

\$~38 (Appellate)

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

Reserved on 12th September 2022

Pronounced on 6th April 2023

+ RFA 742/2019

ATTAR SINGH & ORS Appellants

Through: Mr. Himanshu Thakur, Adv.
versus

MAHINDER SINGH & ANR Respondents

Through: Mr. Surinder Jain, Adv.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT

% **06.04.2023**

RFA 742/2019 and CM APPL. 36857/2019 (stay)

The *lis*

1. Ami Chand and his wife Barpai Devi had four sons, Mahinder Singh, Hukam Singh, Attar Singh and Chattar Singh. Ami Chand died on 30th April 1988 and Barpai Devi died later; however, her date of death is not forthcoming on the record. With the death of Barpai Devi, their sole surviving legal heirs were Mahinder Singh, Hukam Singh, Attar Singh and Chattar Singh. Hukam Singh had three sons and one daughter, namely, Dev Raj, Hem Raj, Yogesh and Aarti. Hukam Singh apparently went missing, as per the impugned judgment, sometime in 1996.

2. Mahinder Singh instituted CS 06/2012 against Hukam Singh, Attar Singh, Chattar Singh and Dev Raj, claiming partition of properties Nos. 169 and 185, Village Haiderpur, Delhi – 110042 (“the

suit properties”), which admittedly were initially owned by Ami Chand. The suit was subsequently transferred to this Court and re-numbered as CS (OS) 1170 of 2014, whereafter it was re-transferred back to the Court of the learned Additional District Judge (“the learned ADJ”) and re-numbered as CS 578024/2016.

3. By judgment dated 27th February 2019, the learned ADJ has held the plaintiff Mahinder Singh to be entitled to a decree of partition of the suit properties and, in which he has been found entitled to 1/4th share. A preliminary decree of partition has accordingly been passed by the learned ADJ.

4. Aggrieved thereby, the present appeal has been instituted before this Court, under Section 96 of the Code of Civil Procedure, 1908 (CPC) by Attar Singh, Defendant 2 in the suit.

5. For the sake of convenience, the parties shall be designated, in this judgement, by their respective status before the learned ADJ or by their names.

Rival Stands before the learned ADJ

6. The Complaint

6.1 Mahinder Singh, as the plaintiff in the complaint, pleaded that

- (i) Ami Chand was the owner of the suit properties,
- (ii) Ami Chand died on 30th April 1988 left behind Barpai Devi, the plaintiff and Defendants 1 to 3 as his legal heirs,
- (iii) Barpai Devi died subsequently, leaving behind the plaintiff and Defendants 1 to 3 as her legal heirs,

- (iv) the plaintiff was, therefore, claiming 1/4th share in the suit properties, as per the law of inheritance,
- (v) the suit properties were built up and rented out,
- (vi) Property No. 185 was orally given by Ami Chand to the plaintiff and Defendant 2 (the appellant herein),
- (vii) the plaintiff and Defendant 2 each built structures of two storeys on their respective parts of Property No. 185, which were let out,
- (ix) Defendant 2 collected rent from the tenants occupying his share of Property No. 185,
- (x) the plaintiff, being a resident of Palam, had authorised Defendant 3 Chattar Singh to collect rent from the tenants occupying the plaintiff's share of Property No. 185 and to transmit the rent so collected to the plaintiff,
- (xi) Defendant 3 complied with the said request till sometime in 2010, whereafter Defendant 3 stopped forwarding the rent collected from the plaintiff's tenants to the plaintiff and
- (xii) Property No. 169 was occupied by Defendant 4 Dev Raj except for two rooms, of which Defendant 3 had the key.

6.2 The plaint further avers that, on 30th December 2011, the plaintiff approached the defendants to partition the suit properties by metes and bounds, but the defendants refused, whereupon the plaintiff instituted the aforesaid suit against them.

7. The Written Statement

7.1 Defendants 2 to 4 filed a common written statement by way of response to the suit. They contended that, on 10th July 1997, the suit properties stood partitioned between the parties by an oral family

settlement, which was reduced to writing. As per the said family settlement, Property No. 169 was divided between Defendant 1 Hukam Singh and Defendant 3 Chattar Singh and Property no. 185 was divided between the plaintiff Mahinder Singh and Defendant 2 Attar Singh. As such, the plaintiff's assertion that the suit properties were open for partition was categorically denied.

