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

Judgement reserved on **04.08.2020**
Judgement pronounced on **11.01.2021**

+ CS (OS) 1113/2008

BRIGADIER (RETD.) SHYAM PRASADAPlaintiff
Through: Mr. Manish Vashisht with Mr. Sameer
Vashisht, Mr. Manashwy Jha and Ms.
Urvi Kapoor, Advocates.
versus

SMT. DAYAVATI & OTHERSDefendants
Through: Mr. A.K. Singla, Sr. Adv. with Bhaskar
Tiwari, Advocate for D2.
Mr. Jeevesh Nagrath and Mr. Chandan
Dutta, Advocates for D-3.
Mr. Rikky Gupta, Adv. for D-4 and D-6.

+ CS (OS) 3452/2014

BRIGADIER (RETD.) SHYAM PRASADAPlaintiff
Through: Mr. Manish Vashisht with Mr. Sameer
Vashisht, Mr. Manashwy Jha and Ms.
Urvi Kapoor, Advocates.
versus

ARUN PRASADA & ORSDefendants
Through: Mr. Bhaskar Tiwari and Mr. Sanjay Sood,
Advs. for D-2.

+ TEST. CAS. 23/2014

ARUN PRASADAPetitioner
Through: Mr. Bhaskar Tiwari and Mr. Sanjay
Sood. Advocates.

versus
STATE OF NCT OF DELHI & ORS.Respondents

Through: Mr. Manish Vashisht with Mr. Sameer Vashisht, Mr. Manashwy Jha and Ms. Urv Kapoor, Advocates for R-2.

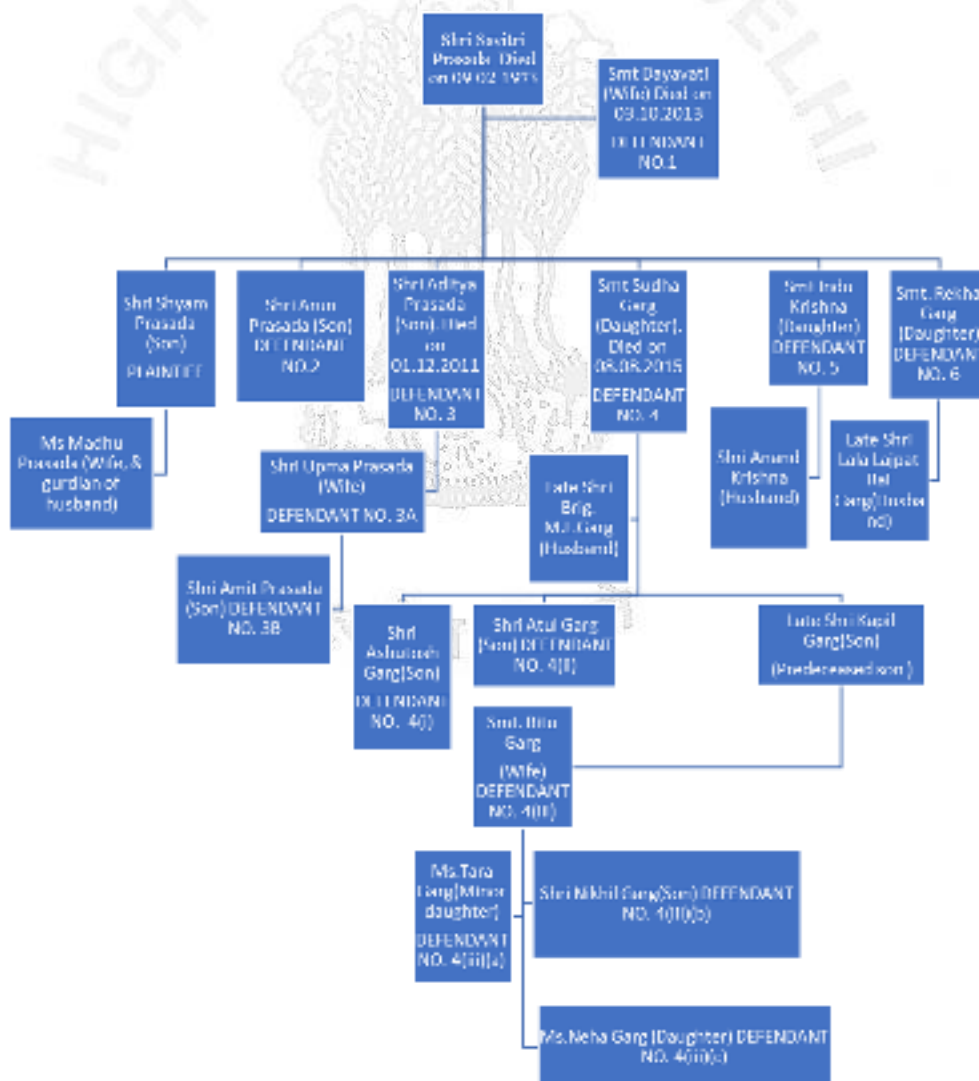
CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.:

Preface: -

1. The captioned suits and the testamentary case are inter-related and involve members of the family of one, Mr. Savitri Prasada and, hence, will be decided by a common judgement. For the sake of convenience, the genealogy of Mr. Savitri Prasada is shown hereafter.



2. Thus, the parties will be referred hereafter by their names unless the context requires otherwise. Furthermore, Mrs. Dayavati and Mr. Arun Prasada will be collectively referred to as the contesting defendants while the Legal Representatives [in short “LRs”] of Mr. Aditya Prasada, LRs of Mrs. Sudha Garg, and LRs of Mrs. Rekha Garg will be referred to as the supporting defendants.

3. The two suits i.e. CS (OS) 1113/2008 [in short “2008 suit”] and CS (OS) 3452/2014 [in short “2014 suit”] seek, essentially, the partition of an immovable property described as plot number 12, Anand Lok, New Delhi [hereafter referred to as the “subject property”].

3.1. The reason that two suits have been filed *qua* the same immovable property is on account of the fact that when the first suit was filed in 2008, partition was sought of a portion of the subject property i.e. 396.65 sq. yards out of a total of 793.30 sq. yards [hereafter referred to as the “suit property”]. The partible portion i.e. the suit property, according to Brigadier (Retd.) Shyam Prasada i.e. the plaintiff in the 2008 suit, then, was the 50% share which was co-owned by Mr. Savitri Prasada along with his wife Mrs. Dayavati.

3.2. However, during the pendency of the 2008 suit, Mrs. Dayavati expired, which then led to the institution of the second suit i.e. the 2014 suit to seek partition of the remaining 50% of the subject property that fell to her share.

3.3. Since Mrs. Dayavati had executed a Will dated 09.11.1992 whereby the subject property, in its entirety, was bequeathed in favour of one of her sons i.e. Mr. Arun Prasada, he instituted the third proceeding which is the testamentary case no. 23/2014 [hereafter referred to as the “testamentary case”].

3.4. Apart from the prayer for partition, in the 2008 suit, whereby, Brigadier (Retd.) Shyam Prasada claims 1/7th share out of his deceased father share admeasuring 396.65 sq. yards i.e. the suit property, there is also a prayer for rectification of a conveyance deed dated 27.03.2000 – this conveyance deed

was executed by the Delhi Development Authority [DDA] in favour of Mrs. Dayavati after the subject property was converted from leasehold to freehold.

3.5. The rectification sought, then, was for inclusion of the name of Brigadier (Retd.) Shyam Prasada and his siblings i.e. defendant nos. 2 to 6 in the 2008 suit along with Mrs. Dayavati; who was alive, at that juncture. Besides this, a prayer was also made, in the very same suit, for a decree for the rendition of accounts against Mrs. Dayavati and Mr. Arun Prasada in respect of shares, debentures, FDRs, bank accounts possessed by the deceased Mr. Savitri Prasada and a consequent share in the same.

3.6. Since on 14.02.2014, Mr. Arun Prasada had moved the testamentary case in which he sought probate of the Will dated 09.11.1992 and the codicil dated 24.02.2000 which was executed by Mrs. Dayavati, on 10.11.2014, the second suit i.e. the 2014 suit filed by Brigadier (Retd.) Shyam Prasada came to be moved before this Court. In this suit, Brigadier (Retd.) Shyam Prasada not only sought partition of the mother's share i.e. Mrs. Dayavati's share admeasuring 452.50 sq. yards but also sought the relief that the Will dated 09.11.1992 and the codicil dated 24.02.2000 be declared null and void.

3.7. This relief was pivoted on the assertion that Mrs. Dayavati, before her death, which occurred on 03.10.2013, had not made a testamentary disposition. In addition to these reliefs, Brigadier (Retd.) Shyam Prasada, in the 2014 suit, also sought a decree for the rendition of accounts against Mr. Arun Prasada *qua* shares, debentures, fixed deposits and bank accounts held by Mrs. Dayavati and a consequent 1/6th share in them as in the 2008 suit.

Background facts: -

4. Given this preface, the following broad facts are required to be noticed for adjudication of the aforementioned actions.

4.1. On 21.09.1960, Mr. Savitri Prasada made an application to the Anand Lok Cooperative House Building Society, New Delhi [in short "Society"] for

becoming its member. Simultaneously, Mr. Savitri Prasad also made an application to the Society for being allotted a plot admeasuring 800 sq. yards.

4.2. In January 1970, Mr. Savitri Prasada was informed by the Society that the Delhi Administration had granted a perpetual lease *qua* a parcel of land in Anand Vihar. *Via* this letter, Mr. Savitri Prasada was also informed that a sublease *qua* a plot, for which, as indicated above, he had already made an application, could be executed in his favour as he was found to be the winner of the lottery held on 28.07.1968.

4.3. Mr. Savitri Prasada was put to notice that if he was interested in having a sublease executed in his favour for allotment of a plot, he would have to pay a further amount equivalent to Rs. 989/-, after accounting for Rs. 24,000/- already paid by him, against the total development cost of Rs. 24,989/-. Also, the Society called upon Mr. Savitri Prasada to pay Rs. 2,380/-towards services that Delhi Municipal Corporation [as it then was] was required to render in respect of constructing roads, sewerage and water supply lines. Mr. Savitri Prasada was, thus, offered the subject property which admeasured 793.30 sq. yards. Mr. Savitri Prasada accepted the offer and executed an agreement with the Society, in that behalf, on 27.03.1971 *qua* which he also bore the burden of stamp and registration charges.

