portion in the site plan Ex.DW1/P1

fell to the share of Sh. Kunj Behari Lal and that appellants/plaintiffs were not given their full share.

(ii) Trial court rightly has held that getting the $1/3^{\text{rd}}$ share does not mean that $1/3^{\text{rd}}$ share to the last square inch because the property may be divided approximately to the extent of $1/3^{\text{rd}}$ share depending upon the size, location and situation circumstances of a property. Merely because an exact $1/3^{\text{rd}}$ physical share is not given to a party would not mean that there is no partition which has taken place, especially when separate portions of the property are shown in the municipal records in three separate names of the three sons of late Sh. Karam Chand. Correct observations therefore have been made by the trial court in para 30 as reproduced above with respect to partition which cannot again be sought once the property has been partitioned although one or more persons' share(s) may be slightly bigger or smaller.

14. In my opinion, therefore the trial court has rightly dismissed the suit for partition. Obviously, the original plaintiff Sh. Onkar Nath Kapoor, grandson of late Sh. Karam Chand and now represented by the present appellants/plaintiffs, were trying to unsettle the position which was settled many decades back prior to filing of the

suit with each of the three branches of three sons of late Sh. Karam Chand having already got 1/3rd shares in the suit property and mutation accordingly done in their names in the house tax records and such mutation and partition having also been acted upon thus showing the best proof of partition already having taken place by acting upon the partition made.

15. There is no merit in the appeal and which is dismissed with costs of Rs.20,000/- as the appeal is an abuse of the process of law and which costs shall be paid by the appellants/plaintiffs with the website www.bharatkeveer.gov.in within four weeks from today and affidavit in this regard of compliance be filed within two weeks thereafter. In case receipt of costs is not filed by the appellants/plaintiffs within six weeks, then Registry will list the matter in the Court for taking appropriate action against the appellants/plaintiffs. Costs are imposed in exercise of powers under Section 151 CPC because Section 35 CPC deals with imposition of costs in favour of a successful party whereas there is no provision of imposition of costs for abuse of process of law and which will therefore be covered under Section 151 CPC.

MARCH 21, 2018

VALMIKI J. MEHTA, J