7.2 The written statement further contended that the plaintiff and Defendants 2 and 3 had jointly purchased a property at Palam on 24th July 1979. Subsequently, in 2006, the plaintiff and Defendant 3 exchanged their respective properties, with the plaintiff relinquishing his share in Property No. 185 in favour of Defendant 3 and Defendant 3 relinquishing his share in the Palam property in favour of the plaintiff. As such, it was contended that the plaintiff had no surviving right in Property No. 185 and Defendant 3 had no surviving right in the Palam property. The plaintiff's contention that he constructed a two storeyed structure on Property No. 185 was also denied.

7.3 Property No. 169, it was asserted, was in the common occupation of Defendants 1 and 3, as per the family settlement dated 10th July 1997. Defendant 3 Chattar Singh claimed to have relinquished his right in Property No. 169 in favour of the children of Defendant 1, i.e. Defendant 4 Hem Raj, Yogesh and Aarti *vide* an *Iqrarnama* dated 13th February 2005. In any event, in view of the family settlement dated 10th July 1997, which was alleged to have partitioned Property No. 169 between Defendants 1 and 3, it was stated that the plaintiff had no right in the said property.

7.4 The written statement also alleged the suit to be liable to be dismissed for mis-joinder and non-joinder of parties. It was stated that

the plaintiff had wrongly impleaded Defendant 1 Hukam Singh despite being aware of the fact that Hukam Singh was untraceable since 1998. Also, the legal heirs of Hukam Singh were also alleged to be necessary parties to the suit, of whom the plaintiff had impleaded only Dev Raj as Defendant 4.

8. No replication was filed.

9. During the pendency of the present appeal, the learned ADJ, *vide* order dated 29th November 2019, decreed the suit, directing the suit properties to be auctioned in execution and the sale proceeds divided among the parties as per their respective shares in accordance with the impugned preliminary decree dated 27th February 2019. The final judgement and decree have not been challenged.

Proceedings thus far

10. Issues

10.1 On 15th December 2012, the following issues were framed by the learned ADJ:

- “1. Whether this Court has no pecuniary jurisdiction to try and entertain the present suit in view of preliminary objection no. 1 of WS? OPD.
2. Whether the suit property has already been divided between the parties as stated in para no. 2 of preliminary objection in WS, if so, its effect? OPD.
3. Whether the suit is bad for misjoinder of the parties as alleged in para no. 3 of preliminary objection in WS? OPD.
4. Whether the suit is bad for non-joinder of the parties as alleged in para no. 3 of preliminary objection in WS? OPD.
5. Whether the plaintiff is entitled for a decree of partition, as prayed? OPP.

6. Whether the plaintiff is entitled for a decree of permanent injunction, as prayed? OPP.

7. Relief.”

10.2 Issue 1 was decided in favour of Defendants 2 to 4 and against the plaintiff *vide* order dated 6th November 2013, passed by the learned District and Sessions Judge, which returned the plaint under Order VII Rule 10 of the CPC for being presented before this Court. Subsequently, as already noted, the plaint was pending before this Court and was transferred back to the learned ADJ on 14th January 2016. As such, Issue 1 does not survive for consideration.

11. Evidence

11.1 Plaintiff's Evidence

11.1.1 The plaintiff led the evidence of two witnesses, namely, Mahinder Singh, the plaintiff, as PW-1 and Naveen Sharma, Assistant Officer, Shalimar Bagh, District Office, Tata Power Delhi Distribution Ltd, as PW-2.

11.1.2 PW-1 Mahinder Singh, tendered his affidavit dated 21st February 2013 (Ex. PW-1/A) by way of evidence, which he testified in his examination-in-chief on 21st February 2013.

11.1.3 The affidavit-in-evidence of the plaintiff, as PW-1, set out all the assertions in the plaint and testified, further, that

- (i) the family settlement dated 10th July 1997 was indeed executed as per the wishes of Ami Chand, but was of no evidentiary or legal value, as it was unregistered,

- (ii) the plaintiff purchased the share of Defendant 3 in the Palam property for an amount of ₹ 1.20 lakhs, which was paid by the plaintiff to Defendant 3 in March 2006 itself,
- (iii) Defendant 3, however, dishonestly failed to execute the sale documents, in respect of his share in Palam property, in favour of the plaintiff,
- (iv) the assertion of Defendant 3 that, in 2006, the plaintiff and Defendant 3 had exchanged their shares in Property No. 185 and the Palam property was incorrect and was, accordingly, denied,
- (v) the consequent assertion that the plaintiff had, therefore, relinquished his share in Property No. 185 in favour of Defendant 3 and was left with no surviving right in the said property, was also, therefore, incorrect and denied and
- (vi) the *Iqrarnama* dated 13th February 2005, whereunder Defendant 3 claimed to have relinquished his right in Property No. 169 in favour of the children of Defendant 1 was of no value, as it was unregistered and was, even otherwise, not binding on the plaintiff as he was not a party thereto.