4.4. It appears that on that very date i.e. 27.03.1971 Mr. Savitri Prasada wrote to the Society that he was desirous that the sublease *qua* the subject property be jointly executed both in his name and that of his wife Mrs. Dayavati.

4.5. Since this was not within the ken of the Society, the matter was escalated to the DDA. The Society, on behalf of Mr. Savitri Prasada, requested that necessary permission be granted for executing the sublease in the joint names of Mr. Savitri Prasad and his wife Mrs. Dayavati.

4.6. DDA *via* a communication dated 12.04.1971 [Exhibit P-5] acceded to the request made by the Society with a caveat that Mrs. Dayavati had to be its

member and should fulfil the conditions prescribed for allotment of the subject residential plot.

4.7. It is in this background that on 16.07.1971 a joint sublease *qua* the subject property was executed in favour of Mr. Savitri Prasada and Mrs. Dayavati Prasada. On 09.02.1973, Mr. Savitri Prasada expired.

4.8. Upon the death of Mr. Savitri Prasada, his progeny decided that a fresh perpetual sublease should be executed in favour of their mother i.e. Mrs. Dayavati. That being stated, an issue has been raised as to whether the request made to DDA, in this behalf, in law, tantamount's to the progenies relinquishing their legal rights in their father's [i.e. Mr. Savitri Prasada's] 50% share in the suit property in favour of their mother Mrs. Dayavati. Consequently, a fresh perpetual lease deed was executed on 27.02.1973.

4.9. Between 1974 and 1975, Mrs. Dayavati carried out construction in the subject property comprising two bedrooms, drawing cum dining toilets, garage, verandah, and a servant quarter over an area admeasuring 325 sq. yards.

5. It appears that the inter-personal relationship amongst the family members received a jolt when Brigadier (Retd.) Shyam Prasada was drawn into a conversation regarding the reconstruction of the superstructure on the subject property when he had gone to visit his mother on 08.05.2008.

5.1. Brigadier (Retd.) Shyam Prasada thereafter inspected the records of the Society on 19.08.2008 whereupon he discovered that Mr. Arun Prasada had been made the sole nominee *qua* the subject property by Mrs. Dayavati. A letter to that effect was also received by Brigadier (Retd.) Shyam Prasada from the Society on 20.05.2008.

5.2. Brigadier (Retd.) Shyam Prasada claims that after noting the particulars of the conveyance deed said to have been executed by DDA in favour of Mrs. Dayavati, he obtained a certified copy of the same on 20.05.2008. As noticed above, the conveyance deed is dated 27.03.2000. It is in this backdrop that

Brigadier (Retd.) Shyam Prasada instituted the first suit [i.e. the 2008 suit] seeking 1/7th share out of the 50% share/396.65 sq. yards held by his deceased father [i.e. Mr. Savitri Prasada] in the suit property, and an equivalent share in the shares, debentures, fixed deposits and bank accounts left by Mr. Savitri Prasada.

5.3. Thus, the principal dispute amongst the parties, when the 2008 suit was instituted, centred on whether or not Brigadier (Retd.) Shyam Prasada along with his siblings and his mother i.e. Mrs. Dayavati could claim 1/7th share in the suit property ad measuring 396.65 sq. yards. The issue got complicated when, during the pendency of the 2008 suit, Mrs. Dayavati, executed the Will dated 09.11.1992 followed by a codicil dated 24.02.2000.

5.4. As indicated above, her death, on 03.10.2013, led to the institution of the testamentary case by Mr. Arun Prasada followed by the institution of the second suit[i.e. the 2014 suit] by Brigadier (Retd.) Shyam Prasada.

5.5. On 27.07.2010, an order was passed in the 2008 suit whereby the following issues were framed.

- “1. Whether the Plaintiff and the Defendants inherited 1/7th share each out of the share of Late Shri Savitri Prasad which was 396.65 Sq. yards in the immoveable property, at 12, Anand Lok, New Delhi? If so, its effect? OPP
2. Whether this suit seeking the relief of partition is barred by limitation, as claimed by the Defendant No. 1 and 2 in their written statements? OPD-1&2.
3. Whether the Defendant No. 1 had a pre existing right to the title of the suit property as stated by her in the written statement? OPD-1
4. Whether Late Shri Savitri Prasad had executed his last Will and testament dated 24.02.1966, in favour of Defendant No. 1 in respect of all his moveable assets? OPD-1
5. Whether the suit as framed is barred and is liable to be dismissed for failure to question the No objection/Disclaimer of February 1973 of the Plaintiff in favour of the Defendant No. 1? PPD-1&2.
6. What is the effect of disclaimer given by the Plaintiff in favour of Defendant No. 1? OPP
7. Relief.”

5.6. However, on 23.05.2016, an order was passed in the 2008 suit, whereby an additional issue was framed concerning the validity of the Will dated

09.11.1992 and the codicil dated 24.02.2000 said to have been executed by Mrs. Dayavati.

“i) Whether late Smt. Dayawati died leaving behind her last Will and Codicil dated 9.11.1992 and 20.2.2000 [sic: 24.02.2000]? OPD-2”

5.7. This issue was framed by the Court in an application filed for consolidation of the three actions. The Court was of the view that if an issue concerning the aforementioned Will and codicil was framed in the 2008 suit then the other two actions could be adjourned to await the decision in the 2008 suit as it had already reached the stage of evidence.

5.8. Accordingly, the Court recorded the statement of counsel for Mr. Arun Prasada, to the effect, if such an issue was framed, he would not press the testamentary case and would abide by the decision of the Court in the 2008 suit. The Court had thus, *via* the very same order, directed the parties to move applications in the 2014 suit and the testamentary case so that they could be adjourned and taken up after a decision was rendered in the 2008 suit. Unfortunately, none of the parties moved such an application.

5.9. The record shows that Brigadier (Retd.) Shyam Prasada had moved an application for amendment of the plaint filed in the 2014 suit [i.e. I.A. No. 21491/2015] given the fact that, in the meanwhile, Mrs. Dayavati had expired. The Court *vide* order dated 10.10.2018 allowed the amendment and granted time to file an amended plaint and written statement.

6. However, none of the counsels informed the Court about the order dated 23.05.2016, passed in the 2008 suit, which required parties to move an application for adjourning the 2014 suit. This aspect was noticed in the order dated 12.12.2018, passed in the 2014 suit, when it was brought to the notice of the Court that the amended plaint bore the signatures of Mrs. Madhu Prasada i.e. the wife of Brigadier (Retd.) Shyam Prasada.

6.1. It appears that such a step had been taken as Brigadier (Retd.) Shyam Prasada was suffering from dementia. Accordingly, the Court adjourned the

matter and also directed that an appropriate application be moved to bring on record the next friend of Brigadier (Retd.) Shyam Prasada.

6.2. Resultantly, both in the 2008 suit and the 2014 suit, applications were moved to bring on record Mrs. Madhu Prasada as the guardian of Brigadier (Retd.) Shyam Prasada. Orders, to this effect, were passed on 16.05.2018 in the 2008 suit and 27.08.2019 in the 2014 suit.

6.3. The record also shows that an application [i.e. I.A. No. 9522/2008] was filed by Mrs. Dayavati in the 2008 suit under Order VII Rule 11 (d) of the Code of Civil Procedure, 1908 [CPC] for rejection of the plaint on the ground that the suit was barred by limitation.

6.4. The Court, while rejecting the application did observe in paragraph 21 of the judgement dated 14.01.2010, passed in the 2008 suit, that registered relinquishment deeds had not been executed and also the fact that, although Brigadier (Retd.) Shyam Prasada had moved an application [i.e. I.A. 5242/2009] for discovery and production of the no-objection/disclaimers said to have been submitted to the DDA by Brigadier (Retd.) Shyam Prasada and his siblings for enabling the execution of a fresh perpetual lease deed dated 27.02.1973 solely in favour of Mrs. Dayavati, it had received no response. However, the Court while rejecting this application observed that limitation was a mixed question of law and fact and therefore, the plaint could not be rejected at that stage without a trial.

6.5. I may also note that the record shows when Brigadier (Retd.) Shyam Prasada moved an application [i.e. I.A. No. 18295/2013] to bring on record the factum of death of Mrs. Dayavati, a statement was given on his behalf by his counsel at the hearing held on 27.01.2016 in the 2008 suit before the Joint Registrar (Judicial), when the application was disposed of, that he would have no objection to Mr. Arun Prasada representing her case before the Court.

7. The aforesaid backdrop having been etched out, I propose to deal with the submissions made by the contesting parties against each of the issues discussed hereafter. In this context, I must record that Mr. Manish Vashisht advanced submissions on behalf of Brigadier (Retd.) Shyam Prasada. Mr. Vashisht was supported by Mr. Jeevesh Nagrath who appeared on behalf of the LR's of Aditya Prasad, and Mr. Rikky Gupta who appeared on behalf of LR's of Mrs. Sudha Garg, and Mrs. Rekha Garg.

7.1. Likewise, on behalf of Mr. Arun Prasada, the submissions were advanced by Mr. A.K. Singla, senior advocate instructed by Mr. Bhaskar Tiwari, Advocate.

7.2. As noticed hereinabove, the case set up on behalf of Mrs. Dayavati was also propounded by Mr. Singla, on instructions of Mr. Tiwari, in line with the order dated 27.01.2016, passed in 2008 suit.

7.3. Thus, after the pleadings were complete and admission/denial of documents had taken place, parties examined the following witnesses on the dates given hereafter.