11.1.4 PW-1 was cross-examined on 25th April 2013. In his cross-examination, he admitted ignorance of the identities of the tenants residing in Plot No. 185, but claimed to have visited the property and interacted with them. While reasserting his claim that Defendant 3 Chattar Singh had transmitted to the plaintiff the rent collected in respect of the plaintiff's share in Property no. 185 till two years prior to institution of the suit, he admitted not having placed on record any document to support the said assertion. He also acknowledged the documents which were shown to him and exhibited as PW-1/D-1 to be the family settlement, whereunder the suit properties were partitioned.

He also admitted joint purchase of the Palam property by himself, Defendant 2 Attar Singh and Defendant 3 Chhattar Singh. However, he denied having exchanged his share in Property No. 185 in lieu of the share of Defendant 3 in the Palam property. He, however, acknowledged that he had not placed any documentary proof on record relating to payment of ₹ 1.2 lakhs to Defendant 3 Chhattar Singh for purchasing his share in Palam property or of having raised any construction in his share in Property No. 185. He claimed ignorance of whether the children of Defendant 1 Hukam Singh were residing in Property No. 169. He acknowledged not having seen Hukam Singh since 1996.

11.1.5 PW-2 Naveen Sharma, an Officer from District Office, Tata Power Delhi Distribution Ltd, brought the records relating to the electricity connection in Property No. 185. However, this has not been made subject matter of dispute before this Court.

11.2 Defendants' Evidence

11.2.1 Defendants 4 and 3 tendered evidence as DW-1 and DW-2 respectively.

11.2.2 Defendant 4 filed his affidavit in evidence dated 15th July 2013, which he proved in his examination-in-chief on 24th July 2013.

11.2.3 In his affidavit by way of evidence, Defendant 4, deposing as DW-1, asserted execution of the family settlement on 10th July 1997 and its reduction into writing, whereunder Property No. 169 was divided between the plaintiff Mahinder Singh and Defendant 2 Attar

Singh. The affidavit further deposed that Defendant 2 Attar Singh, Defendant 3 Chattar Singh and the plaintiff Mahinder Singh had purchased the Palam property on 24th July 1979 and that, in 2006, Defendant 3 Chattar Singh and the plaintiff exchanged their respective shares in the Palam property and Property No. 185 with each other. Consequently, asserted Defendant 4 (as DW-1), the plaintiff was left with no prevailing interest in Plot No. 185 and Defendant 3 Chattar Singh was left with no prevailing interest in the Palam property. The affidavit further asserted that, on 13th February 2005, Defendant 3 Chattar Singh relinquished his right in Property No. 169 in favour of Defendant 4 and the other two sons of Hukam Singh, namely, Hem Raj and Yogesh.

11.2.4 Defendant 4, as DW-1, was cross-examined on 24th July 2013. In his cross-examination, he reasserted the family settlement dated 10th July 1997 (Ex. PW-1/D-1), stating that it had been executed in his presence, though it did not bear his signature. He pleaded ignorance as to whether the family settlement was registered. He further asserted that Property No. 169 was divided by giving the ground floor to Defendant 3 Chattar Singh and the first floor to Defendant 1 Hukam Singh. He, however, admitted the fact that construction in Property No. 185 was erected by Defendant 2 Attar Singh and the plaintiff Mahinder Singh in 1997-1998 and that the constructed portion was occupied by the tenants. In conclusion, he denied the suggestion that there had been no partition of the suit properties or that the plaintiff Mahinder Singh was entitled to 1/4th share therein.

11.2.5 Defendant 2 Chattar Singh also filed his affidavit dated 8th August 2013 (Ex. DW-2/A) by way of evidence, which he proved in his examination-in-chief on 30th August 2013. The affidavit reiterated

the contents of the written statement and further denied the assertion of the plaintiff that he had purchased the share of Defendant 3 in the Palam property. Rather, the affidavit reasserted the position that there had been an exchange, between the plaintiff and Defendant 3, of their respective shares in Property No. 185 and in the Palam property, following which the plaintiff had no surviving interest in Property No. 185.