Number of witness	Name of the witness	Date of affidavit of evidence	Date of cross- examination	
			Start date	End date
PW 1	Brigadier (Retd) Shyam Prasada	27 September, 2010 16 August, 2016	26 October, 2010	06 July, 2011
DW 1	Smt. Rekha Garg	20 July, 2011 20 August, 2016	11 August, 2011 26 September, 2019	11 August, 2011 07 November 2019

	Smt Sudha Garg	20 July, 2011	Nil	Nil
DW 2	Smt. Upma Prasad (LR of Defendant no. 3)	20 July, 2011 20 August, 2016	12 August, 2011 02 May, 2018	18 August, 2011 17 August, 2019
DW 3	Smt Dayavati	12 September, 2011	19 September, 2011	20 September, 2011
DW 4	Shri Arun Prasad	12 September, 2011	21 July, 2012	29 September, 2012
DW 5	Shri Charan Singh (House Tax record)	Nil	02 November, 2012	02 November, 2012
DW 6	Shri Surinder Pal, Inspector, Income Tax	Nil	03 December, 2012	03 December, 2012
DW 7	ASI OM Prakash, PS Hauz Khas	Nil	03 December, 2012	03 December, 2012
DW 8	Shri Amar Nath, Oath Commissioner	Nil	16 April, 2013	
DW 9	Shri Mukul Bawa (witness to Will of Smt. Dayavati)	14 February, 2014 14 July, 2016	20 August, 2016	19 April, 2017
DW 10	Dr. Suman Kirti (witness to Will of Smt Dayavati)	19 June, 2016	06 May, 2017	27 May, 2017
DW S1	Shri Daulat Ram Kashyap, UDC, Office of Sub-Registrar-III, New Delhi	Statement made on 05 September, 2017 that he has not got the summoned record and neither has the authority to represent.		
	Shri Rajpal, Sub Registrar-III, Asaf Ali Road, New Delhi	Nil	18 January, 2018	18 January, 2018

Issue nos. 1, 3, 5, and 6

8. Since these issues impact one another, they are taken up together.

8.1. As would be evident upon a perusal of the aforementioned issues, what is pivotal to the three actions is the status of the father's share i.e. Mr. Savitri Prasada's share, in the suit property which ad measures 396.65 sq. yds and the validity of his purported Will dated 24.02.1966.

8.2. In this context, let me examine, in the first instance, the documentary evidence placed on record, i.e. Exhibits P-1 to P-8. These exhibits bring to fore, the following:

- i. First, that Mr. Savitri Prasada, on 21.07.1960, had made an application to the Society for being taken in as a member and also for allotment of a plot in the proposed colony. *Via* this very letter, Mr. Savitri Prasada had nominated his wife Mrs. Dayavati as the legal heir, in terms of bye-law 16 of the Society, made payments to the Society and/or identified the person in whom the interest in the proposed plot would pass in event of his death. The letter was also accompanied by a declaration under bye-law 5(ii) of the Society. The declaration made was that he did not own a dwelling house or a residential building in the urban areas of Delhi, New Delhi, or Delhi Cantonment area. [See Exhibit P-1]
- ii. Second, Mr. Savitri Prasada's application for membership and allotment of a plot by the Society bore fruit, when in January 1970, the Society informed him that upon payment of a further amount of Rs. 3,369/- [having already paid Rs. 24,000/-], a sublease would be executed in his favour *qua* the suit property. [See Exhibit P-2]
- iii. Third, in line with the aforementioned communication, on 27.03.1971, an agreement was executed between the Society and Mr. Savitri Prasada.

- iv. Fourth, on the very same day, Mr. Savitri Prasada requested the Society, to execute a joint sublease *qua* the suit property, in his name and his wife's name as against a sublease being executed only in his favour. [See Exhibit P-3]
- v. Fifth, the Society, on that very date [i.e. 27.03.1971], wrote to the Executive Officer (Cooperative Societies), DDA to seek permission for executing a joint sublease *qua* the subject property. This communication was accompanied by an affidavit of Mr. Savitri Prasada and his wife Mrs. Dayavati which *inter alia* alluded to the fact that they did not own a dwelling house or plot in Delhi, New Delhi, or Delhi Cantonment area. [See Exhibit P-4]
- vi. Sixth, the DDA, *via* a return communication dated 12.04.1971, accorded permission for execution of a joint sublease in favour of Mr. Savitri Prasada and Mrs. Dayavati provided Mrs. Dayavati was enrolled as a member of the Society and fulfilled the conditions stipulated for allotment of a residential plot. [See Exhibit P-5]
- vii. Seventh, accordingly, a joint sublease was executed by the Society in favour of Mr. Savitri Prasada and Mrs. Dayavati.
- viii. Eighth, admittedly, Mr. Savitri Prasada expired on 09.02.1973.
- ix. Ninth, on 15.02.1973, the Society wrote to the DDA that because of the death of Mr. Savitri Prasada, permission, be accorded for the execution of the sublease in favour of Mrs. Dayavati. In support of this request, the Society gave two reasons. One, that Mrs. Dayavati was a co-lessee. Two, Mrs. Dayavati was the nominee of the deceased Savitri Prasada. [See Exhibit P-6]
- x. Tenth, on 23.02.1973, DDA gave its no objection to the substitution of Mrs. Dayavati in place of her husband Mr. Savitri Prasada and also, in the alternative, for execution of a fresh sublease in her favour. [See Exhibit

P-7] Accordingly, on 27.02.1973, a perpetual sub-lease was executed by the Society in favour of Mrs. Dayavati. [See Exhibit P-8]

- xi. Eleventh, concededly, no objections/disclaimers were submitted by Brigadier (Retd.) Shyam Prasada and his siblings to the DDA for the execution of a fresh perpetual sub-lease in favour of their mother Mrs. Dayavati.
- xii. Twelfth, the no objections/disclaimers, though admitted to having been filed by the parties with the DDA, were not produced in Court. Although Brigadier (Retd.) Shyam Prasada had moved an application for production of these documents, no reply was filed. The record shows that Brigadier Shyam Prasada had also moved an application dated 26.02.2009 with the DDA under the Right to Information Act, 2005 [RTI Act], to which, he had received the following reply, that is, dated 06.04.2009.

“Sir,

Kindly refer to your RTI application I.D. No.940 dated 26.02.09 on the subject cited above, in this regard, the property file of your plot has requisitioned from the store/record room. In the said file a letter No. F6(11)71/DDA dated 23.02.73 is available on the basis of which Sub-Lease Deed in the name of your mother was executed ^ (attached herewith). This file does not contain the No Objection Certificate given by you at the time of transfer of the share of your father Shri Savitri Prasad.

The said file is being requisitioned from the store and the required information will be supplied to you shortly.”

- xiii. Thirteenth, concededly, neither Brigadier (Retd.) Shyam Prasada nor his siblings which include Mr. Arun Prasada had executed a registered instrument relinquishing their share in the suit property i.e. 396.65 sq. yards in favour of their mother i.e. Mrs. Dayavati.

9. Given the aforesaid state of the evidence, it was contended on behalf of Mrs. Dayavati and Mr. Arun Prasada [i.e. the contesting defendants] that after the death of Mr. Savitri Prasada, *via* an oral family arrangement, it was decided that Mr. Savitri Prasada’s share should devolve on Mrs. Dayavati.

9.1. Mr. Singla submitted that since in the plaint, it has been averred that no-objections/disclaimers were submitted to the DDA to facilitate execution of fresh sublease solely in favour of Mrs. Dayavati, nothing further was required by way of proof to establish subsistence of an oral family arrangement; these being admissions in pleadings. Reference, in this regard, was made to paragraph 14, 15, and 17 of the plaint. In this behalf, Mr. Singla relied upon Section 58 of the Indian Evidence Act, 1872 [in short “Evidence Act”]

9.2. Besides this, Mr. Singla also sought to place reliance on Section 14(1) of the Hindu Succession Act, 1956 [in short “HSA”] It was contended that Mrs. Dayavati by virtue of being a female-hindu, had a pre-existing right in the subject property as per the provisions of Section 14 (1) of the HSA.

9.3. Mr. Singla said that Mrs. Dayavati not only had continuous possession of the subject property but had also acquired absolute legal right in respect of the same in lieu of arrears of maintenance. It was submitted that a perpetual sublease *qua* the subject property was executed in her favour as far back as on 27.02.1973 followed by a conveyance deed dated 27.03.2000 *albeit* after the property had been converted from leasehold to freehold.

9.4. Mr. Singla made it a point to emphasize the fact that both the construction of the superstructure as well as the conversion of the land beneath, from leasehold to freehold, was enabled through funds deployed by Mrs. Dayavati. In support of his submissions, Mr. Singla has relied on the following judgements. [See: ***Kale vs. Dy. Director of Consolidation***, 1976 (3) SCC 119; ***Smt. Gulwant Kaur & Another vs Mohinder Singh & Ors.*** AIR 1987 SC 2251; ***Vaddeboyina Tulsamma vs. Vaddeoyin Sesha Reddi***, AIR 1977 SC 1944].

9.5. Also, Mr. Singla argued that the nomination made by Mr. Savitri Prasada, at the time of seeking membership of the Society, had the force of a testamentary disposition. In this behalf, he relied upon Section 2(h) of the Indian Succession Act, 1925 [in short “ISA”] and Section 90 read with Section

94 of the Evidence Act. The provisions of the Evidence Act were relied upon to demonstrate that the signatures of Mr. Savitri Prasada stood verified and thus, the nomination made by Mr. Savitri Prasada should, in law, be treated as a testamentary disposition.

9.6. In support of this plea, Mr. Singla also sought to argue that Mrs. Dayavati, at the time of her marriage with Mr. Savitri Prasada, had brought *Streedhan* which was used to acquire, at the relevant point in time, a leasehold interest in the subject property. It was further suggested that because Mrs. Dayavati had given up her share in the joint family properties, which comprised 8-10 Babur Road, New Delhi, her husband, Mr. Savitri Prasada had made a declaration while making an application to the Society for allotment of the subject property that upon his death, his interest in the subject property would pass on to Mrs. Dayavati. In this connection, my attention was drawn to the partition deed dated 07.06.1962.

9.7. Mr. Singla, *inter alia*, took me through the relevant parts of the deposition of Mrs. Dayavati/DW-3 in support of the aforementioned pleas made before me.

10. Mr. Vashisht, on the other hand, relied upon Exhibits P-1 to P-8 in support of his contention that Brigadier (Retd.) Shyam Prasada and his siblings were entitled to 1/6th share in the subject property [which was inclusive of the mother's share i.e. Mrs. Dayavati share upon her demise].

10.1. The contention was that the no-objections/disclaimers were filed with the DDA only to give a sense of security to the mother [i.e. Mrs. Dayavati] as their father [i.e. Mr. Savitri Prasada] had died at a young age. Mr. Vashisht said that at the relevant point in time, almost all children of Mrs. Dayavati were located outside Delhi and, therefore, it was thought fit that DDA should be called upon to execute a fresh perpetual lease deed in favour of their mother Mrs. Dayavati

so that she could carry on with her life free of the anxiety of not having a roof over her head.

10.2. According to Mr. Vashisht, this arrangement did not entail, contrary to the contention of Mr. Singla, relinquishment by the children of their share in the suit property. Mr. Vashisht countered the submission of Mr. Singla that the application dated 21.07.1960 [Exhibit P-1] made by Mr. Savitri Prasada to the Society amounted to a testamentary disposition by stressing the fact that it was a mere nomination. Mr. Vashisht contended that the nomination in the eyes of law cannot be treated as a testamentary disposition as it fails to meet the legal standards prescribed under Section 63 of the ISA, and Section 68 of the Evidence Act.

10.3. It was contended that Mr. Savitri Prasada had died intestate and, therefore, under the provisions of Section 8 of the HSA, Brigadier (Retd.) Shyam Prasada and his siblings, being class I heirs, were entitled to a share out of their father's interest in the suit property.

10.4. Furthermore, Mr. Vashisht countered the submission advanced by Mr. Singla that Mr. Savitri Prasada had decided to nominate Mrs. Dayavati as the legal heir, to whom, interest in the subject property would pass upon his death because she had given up her share in the two HUF properties i.e. 8-10, Babur Road, New Delhi, by drawing attention to the fact that the partition deed of 07.06.1962 made no mention of this fact and also the fact that these properties were bought only on 27.01.1961.

10.5. It was contended that in consideration of Mr. Savitri Prasada giving up his share in the HUF properties, he was paid, by his three sons, Rs. 23,750/-. The argument being that the understanding which Mr. Singla sought to allude to, which purportedly had been arrived at between Mr. Savitri Prasad and his wife Mrs. Dayavati, did not align with the documentary evidence that had been placed on record.

10.6. As regards the contention of Mr. Singla that the funds for acquiring an interest in the subject property by Mr. Savitri Prasada had their source in the *Streedhan* of Mrs. Dayavati, Mr. Vashisht took me through the deposition of Mrs. Dayavati to demonstrate that her family of origin was not wealthy and that there was no clarity as to what exactly she received in the form of *Streedhan* [although there is a reference to the fact that she received 50 tolas of gold] and more particularly how the funds were funnelled by Mrs. Dayavaati for purchase of the leasehold interest in the subject property. Mr. Vashisht also submitted that the fact that the superstructure was built by Mrs. Dayavati would not, by itself, lead to a conclusion that she also had a subsisting legal interest in the land beneath which fell to the share of the deceased husband Mr. Savitri Prasada.

10.7. The argument that Mrs. Dayavati had a pre-existing right was sought to be countered by Mr. Vashisht by drawing my attention to the deposition of Mr. Arun Prasada made on 27.01.2012 to the effect that she was a homemaker. It was argued that although some deposit receipts and certain other documents were produced on behalf of Mrs. Dayavati, nothing had been produced to prove that she had an independent income of her own.

10.8. On the other hand, according to Mr. Vashisht, Mr. Savitri Prasada was a man of means. He was, admittedly, the chairperson of NBCC (India) Limited [in short “NBCC”] from 1968 to 1971. It was emphasized that Mr. Savitri Prasada had inherited two immovable properties, one of which was located in Kamla Nagar, while the other, described as Nahar Sahadat Khan, was numbered as Municipal No. 1758-1759, Ward No. III, Old Delhi [in short “Nahar Sahadat Khan”] and that the funds received from the sale of the latter property along with personal contribution made by Mr. Savitri Prasada to the tune of Rs. 32,920.96/- were used to purchase 8-10 Babur Road, New Delhi – 110001 [in short “8-10 Babur Road”].

10.9. Mr. Vashisht said that these properties, as indicated above, were part of a partition deed in which Mr. Savitri Prasada received from his sons Rs. 23,750/- as recorded in the partition deed dated 07.06.1962.

11. According to Mr. Vashishta, a perusal of the record would show that Mr. Savitri Prasada was meticulous in putting down, in writing, transactions entered into amongst family members and, therefore, there was no good reason as to why he would not have acquired a leasehold interest in the subject property solely in the name of Mrs. Dayavati had her *Streedhan* been used for the said purpose.

12. After perusing the evidence and hearing the submissions of the counsels for the parties *qua* the aforementioned issues what, according to me, has emerged is that there is no evidence on record which would show firstly, that the *Streedhan* said to have been brought by Mrs. Dayavati, at the time of marriage with Mr. Savitri Prasada, was utilized to acquire an interest in the suit property.

12.1. The evidence on record shows that Mrs. Dayavati was a homemaker and that there were some deposits and investments made in her name. There is no evidence on record to show that the source of deposits credited to her bank account or investments made in her name had their source in the *Streedhan* of Mrs. Dayavati.

12.2. There is no clarity as to what Mrs. Dayavati received as her *Streedhan*. Mere reference to a certain quantity of gold said to have been received by Mrs. Dayavati at the time marriage, without more, in my view, would not suffice when the evidence on record does indicate that her family of origin had modest means¹ while her husband's family [i.e. Savitri Prasada's family] was wealthy.

¹ **Extracts from the testimony of Mrs. Dayavati**

“Q. 43 How much gold was given to you by your parents at the time of your marriage?

A. I do not remember.

Q.44 Is it correct to say that your parents were not very rich?

12.3. Mr. Savitri Prasada, even according to Mrs. Dayavati and Mr. Arun Prasada, was a man of means, who rose to the level of Joint Secretary, Government of India and functioned as a Chairperson of NBCC from 1968 to 1971. The evidence also discloses that Mr. Savitri Prasada had inherited two immovables properties one, located in Kamla Nagar, Delhi and the other in Nahar Sahadat Khan, Delhi.

12.4. Furthermore, the perusal of Exhibit P-1 shows that Mr. Savitri Prasada had made an application for membership and allotment of the suit property to the Society on 21.09.1960.

12.5. Over time, Mr. Savitri Prasada paid a total sum of Rs. 24, 000/- to the Society to acquire an interest in the subject property. Mr. Singla was not able to demonstrate that the said funds were paid out of the *Streedhan* said to have been brought by Mrs. Dayavati at the time of her marriage.

12.6. Notwithstanding this circumstance, Mr. Savitri Prasada, as indicated above, did write to the Society, once a decision was taken in January 1970, to allot, the subject property in his favour subject to payment of the further amount as indicated therein (to which I have referred above) to execute a joint lease in his name along with that of his wife Mrs. Dayavati.

12.7. The two communications dated 27.03.1971 [Exhibit P-3] which were addressed by Mr. Savitri Prasada to the Society and another communication of the same date which was addressed by the Society to the concerned officer in the DDA establishes this fact. The speed with which the Society acted, perhaps, was on account of the reason that the Society seemed to function from the registered office located in the properties owned by the Mr. Savitri Prasada

A. It is correct that they were not very rich but they had gold which they had given me as dowry. I was the only daughter of my parents.

xxx

xxx

xxx

Q.47 Was any gold was given to your brother at the time of his marriage?

A. Yes. 100 tolas were given to him and 50 tolas were given to me at the time of marriage.”

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HUF i.e. 8-10 Babur Road. It appears that Mr. Savitri Prasada was a key member of the Society.

12.8. The DDA, *vide* communication dated 12.04.1971 [Exhibit P-5], accorded permission for execution of the joint lease on the condition that Mrs. Dayavati is enrolled as a member of the Society and fulfils the condition of the allotment. Consequently, the Society executed a lease deed on 16.07.1971 wherein Mrs. Dayavati was shown as a co-lessee along with Mr. Savitri Prasada.

12.9. Upon the expiry of Mr. Savitri Prasada on 09.02.1973, a fresh perpetual sublease dated 27.02.1973 was executed in favour of Mrs. Dayavati. This, as indicated above, was preceded by an exchange of communication between the Society and DDA.

13. The Society, *vide* communication dated 15.02.1973, requested that the sublease be executed in favour of Mrs. Dayavati upon the death Mr. Savitri Prasada for the reason that she was a co-lessee and a nominee of Mr. Savitri Prasada. The DDA granted, its no objection *vide* communication dated 23.02.1973 [Exhibit P-7] precisely for the very same reasons.

14. The sense one draws from the evidence on record is that Mr. Savitri Prasada, cognisant of the vagaries of life, had a joint sublease executed *qua* the subject property in favour of his wife, which had nothing to do with Mrs. Dayavati providing funds for acquiring an interest in the subject property. The test of preponderance of probability i.e. the weight of evidence would have me conclude that Mr. Savitri Prasada utilized his funds to acquire an interest in the subject property and that Mrs. Dayavati's *Streedhan*, if any, did not form apart these funds.

15. The submission made by Mr. Singla that the nomination should be treated as a testamentary disposition has several flaws.

15.1. Firstly, for a writing to be treated as a Will or testament, it should *inter alia* accord with the provisions of Section 63 of the ISA and Section 68 of the

Evidence Act. Clause (b) of Section 63 of the ISA requires that the signature or mark of the testator or the signature of the person signing for him shall be so placed that it would show it was the intention of the testator to give effect to the writing as a Will. Clause (c) of the said Section *inter alia* requires the Will to be attested by two or more witnesses each of whom should have seen the testator sign or effect his mark to the Will. The expression Will, on the other hand, has been defined as follows in Section 2(h) of the ISA.

“2. (h) “will” means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.”

15.2. Therefore, before any writing can be treated as a legal declaration of the intention of a testator *qua* his property, and how it has to be given effect to after his death, it should bear the following indices.

- i. Firstly, the writing should bear the signature or mark of the testator or the signature of the person signing for him as stipulated in Clause (a) of Section 63 of the ISA.
- ii. Secondly, the mark or signature should be placed in a manner which would exemplify the testator's intention that the writing should be given effect to as a Will.
- iii. Thirdly, for a document to be treated as a Will, it requires attestation by two or more witnesses, each of whom should have seen the testator sign, or affix his mark to the Will.
- iv. Fourthly, the witnesses are required to sign the Will in the presence of the testator. Furthermore, Section 68 of the Evidence Act provides that if a document is required by law to be attested, it can be used as evidence only if at least one of the attesting witnesses, if alive, and subject to the process of the Court and is capable of giving evidence - if called for proving its execution.

15.3. In the instant case, the document-in-issue [i.e. Exhibit P-1] admittedly bears the signatures of Mr. Savitri Prasada. The signature, however, does not

reveal that the part of the writing whereby nomination is made was intended to give effect to as a Will. At the foot of this document is a certificate of sponsorship signed by one member of the Society. The nomination has been made in terms of bye-law 16 of the Society. The nomination reads as follows.