11.2.6 Defendant 3, as DW-2, was cross-examined on 30th August 2013. In his cross-examination, DW-2 admitted the fact that the family settlement (Ex. PW-1/D-1) was unregistered. He also deposed that no partition wall has been erected after 10th July 1997, partitioning either of the suit properties. He further asserted that constructions in both portions of Property No. 185 of the plaintiff Mahinder Singh and of Defendant 2 had been made by him and that he was collecting rent from the tenants of the suit properties and paying the rent so collected to the plaintiff and Defendant 2. He denied the assertion, in the plaint, that Ami Chand had given Property no. 185 equally to the plaintiff Mahinder Singh and Defendant 2 Attar Singh during his life time. He also acknowledged that he had transmitted the rent collected from the plaintiff's portion in Property No. 185 to the plaintiff till 2005. He volunteered that the plaintiff Mahinder Singh had not, till that date, repaid, to Defendant 3, the money invested by Defendant 3 in constructing the plaintiff's share of Property No. 185. He denied the suggestion that no such construction had been made by him.

11.2.7 Defendant 3, as DW-2, further acknowledged that there was no written agreement of relinquishment by the plaintiff, of his share in Property No. 185, in favour of Defendant 3 or of relinquishment by

Defendant 3 of his share in the Palam property in favour of the plaintiff. He denied the suggestion that the plaintiff had, in March 2006, purchased the share of Defendant 3 in the Palam property for an amount of ₹ 1.2 lakhs or that he had received any such amount from the plaintiff.

11.2.8 Apropos Property No. 169, however, Defendant 3 admitted that there was no registered document, whereby Defendant 3 had relinquished his share in Property No. 169 in favour of the sons of Hukam Singh. He denied the suggestion that he had not sold his share in the said property in their favour. He reasserted his contention that there had been an exchange of the respective shares of the plaintiff and of himself in Property No. 185 and in the Palam property, with each other, in 2006. He denied the plaintiff's assertion that he was entitled to 1/4th share in the suit properties.

12. The Impugned Judgement

12.1 Consequent to concluding of evidence and completion of arguments, the learned ADJ *vide* the impugned judgment dated 27th February 2019, passed a preliminary decree, partitioning the suit properties amongst the plaintiff and Defendants 1 to 3, holding each of them entitled to 1/4th share in the suit properties.

12.2 The impugned order holds the partition of the suit properties by the family settlement dated 10th July 1997 to be of no legal force or value as the document was unregistered. The learned ADJ has held that, under the Registration Act, 1908, every document partitioning immovable property was required to be registered. For the same reason, the plea of Defendant 3, to the effect that the plaintiff had

relinquished his share in Property No. 185 was also rejected, as every document of relinquishment of immovable property was also required to be registered under the Registration Act. The learned ADJ notes that it was admitted by Defendant 3 as well as Defendant 4, in the evidence recorded before him, that the family settlement dated 10th July 1997 was not registered. He also holds that, as Defendant 1 was untraceable since 1996, he could not have been a party to the family settlement in 1997.

12.3 For both these reasons, the learned ADJ has refused to take cognizance of the alleged family settlement dated 10th July 1997.

12.4 Issue 2 was, therefore, decided against the defendants and in favour of the plaintiff.

12.5 The learned ADJ further rejects the plea of mis-joinder and non-joinder of parties, holding that under Order I Rule 9 of the CPC, no suit could be defeated because either of mis-joinder or non-joinder of parties. That apart, he holds that, in a partition suit, in which Defendant 1 had an interest in the suit properties, the legal heirs of Defendant 1 were not required to be impleaded until a competent court declared Defendant 1 to be dead.

12.6 Following the aforesaid, the learned ADJ has held the plaintiff's right to 1/4th share in the suit properties to be unassailable and has, accordingly, passed the impugned judgment, which is under challenge in the present appeal.

Rival Stands before this Court

13. The present appeal

13.1 The appellant contends, in the appeal, that the impugned order errs in failing to take stock of the partition of the suit properties by the family settlement dated 10th July 1997, the purchase of the Palam property by the plaintiff, Defendant 2 Attar Singh (Appellant 1 before me) and Defendant 3 Chattar Singh and of the subsequent relinquishment, by the plaintiff, of his share in Property No. 185 in 2006, or the relinquishment, by Defendant 3 Chattar Singh, of his share in Property No. 169 in favour of the sons of Defendant 1 Hukam Singh on 13th February 2005. The appeal also questions the correctness of the finding, in the impugned judgment, that the family settlement dated 10th July 1997 or the *Iqrarnama* dated 13th February 2005 were required to be registered under the Registration Act and that, in the absence of such registration, they were of no evidentiary value. In so holding, contends the appeal, the learned ADJ failed to notice that the family settlement and the *Iqrarnama* were duly acted upon by the parties. Besides, the factum of partition of the properties on 10th July 1997, asserts the appeal, was admitted by the plaintiff in cross-examination.