“Under bye-law 16 of the bye-laws of the Society, I hereby nominate the following as on heir to whom sums due to me by the Society shall be paid or the interest in the plot shall pass in case of death: -

Name of Nominee (in block letters) Shrimati DAYAVATI

Relationship wife

Age 43 years

Place New Delhi

Sd/-

Date 21-7-60

(Signature of applicant)”

15.4. It needs to be emphasized that at the point in time when the nomination was made, Mr. Savitri Prasada had not been allotted a plot. Thus, when in January 1970, Mr. Savitri Prasada was informed by the Society that it intended to execute a sublease in his favour, he wrote back on 27.03.1971 that a joint sublease, be executed in his name along with that of his wife Mrs. Dayavati.

15.5. Therefore, if Mr. Savitri Prasada had treated Exhibit P-1 as a testamentary disposition, he would have, perhaps, not made that request to the Society. Furthermore, the law requires [i.e. Clause (c) of Section 63 of the ISA] that it should bear attestation by at least two witnesses. Had such attestation been made, the said witnesses would have been required to depose that the testator had seen the testator “sign or affix his mark to the Will” and they, in turn, had signed the Will in the presence of the testator.

15.6. The emphasis in Clause (c) of Section 63 is on the word "Will". The reason why this is so is, that the testimony of the attesting witness would demonstrate, as to whether or not, the writing on which the testator had affixed his signatures was intended to take effect as a Will. Since Exhibit P-1 has been produced by Brigadier (Retd.) Shyam Prasada, and is an admitted document, the signatures of Mr. Savitri Prasada on the same are not in dispute. What is in dispute is whether he intended this writing to take effect as a Will.

15.7. The absence of attesting witnesses, in my view, creates a gap as to whether or not Mr. Savitri Prasada intended to give effect to exhibit P-1 as a Will. The best that can be said in favour of Mr. Arun Prasada is that Mr. Savitri Prasada appended his signatures to a formatted document and the literal language of bye-law 16 of the Society.

15.8. The writing i.e. Exhibit P-1 in my view, cannot be treated as a testamentary disposition as contended by Mr. Singla. Mr. Singla's reliance on Section 74 and 90 of the Evidence Act is misconceived. Section 74 concerns public documents while Section 90 provides that if a document is more than 30 years old, then the signatures and every other part of the document including its execution and attestation should be treated as authentic and, in order, as per law provided that the Court is satisfied that the custody from which it was produced was proper.

15.9. In my view, Exhibit P-1 cannot be treated as a public document as it rests in the custody of the Society having a closed membership. Insofar as the reliance on Section 90 of the Evidence Act is concerned it also has no relevance as what is in issue is not the factum of execution of Exhibit P-1 by Mr. Savitri Prasada but that whether he intended it to be a writing that was to be given effect to as a Will. As noted above, there is no evidence on record which would show that Mr. Savitri Prasada intended to give effect to Exhibit P-1 as a Will.

16. Furthermore, one has to bear in mind, a well-established principle that a bare nomination does not confer any beneficial interest in the nominee. Figuratively speaking, a nominee is only "the hand which receives the benefits" which are then to be distributed either by taking recourse to the law of succession or a testament. In other words, the succession to the property at hand may be either intestate or testamentary. [See: *Sarbati Devi vs. Usha Devi*, (1984) 1 SCC 424 : 1984 SCC (Tax) 59; and *Shipra Sen Gupta vs. Mridul Sen Gupta and Ors.*, (2009) 10 SCC 680]

17. This takes me to the submission of Mr. Singla that upon the death of Mr. Savitri Prasada there was an oral family arrangement that the interest in the subject property (which included Mr. Savitri Prasada's share i.e. the suit property) would devolve on Mrs. Dayavati. This submission is pivoted on the admission made by Brigadier (Retd.) Shyam Prasada and siblings that no-objections/disclaimers were filed with the DDA.

17.1. To appreciate this contention, it would be necessary to advert to the averments made by Brigadier (Retd.) Shyam Prasada in the plaint as also during the deposition made by him during the trial.

Extracts from the plaint filed in the 2008 suit: -

"14. That as none of the legal heirs except the Defendant No.1 was based at Delhi at that point of time, it was therefore decided by all the legal heirs of Late Shri Savitri Prasada that the DDA be informed about the demise of Shri Savitri Prasada and the fresh perpetual Sub-Lease may be executed in the name of Defendant No.1 alone instead of all the Legal Heirs of Late Shri Savitri Prasada joining the perpetual Sub Lease Deed in respect of his half undivided share in the Plot.

15. That therefore in order to facilitate the execution of a fresh Perpetual Sub-Lease in favour of Defendant No.1 their mother, all the sons and the daughters gave their No Objections/ disclaimer in favour of their mother so that her name could be recorded in the perpetual Sub Lease. That the Plaintiff submits that the No-objection/ disclaimer was) not towards the relinquishment of the respective shares in favour of the mother but only to facilitate the execution of the perpetual sub-lease in her name.

16. That as stated above, the reason for this No-objection was only to facilitate the execution of fresh Sub-Lease deed after the demise of Shri Savitri Prasada the co-owner of the property. As the process of execution of fresh Sub-lease was cumbersome and a time consuming affair and as all the legal heirs of Late Shri Savitri Prasada were residing far away from Delhi and were in respective Jobs/ occupation, it was difficult for all of them to come to Delhi together at the same time for getting their names recorded in the Perpetual Sub-Lease, hence it was decided that the Perpetual Sub-Lease be executed in the name of Defendant No.1 instead of the remaining legal heirs of Shri Savitri Prasada. The idea was also that the undivided interest of all the legal heirs of late Shri Savitri Prasada shall be secured and protected and would be taken care of by their mother.

17. That accordingly a fresh Perpetual Sub Lease deed was executed on 27.02.1973 in favour of Defendant No.1 Smt. Dayavati the mother of the Plaintiff."

Extracts from the evidence of Brigadier (Retd.) Shyam Prasada: -

"Q. 72 Whether any of the legal heirs of late Shri Savitri Prasada demanded his/her share in the suit property at the time of the death of Shri Savitri Prasada?

Ans. No. (Vol.) The father died at very young age and we all were in a state of shock. At that time, the prime concern was security of our mother. It was decided by all the

legal heirs to have the name of the mother in the records of DDA in the sub lease instead of all legal heirs joining it.

xxx

xxx

xxx

Q.119 I put it to you that to fulfill the wish of your father that the suit property should exclusively be owned by Smt. Dayavati that you and other legal heirs of Sh. Savitri Prasada executed disclaimer/ No Objection.

Ans. It is incorrect. (Vol.) The No Objection/ disclaimer was given to facilitate to have the name of my mother Smt. Dayavati in the records of DDA. The legal heirs did not surrender their rights on the suit property.

xxx

xxx

xxx

Q. 122 I put it to you that Smt. Dayavati, Defendant No. 1 was always considered to be exclusive owner of the suit property which is evident from the fact that none of the legal heirs ever declared his/her interest in the suit property.

Ans. It is incorrect. (Vol.) It was my late father who had written to DDA to have the name of my mother Smt. Dayavati as a co-lessee/co-owner of the suit property. After the death of my father, it was a joint property and all the legal heirs including my mother had one seventh share each in the suit property.”

17.2. Admittedly, apart from the so-called admissions made in the plaint, the contesting defendants did not place any evidence on record to demonstrate that upon the death of Mr. Savitri Prasada, Brigadier (Retd.) Shyam Prasada and his siblings had agreed to relinquish their claim to their father’s share i.e. the suit property.

17.3. A perusal of the pleadings and the deposition would show all that Brigadier (Retd.) Shyam Prasada and siblings intended was to facilitate the execution of the perpetual lease deed in favour of their mother Mrs. Dayavati to accord her the security of having a roof over her head while she was alive.

17.4. The decision was taken, it appears, at that juncture, because their father had died at a relatively young age. For me to conclude, that Brigadier (Retd.) Shyam Prasada and his siblings had, under an oral family arrangement, relinquished their interest in their father's share in the subject property, I would have liked to see, in the very least, the document-in-issue i.e. the no-objections/ disclaimers

17.5. Unfortunately, neither Brigadier (Retd.) Shyam Prasada nor the contesting defendants could place the said documents on record. It is on account of this reason Mr. Singla had taken recourse to Section 58 of the Evidence Act.

Mr. Singla is right to the extent that if an admission is made in the pleadings, it doesn't require proof.

17.6. That being said, I am not persuaded to hold that the assertions made in the pleadings, which I have extracted hereinabove, demonstrate that Brigadier (Retd.) Shyam Prasada and his siblings had gone beyond the threshold of facilitating the execution of a fresh sublease in favour of Mrs. Dayavati.

17.7. It is evident that because even according to the contesting defendants the no-objections/disclaimers were not registered, the plea put forth was that it established the existence of an oral family arrangement, as otherwise, relinquishment of interest would have required registration as per law. Admittedly, no such step was taken, although, Brigadier (Retd.) Shyam Prasada and the defendants conceded that they were filed with the DDA.

18. The next contention of Mr. Singla was that since Mrs. Dayavati was, admittedly, in possession of the subject property, being a female-hindu, she would hold the same as a full owner. It was submitted by Mr. Singla that since the subject property had been given to Mrs. Dayavati for her maintenance and she had erected a superstructure on the same, albeit with her own-funds, her rights in the suit property could not be questioned.

18.1. Mr. Singla also submitted that no specific mention of maintenance is required to be made for a female-hindu to avail the benefits of the provisions of Section 14(1) of the HSA and that life interest gets converted into absolute ownership due to pre-existing right of maintenance. In this behalf, Mr. Singla relied upon the following judgements: *Subhan Roa & Ors vs Parvathi Rao & Ors*, 2010 (10) SCC 235; Judgement dated 17.07.2020, passed in Civil Appeal No. 1021-1026, titled *V Kalyanaswamy D by LRs and Ors vs L Baktbavatsalam D by LRs and Ors.*; and *Jupudy Pardha Sarthy vs. Pentapati Rama Krishna & Ors.*, 2016 (2) SCC 56]

18.2. In my view, the submission made by Mr. Singla, in this behalf, is misconceived, for the reason, the subject property was not even allotted to her late husband Mr. Savitri Prasada on the date when HSA came into force and therefore, she could not have possessed the subject property (including the suit property) for her to acquire the rights of an absolute owner in terms of subsection (1) of Section 14 of the HSA. Dehors this crucial aspect of the matter, there is no evidence that the suit property was in the possession of Mrs. Dayavati in lieu of maintenance or on account of arrears of maintenance.

18.3. Mr. Singla's attempt to eke out a case that the no-objections/disclaimers filed with DDA by Brigadier (Retd.) Shyam Prasada and his siblings for execution of a fresh perpetual lease deed in favour of Mrs. Dayavati only to accord her maintenance, in my opinion, is completely flawed. The expressions maintenance or arrears of maintenance do not find mention in the plaint.

18.4. The fact that Mrs. Dayavati spent money on construction of the superstructure and the conversion of the subject property from leasehold to freehold cannot be used to demonstrate that she had ownership of the land beneath the superstructure to the extent of Mr. Savitri Prasada's share i.e. the suit property.

18.5. At best, what is deducible from the evidence on record is that out of filial piety, Brigadier (Retd.) Shyam Prasada and his siblings agreed to file their no-objections/disclaimers with the DDA for the execution of a perpetual sublease in favour of Mrs. Dayavati.

18.6. In the absence of the production of the no-objections/disclaimers, in my view, it would not be right to leapfrog and thus, conclude that there was an intention to allow Mrs. Dayavati to hold on to the subject property in lieu of maintenance or arrears of maintenance. The argument advanced by Mr. Singla that because Mrs. Dayavati was in possession of the subject property, it should lead to a conclusion that she had a pre-existing right in the same is flawed.

There is, as indicated above, no evidence on record to show that she had a pre-existing right of maintenance in the subject property. The evidence on record shows that the subject property was let out on rent while Mrs. Dayavati was residing with Mr. Aditya Prasada. Therefore, a part of the funds, if not all, were perhaps provisioned through rent collected by Mrs. Dayavati.

18.7. Mr. Singla, in the course of his arguments, had relied upon the judgement of the Supreme Court in case of ***Vaddeboyina Tulsamma & Ors. vs. Vaddeoyin Sesha Reddi***, AIR 1977 SC 1944 to contend that Mrs. Dayavati, by virtue of the provisions of Section 14(1) of the HSA, had acquired the rights of an absolute owner *qua* the subject property. It is important to note that ***Tulsamma*** was a case where the appellants had approached the Court claiming rights of a full owner, which arose out of a decree passed in a compromise suit, whereby, certain properties were allotted towards maintenance in favour of appellant no. 1. The compromise decree had curtailed the right of alienation and, thus, conferred only a limited interest in the properties in favour of the appellant no. 1. The Trial Court had repelled the contention of appellant no. 1 that she had acquired, by virtue of Section 14(1) of the HSA, an absolute right in the properties allotted to her in lieu of maintenance by relying upon the provisions of subsection (2) of Section 14 of the HSA. It is in this background that the Supreme Court was called upon to interpret the width and scope of the provisions of subsection (2) of Section 14 of the HSA. The Supreme Court, thus, proceeded to narrow down the width and amplitude of Section 14(2) of the HSA which excluded the applicability of subsection (1) to those properties which were acquired by way of gift, or under a Will, or any other instrument, or under a decree, or order of a civil court, or under an award, where the terms of the gift, Will, or other instrument, or the decree, order or award, prescribe a restricted estate in such property. The Supreme Court *inter alia* observed “... that the legislative intendment was that sub-section (2) should be applicable

only to cases where acquisition of property is made by a Hindu female for the first time without any pre-existing right — a kind of acquisition akin to one under gift or will. Where, however, property is acquired by a Hindu female at a partition or in lieu of right of maintenance, it is in virtue of a pre-existing right and such an acquisition would not be within the scope and ambit of sub-section (2), even if the instrument, decree, order or award allotting the property prescribes a restricted estate in the property.” As would be evident, appellant no. 1 had a pre-existing right in the form of a compromise decree whereby properties were allotted to her towards maintenance without the power of alienation. It was this pre-existing right, which the Supreme Court said, was enlarged into an absolute right of an owner by virtue of subsection (1) of Section 14 of the HSA. The important fact obtaining in *Tulsamma* case was that the appellant no. 1 was in possession of the suit property when HSA came into force. This, to my mind, is the ratio of the judgement.

18.8. In the instant case, what is clear is Mr. Savitri Prasada acquired leasehold interest in the subject property only on 27.03.1971 and on his request, Mrs. Dayavati was included as a joint lessee on 16.07.1971. Thus, quite obviously, Mrs. Dayavati could not have been in possession of the subject property on the date when HSA came into force and, therefore, it could not be said that she was possessed of a property with a limited interest which got enlarged into an absolute right by virtue of the provisions of subsection (1) of Section 14 of the HSA. Furthermore, it is also necessary to emphasize the fact, an aspect which I have touched upon hereinabove, that there is nothing on record to suggest that her inclusion, as a joint lessee, was made for the purposes of providing her maintenance or in lieu of maintenance. The observations of the Supreme Court in *Sadhu Singh vs. Gurdwara Sahib Narike*, (2006) 8 SCC 75 wherein the judgement of the Supreme Court in *Tulsamma* case has been discussed, being apposite, are extracted hereafter.

“11. On the wording of the section and in the context of these decisions, it is clear that the ratio in *V. Tulasamma v. Shesha Reddy* [(1977) 3 SCC 99 : (1977) 3 SCR 261] has application only when a female Hindu is possessed of the property on the date of the Act under semblance of a right, whether it be a limited or a pre-existing right to maintenance in lieu of which she was put in possession of the property. **Tulasamma [(1977) 3 SCC 99 : (1977) 3 SCR 261] ratio cannot be applied ignoring the requirement of the female Hindu having to be in possession of the property either directly or constructively as on the date of the Act, though she may acquire a right to it even after the Act.** The same is the position in *Raghubar Singh v. Gulab Singh* [(1998) 6 SCC 314 : AIR 1998 SC 2401] wherein the testamentary succession was before the Act. The widow had obtained possession under a will. A suit was filed challenging the will. The suit was compromised. The compromise sought to restrict the right of the widow. This Court held that since the widow was in possession of the property on the date of the Act under the will as of right and since the compromise decree created no new or independent right in her, Section 14(2) of the Act had no application and Section 14(1) governed the case, her right to maintenance being a pre-existing right. In *Karmi v. Amru* [(1972) 4 SCC 86 : AIR 1971 SC 745] the owner of the property executed a will in respect of a self-acquired property. The testamentary succession opened in favour of the wife in the year 1938. But it restricted her right. Thus, though she was in possession of the property on the date of the Act, this Court held that the life estate given to her under the will cannot become an absolute estate under the provisions of the Act. This can only be on the premise that the widow had no pre-existing right in the self-acquired property of her husband. In a case where a Hindu female was in possession of the property as on the date of the coming into force of the Act, the same being bequeathed to her by her father under a will, this Court in *Bhura v. Kashi Ram* [(1994) 2 SCC 111] after finding on a construction of the will that it only conferred a restricted right in the property in her, held that Section 14(2) of the Act was attracted and it was not a case in which by virtue of the operation of Section 14(1) of the Act, her right would get enlarged into an absolute estate. This again could only be on the basis that she had no pre-existing right in the property. In *Sharad Subramanyan v. Soumi Mazumdar* [(2006) 8 SCC 91 : JT (2006) 11 SC 535] this Court held that since the legatee under the will in that case, did not have a pre-existing right in the property, she would not be entitled to rely on Section 14(1) of the Act to claim an absolute estate in the property bequeathed to her and her rights were controlled by the terms of the will and Section 14(2) of the Act. This Court in the said decision has made a survey of the earlier decisions including the one in *Tulasamma* [(1977) 3 SCC 99 : (1977) 3 SCR 261] . **Thus, it is seen that the antecedents of the property, the possession of the property as on the date of the Act and the existence of a right in the female over it, however limited it may be, are the essential ingredients in determining whether sub-section (1) of Section 14 of the Act would come into play. What emerges according to us is that any acquisition of possession of property (not right) by a female Hindu after the coming into force of the Act, cannot normally attract Section 14(1) of the Act. It would depend on the nature of the right acquired by her. If she takes it as an heir under the Act, she takes it absolutely. If while getting possession of the property after the Act, under a devise, gift or other transaction, any restriction is placed on her right, the restriction will have play in view of Section 14(2) of the Act.**”

[Emphasis is mine]

Issue no. 4

19. Insofar as this issue is concerned, the admitted position is that Mr. Savitri Prasada's original Will dated 24.02.1966 was not produced by the contesting defendants. The contesting defendants have claimed that the Will was lost and a complaint, in that behalf, was filed with the Haus Khas New Delhi police station. Shri Om Prakash i.e. DW/7 has proved that a non-cognizable report [NCR] was registered with the aforementioned police station on 28.10.2009 concerning the loss of original documents [including Mr. Savitri Prasada's Will] which were contained in a briefcase kept in Mr. Arun Prasada's car parked outside the club.

19.1. The copy of the Will, which has been placed on record, purportedly, bears the signatures of Mr. Savitri Prasada and two witnesses i.e. one, Sohan Das and C.K. Kesavan. Since Mr. Arun Prasada claims that the Will had been lost, and had sought, therefore, to place on record a copy, he ought to have led secondary evidence, if nothing else, as regards the existence of the document.

19.2. Mr. Arun Prasada has not led any evidence to demonstrate that Will dated 24.02.1966 existed which replicated the copy filed in Court. It appears that Mr. Sohan Das, one of the witness, had expired on 13.04.2007. There is no clarity as to whether Mr. C.K. Kesavan, the other witness, was alive, when the 2008 suit went to trial. It is required to be noticed that Will dated 24.02.1966, said to have been executed by Mr. Savitri Prasada, in favour of Mrs. Dayavati, only relates to his "movable assets in the shape of GP fund, gratuity, deposits in banks and shares and annuities".

19.3. There is no mention of devolution of interest in any immovable property. It would also be relevant to note, in this behalf, the testimony of Mr. Arun Prasada whereby he indicated that he did not know of the existence of Will dated 24.02.1966.

"Q. 99 I suggest that your father had executed a Will dated 24th February, 1966 which he wrote in his own hand.

Ans. I have no knowledge about any such Will.”

19.4. Likewise, Brigadier (Retd.) Shyam Prasada gave a similar answer when cross-examined on this aspect.

“Q.134 I put it to you that late Shri Savitri Prasada had bequeathed all his movable assets by Will dated 24th February, 1966 to Smt. Dayavat.

Ans. I am not aware.”

19.5. The record shows that even in her examination-in-chief filed by way of an affidavit dated 12.09.2011, Mrs. Dayavati has not alluded to Mr. Savitri Prasada’s Will dated 24.02.1966.

19.6. Therefore, it has to be held that the contesting defendants were unable to prove the existence of the Will dated 24.02.1966 said to have been executed by Mr. Savitri Prasada.

Additional Issue no. 1 [Framed vide order dated 23.05.2016, passed in 2008 suit]

20. This issue concerns the existence of Will dated 09.11.1992 and the codicil dated 24.02.2000 said to have been executed by Mrs. Dayavati. It is not in dispute that Mrs. Dayavati died on 03.10.2013. The record shows that Mrs. Dayavati was cross-examined on two dates i.e. 19.09.2011, and 20.09.2011. Since she was alive when her testimony was recorded, she deposed, in no uncertain terms, that both the Will dated 09.11.1992 [i.e. Exhibit DW-3/2] and the codicil dated 24.02.2000 [i.e. Exhibit DW-3/3] had been executed by her and bore her signatures. The relevant portion of her testimony, in that behalf, is set forth hereafter for the sake of convenience.

“Q.78 Have you executed any Will?

A. Yes.

Q.106 Is it correct that during your stay with Shri Arun Prasada in 2001 you had prepared Codicil Exhibit DW-3/3?

A. Exhibit DW-3/3 bears my signatures. I do not remember when it was prepared or where it was prepared.

Q.107 Where was Codicil Exhibit DW-3/3 was registered?

A. I had written the codicil but I do not remember where and when it was registered.”

20.1. Although, in a sense, superfluous, as this is a rare case where the testator was alive when the Will was brought into issue, and she could depose as to its

authenticity, the execution of the Will [i.e. Exhibit DW-3/2] was also proved by the attesting witnesses. The relevant portions of their testimonies are extracted hereafter.

Extracts from the evidence of Mr. Mukul Bawa: -

“Q .16 Can you tell what were your inputs for the Will?

A. I drafted the Will as per the instructions of late Mrs. Dayavati.

Q. It is correct that Late Mrs. Dayavati could not speak and converse in English?

Ans. Yes, it is correct but she could read in English and understand the language.

Q. Did late Mrs. Dayavati read the alleged Will dated 9th Nov, 1992 on the date of alleged execution?

Ans. Yes. She read the Will. Vol. I also read it in English and explained her in Hindi Language in the presence of all the witnesses.

Q. Did Late Mrs. Dayavati know to write numbers and alphabets in English?

Ans. May be she knew.

Q.10 I put it to you that the Will was got executed by Mr. Arun Prasada from Mrs. Dayavati at 12, Anand Lok, New Delhi and it is for this reason that in the Will dated 9th November, 1992 the address is mentioned as 12, Anand Lok, New Delhi.

A. The Will was executed at 106, Anand Lok, New Delhi and only on instructions of late Mrs. Dayavati the address 12, Anand Lok, New Delhi was written on the Will.

Q.16 When did Mrs. Dayavati ask you to prepare the Will?

A. In the first week of November, 1992.

Q.38 So according to you Mrs. Dayavati relied only on your vernacular explanation to the Will before its execution?

A. Mrs. Dayavati read the Will as she understood English and the Will was drafted as per instructions.

Q.41 I put it to you that since the Will had been got executed at 12, Anand Lok, New Delhi at the behest of Mr. Arun Prasada that is why no date and even the month of November had not been put and you waited for an opportune moment to get the same signed.

A. The Will was executed at 106, Anand Lok, New Delhi and date and month were left blank as a matter of abundant caution and it was executed when late Mrs. Dayavati wanted it to be done in front of witnesses.

Q.57 I put it to you that Mrs. Dayavati never really knew what she was signing as a Will and Codicil until the disputes emerged between the parties in CS(OS)No. 1113/2008.

A. It is incorrect as late Mrs. Dayavati was in a very sound mental condition when she executed the Will and the Codicil.

Q. Did Suman Kirti and Madhu Gopal reach 106, Anand Lok, New Delhi in your presence on 9th November, 1992?

A. Yes.

Q. Did the attesting witnesses Mrs. Madhu Gopal and Mrs. Suman Kirti read the Will themselves?

A. No. I read the Will also in vernacular in Hindi in presence of all.”

Extracts from the evidence of Dr. Suman Kriti: -

“Q. When did Mrs. Dayavati tell you to be an attesting witness to her will?

Ans. Some days before the will was actually executed she called upon telephone and asked me if I could be able to witness her will.

Q. Did you tell Mrs. Dayavati or Mr. Mukul Bawa get the signatures /initial at Point X as the same was filled in hand?

Ans. No. Vol. I have simply signed the will after Mrs. Dayavati signed it.

Q. Who were present at 106, Anand Lok, New Delhi when you reached?

Ans. Mrs. Dayavati, Mr. Mukul. Bawa and Mrs. Madhu Gopal were present.”

20.2. The aforesaid testimonies would show that the Will dated 09.11.1992 [i.e. Exhibit DW-3/2] was executed by Mrs. Dayavati and that at the time of execution, she was in a sound state of mind. The arguments advanced by Mr. Vashista and Mr. Gupta, although with diffidence, to inject a spectre of suspicious circumstances, in my view, would have no significance given the fact that the testator Mrs. Dayavati herself deposed as to the authenticity of the Will and the very fact that she went through a lengthy cross-examination spread over two days would demonstrate that she possessed sound mind on the date when she had executed the Will.

20.3. In my opinion, discrepancies as to where exactly the testator was located when the Will was executed, lack materiality. According to Mr. Vashistha, Mrs. Dayavati was staying at 106, Anand Lok and the address given in the Will was that of the subject property i.e. plot no. 12, Anand Lok. It was also sought to be demonstrated that the address of the subject property was given on the Will [as per the testimony of one of the attesting witnesses i.e. Mr. Mukul Bawa] on the direction of Mrs. Dayavati.

20.4. Furthermore, it was contended that the aforementioned Will and the Codicil was a product of pressure and undue influence of Mr. Arun Prasada. In my view, the evidence brings to fore that Mrs. Dayavati, independently and without any coercion decided to execute the Will dated 09.11.1992 as also the codicil dated 24.02.2000.

20.5. *Via* the Will, she had made Mr. Arun Prasada the sole beneficiary of the entire subject property including in respect of the 50% share of her husband Mr. Savitri Prasada [i.e. the suit property] besides providing that in case he

predeceased her, his son Mr. Rohit Prasada would be the absolute owner of the subject property. Also, *via* the said Will Mrs. Dayavati bequeathed her jewellery in favour of her three daughters i.e. Mrs. Sudha Garg, Mrs. Indu Kirshna and Mrs. Rekha Garg.

20.6. The jewellery was to be divided equally amongst the three daughters. Insofar as cash and shares were concerned, the same was to be shared equally amongst her three sons i.e. Brigadier Shyam Prasada, Mr. Aditya Prasada and Mr. Arun Prasada after defraying the expenses incurred for her funeral and payment of taxes etcetera.

20.7. The Will also provides that in case the sons or daughters were to predecease her, the legacy would fall to the share of their children. The only change, which was brought about *via* the codicil dated 24.02.2000, was that the cash and shares, except money, kept in account no. 1765 in Allahabad Bank [which was to fall to the share of the three sons, in equal measure, for contributing to charities] were bequeathed to the daughters as she had not been able to provide for them any jewellery as it had already been gifted to her grandchildren.

20.8. Thus, having regard to the evidence on record, I am of the view that the Will dated 09.11.1992 and codicil dated 24.02.2000 executed by Mrs. Dayavati is valid in the eyes of law as it complies with the parameters prescribed under Section 63 of the ISA and Section 68 of the Evidence Act. The suggestion that these documents were executed in suspicious circumstances is not borne out from the evidence on record.

21. That being said, having regard to my discussion *qua* issue no. 1, 3, 5 and 6 hereinabove, it must be said that Mrs. Dayavati *via* her the Will dated 09.11.1992 could not have included the suit property [i.e. 50% share owned by her husband Mr. Savitri Prasada] as part of her bequest. The bequest, to that extent, made by Mrs. Dayavati is, unsustainable, in law.

Issue no. 2

22. The contesting defendants have asserted that both the 2008 suit and the 2014 suit are time-barred. In this behalf, reliance has been placed by them on Article 58, 59, 66, 69, and 106 of the Limitation Act.

22.1. In the written statement filed by Mrs. Dayavati, in support of this plea, it is averred that she has been in continuous possession of the subject property since 16.07.1971 [i.e. when she was inducted as a co-sublessee along with her husband Mr. Savitri Prasada] and thereafter, from 27.02.1973 when she acquired the status of a sole sublessee. Furthermore, it is averred that since a conveyance deed was executed on 27.03.2000, in favour of Mrs. Dayavati, the suit actions were barred by virtue of the prescribed period of limitation expiring *qua* them.

22.2. As against this, on behalf of Brigadier (Retd.) Shyam Prasada and the supporting defendants, it was contended that the issue concerning limitation came up for consideration before this Court in an application [i.e. I.A. No. 9522/2008] preferred by Mrs. Dayavati under Order VII Rule 11 of the CPC which was dismissed *via* order dated 14.01.2010, although, with a caveat that it was a mixed question of fact and law. Furthermore, it was stated that the contesting defendants were unable to place on record any evidence in support of their plea that the suit actions were barred on account of the prescribed period of limitation expiring *qua* them. In this behalf, reference was made to the affidavits of evidence filed by the contesting defendants i.e. DW-3/A and DW-4/A. It was contended that a perusal of the affidavits would show that the plea concerning suit actions being barred on account of the expiry of the prescribed period of limitation was given up by the contesting defendants.

22.3. Besides this, it was emphasized that the suit actions were premised on the fact that Mr. Savitri Prasad had died intestate and as class I heirs, Brigadier

(Retd.) Shyam Prasada and his siblings were entitled to a proportionate share to the extent of his share in the subject property.

22.4. The argument was that in consonance with the provisions of Section 8 of the HSA, with the death of Mr. Savitri Prasada, who died intestate, the rights in his estate devolved on Brigadier (Retd.) Shyam Prasada and other Class I legal heirs. It was submitted that the possession of that part of the subject property which was owned by Mr. Savitri Prasada [i.e. the suit property], by Mrs. Dayavati, was neither hostile nor adverse to the other Class I legal heirs and therefore their rights as co-owners remained intact.

22.5. Thus, the contention advanced on behalf of Brigadier (Retd.) Shyam Prasada and the other supporting defendants, was, that there was no period of limitation prescribed for co-owners to seek partition of undivided property. According to Brigadier (Retd.) Shyam Prasada and the supporting defendants, none of the Articles of the Limitation Act on which reliance was placed by the contesting defendants were applicable.

23. *Qua* this issue, what requires to be noticed is as follows.

- i. That the objection concerning the suit actions being barred on account of the prescribed period of limitation having expired was raised by Mrs. Dayavati *via* I.A. No. 9522/2008. This I.A. was dismissed *vide* order dated 14.01.2010. The observations made in the said order, to the extent they are relevant, are extracted hereafter.

“21. Admittedly, no registered relinquishment was ever executed by the plaintiff or any other legal heir of late Sh. Savitri Prasad releasing their 1/7th share in favour of the defendant No.1 at any point of time. It is a settled law that the transfer of immovable property must be made through a registered instrument.

22. The law relating to partition on the basis of inheritance is settled that no period of limitation is prescribed for filing the suit for possession and possession of the co-owner deemed to be possession of all the co-owners. It is well settled law also that Article 59 of the Act does not apply in the suit for partition and possession. According to the plaintiff, he got the knowledge about the execution of conveyance deed dated 27th March, 2000 only on 19th May, 2008 as averred in paras 25 and 26 of the plaint. In case the said statement made by the plaintiff in these paras is correct then the suit is also maintainable under Article 59 of the Act. It has been pleaded in para 12 and 27 of the plaint that the mother has 453.31 sq. yds. share in the property. Therefore, the

allegation of the defendant that the plaintiff and defendant nos. 3, 4 and 6 want to dislodge the mother/defendant no. 1 is not sustainable at this stage unless it is proved otherwise.

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27. In the present case, the nature of the pleadings in the plaint being what it is, this Court does not agree with the contentions of defendant no. 1 that the action is time barred as the question of limitation is a mixed question of law and fact which can be decided only after the evidence of the parties. Moreover under Order VII Rule 11, only the allegations in the plaint are to be looked into and plea of limitation cannot be accepted at this stage. Therefore, I am of the view that all the pleas raised by the defendant No.1 in her application and the averments made by her in the written statement cannot be decided at the pre-trial stage without recording the evidence in view of the facts and circumstances of the present case.

28. Thus, the application of the defendant under Order VII Rule 11 CPC for rejecting the plaint is without any merit and is hereby rejected.”

- ii. The affidavits that have been filed by way of evidence by the contesting defendants which are marked as Exhibits DW-3/A and DW-4/A do not advert to the aspects concerning limitation.
- iii. Mr. Savitri Prasada died intestate. Concededly, he had not executed a Will/testament *qua* his share of the suit property. The Will/testament dated 24.02.1966 which Mr. Savitri Prasada had supposedly executed vis-à-vis his movable properties, as discussed above, was not proved by the contesting defendants.
- iv. Brigadier (Retd.) Shyam Prasada along with the supporting defendants at the relevant point in time, were heirs who fell in Class I of the Schedule appended to the HSA.
- v. While Mrs. Dayavati had possession of the subject property, there is no evidence on record to show that her possession *qua* her husband's share i.e. the share of Mr. Savitri Prasada, that is, the suit property was either hostile or adverse to the rights of the other Class I heirs of Mr. Savitri Prasada.

23.1. Therefore, in my view, Brigadier (Retd.) Shyam Prasada and the supporting defendants along with the contesting defendants were, as correctly argued by Mr. Vashista and Mr. Gupta, co-owners *vis-à-vis* Mr. Savitri Prasada's share i.e. the suit property. The cause of action, as per Brigadier

(Retd.) Shyam Prasada arose when the contesting defendants disputed his right to claim a proportionate share in Mr. Savitri Prasada's share, that is, the suit property. This event occurred, according to Brigadier (Retd.) Shyam Prasada, on 08.05.2008.

23.2. As per the averments made in the plaint filed in the 2008 suit, the aforesaid event led Brigadier (Retd.) Shyam Prasada to make enquiries with the Society which led to him to discover that Mr. Arun Prasada had been appointed as the sole nominee by Mrs. Dayavati and that Mrs. Dayavati had obtained a conveyance deed dated 27.03.2000 in her favour; an aspect which got revealed to him only on 20.05.2008.

23.3. Therefore, to my mind, the 2008 suit action which was instituted on 27.05.2008 cannot be dismissed on the ground of limitation. The reliance placed on Article 58 of the Limitation Act is misconceived. Article 58 of the Limitation Act finds a place in the first division – suits Part – III of the Schedule appended to the said Act. Part III relates to the suits in which declarations are sought.

23.4. This part contains two other Articles i.e. 56 and 57. Article 56 relates to a case where a declaration is sought that the instrument issued or registered is a product of forgery. Article 57 concerns a case where a declaration is sought that an alleged adoption is invalid or, in fact, never took place. Article 58 is, thus, in a sense, a residuary Article, under this part, which concerns a suit action where any other declaration is sought. This Article, which is cited by the contesting defendants, has an applicability *qua* a suit action where a declaration simpliciter is sought.

23.5. In the 2008 suit, not only is a declaratory relief sought but also a relief for possession is sought, amongst other reliefs. Therefore, to my mind, Article 58 has no application to the instant case.

23.6. Insofar as Article 59 is concerned, it falls in Part IV of the Schedule appended to the Limitation Act which concerns "suits relating to decrees and

instruments”. This part contains two Articles i.e. 59 and 60. Article 59 relates to a suit action preferred to cancel or set aside an instrument or decree or for rescission of a contract. I need not dilate on Article 60 as it has no relevance to this case even according to the contesting defendants.

23.7. Article 59, to my mind, does not apply to the instant suit actions for the reason the reliefs sought are for partition and possession and consequent rectification of the conveyance deed dated 27.03.2000 executed in favour of Mrs. Dayavati in respect of the subject property insofar it concerns her deceased husband Mr. Savitri Prasada's share in the same.

23.8. Likewise, Article 66, which falls in Part V of the Schedule to the Limitation Act and concerns suits relating to immovable property, to my mind, has also no application. Article 66 can have no application to the instant case as it concerns an action taken for possession of immovable property when the plaintiff has become entitled to possession because of forfeiture or breach of condition.

23.9. In this case, the perpetual lease concerning the subject property, admittedly, remained intact as there was no breach of the conditions provided therein. There was, thus, no forfeiture or divestiture of the property triggering a cause for instituting any action.

24. Insofar as Article 69 is concerned, which falls in Part VI, it pertains to suits relating to movable properties. The preceding Article i.e. Article 68 concerns a suit action where a specific movable property is lost or acquired by theft or is dishonestly misappropriated or converted. Article 69 covers other suit actions pertaining to other specific movable properties. The limitation prescribed is three years which is to commence from the date when the property is wrongfully taken. There is in fact, no articulation in the written statements of the contesting defendants as to when the specific movables properties of Mr. Savitri Prasada were taken for the prescribed period of limitation to kick in.

24.1. Even in the written submissions filed on behalf of the contesting defendants, all that which is articulated and, therefore, highlighted is the observation made in the order dated 14.01.2010 that the aspect concerning limitation was a mixed question of law and fact. Since the facts concerning this aspect have not been stated by the contesting defendants, on whom the onus was placed by the Court, it cannot be held that part of the suit actions which pertained to movable properties of Mr. Savitri Prasada was barred by limitation.

24.2. This brings me to Article 106. Article 106 falls in part IX of the Schedule which concerns suit actions relating to miscellaneous matters. In particular, Article 106 prescribes limitation *qua* suit actions which are brought against an executor or an administrator or some other person who is legally charged with the duty of distributing the estate of the person who has died intestate. Thus, where there is mere possession of the estate without a duty to distribute the same, Article 106 would have no application.

24.3. A suit for partition, in which the relief for possession is embedded, is not a suit action which falls within the purview of Article 106 of the Limitation Act.

Conclusion: -

25. Accordingly, I have reached the following conclusions:

- i. Brigadier (Retd.) Shyam Prasada and the defendants are entitled to 1/6th share each in the land beneath the suit property. The mere assertion in the plaint that no-objection certificates/disclaimers were filed with the DDA did not establish that Brigadier (Retd.) Shyam Prasada and his siblings had surrendered their interest in the suit property in favour of Mrs. Dayavati.
- ii. The contesting defendants were unable to prove that there was, in subsistence, an oral family arrangement, whereby Brigadier (Retd.) Shyam Prasada and the supporting defendants had agreed to relinquish their share in the suit property in favour of Mrs. Dayavati.

- iii. Mrs. Dayavati had ownership rights only in 50% of the subject property. Since Mr. Savitri Prasada [i.e. Mrs. Dayavati's husband] died intestate, his 50% share in the subject property is required to be distributed in equal measure amongst his heirs falling in Class I of the Schedule to HSA. This would apply not only to the subject property but also to the movable properties of Mr. Savitri Prasada since the contesting defendants failed to prove the Will dated 24.02.1966; purportedly, executed by Mr. Savitri Prasada.
- iv. Since the Will dated 09.11.1992 [Exhibit DW-3/2] and codicil dated 24.02.2000 [Exhibit DW-3/3] executed by Mrs. Dayavati have been proved, her 50% share of the subject property will devolve upon Mr. Arun Prasada. Furthermore, the cash and shares, save and except account number 1765 maintained with Allahabad Bank, will devolve on her three daughters in equal measure as alluded to in the aforementioned testaments.
- v. The 2008 and 2014 suit actions are not barred by limitation. The latter suit i.e. 2014 suit action was filed after the death of Mrs. Dayavati so that her share of the subject property could also be distributed proportionately amongst Brigadier (Retd.) Shyam Prasada and his siblings.

26. Thus, as indicated above, a preliminary decree will be drawn in favour of Brigadier (Retd.) Shyam Prasada, represented through his LR/legal guardian [i.e. his wife Mrs. Madhu Prasada], and his siblings i.e. Arun Prasada, LRs of Aditya Prasada, LRs Mrs. Sudha Garg, Mrs. Indu Krishna and Mrs. Rekha Garg, allocating each one of them, $1/6^{\text{th}}$ share in the land beneath the suit property admeasuring 396.65 sq. yards.

27. List the 2008 suit and the 2014 suit before the Roster Bench on 22.01.2021 for the appointment of a Court Commissioner to ascertain as to whether the suit property can be divided by metes and bounds.

28. Given the discussion above and in consonance with the order dated 23.05.2016, passed in the 2008 suit, the testamentary case shall stand disposed of.

RAJIV SHAKDHER, J

JANUARY 11, 2021

Click here to check corrigendum, if any