13.2 It is also alleged that the suit of the plaintiff was liable to be dismissed on the ground of misjoinder and non-joinder of parties.

13.3 Arguments were advanced at the Bar by Mr Himanshu Thakur and Mr Surinder Jain, learned Counsel for Appellant 1 (Defendant 2) and Respondent 1 (the plaintiff) respectively. Written submissions were also filed by the respondent.

13.4 Mr Thakur contends that the learned ADJ erred in failing to

accord due credence to the family settlement dated 10th July 1997. He draws attention to the cross-examination of the plaintiff as PW-1 to contend that the execution of the family settlement was admitted. That being so, Mr Thakur contends that, even if it was unregistered, it was binding on the parties.

13.5 Mr. Jain contends, *per contra*, that, as the family settlement was not acted upon by his client, who is not in possession of the properties which, as per the said family settlement, devolved on his client, the family settlement was not binding on the plaintiff.

13.6 In his written submissions filed on behalf of the plaintiff-Respondent 1, Mr Jain contends, at the outset, that as the final decree, dated 29th November 2019, passed in the suit, has not been challenged by the appellant, the present appeal has become infructuous and is liable to be dismissed as such.

13.7 Mr. Jain has, on merits, commended for acceptance the finding, in the impugned order, that, as the family partition dated 10th July 1997 was unregistered, it has no value in the eyes of law. Nor, he submits, was the said partition ever acted upon, contrary to what the appellants contend.

13.8 As such, submits Mr Jain, the learned ADJ was perfectly justified in directing partition of the suit properties equally among the plaintiff and Defendants 1 to 3.

Analysis

14. Points for Determination

14.1 It is important to note, at the very outset, that the plaintiff-Respondent 1 does *not* dispute

- (i) the execution of the family settlement on 10th July 1997, as desired by Ami Chand, and the partition of the suit properties thereby, or
- (ii) the purchase of the Palam property jointly by the plaintiff and Defendants 2 and 3.

However, the plaintiff has not accepted the execution of the *Iqrarnama* dated 13th February 2005.

14.2 The impugned judgment proceeds on the premise that the partition effected on 10th July 1997, *vide* the family settlement, was of no legal consequence, as it was unregistered. Ergo, the learned ADJ has not proceeded to examine the rival contentions with respect to the relinquishment, by the plaintiff, of his share in Property No. 185, or with respect to the *Iqrarnama* dated 13th February 2005.

14.3 The following points, therefore, arise for determination, without prejudice to one another:

- (i) Has the present appeal become infructuous as a consequence of the passing of the final decree dated 29th November 2019 which has not been challenged?
- (ii) Was the family settlement dated 10th July 1997 of no legal consequence, for want of registration? If not, what was the consequence thereof?
- (iii) Is the plaintiff entitled to the relief sought in this appeal?

If not, what order is required to be passed?

15. Decisions on the points that arises for determination, and the reasons therefore:

15.1 Re. Point (i)

15.1.1 The plaintiff (as Respondent 1) contends that, in view of the judgment and decree dated 29th November 2019, which Defendant 2 (Appellant in the present appeal) never chose to challenge, the present appeal has become infructuous and is liable to be dismissed as such.

15.1.2 Section 97 of the Code of Civil Procedure, 1908 (CPC) proscribes a party, who does not challenge the preliminary decree and chooses merely to challenge the final decree, from questioning the correctness of the preliminary decree in the challenge to the final decree. The situation before us is, however, exactly the opposite. Defendant 2 in the suit has challenged the preliminary decree passed by the learned ADJ, but has not chosen to appeal against the final decree, though the suit was finally decreed even before this appeal was finally heard. How, in such circumstances, does the law pan out?

15.1.3 The issue is no longer *res integra*, as a Full Bench of the High Court of Rajasthan has addressed precisely this question in ***Haridas v. Banshidhar***¹. In paras 14 and 15 of the report in that case², the Full Bench observed and as under:

“14. ... The question, whether an appeal from a preliminary decree would be incompetent if a final decree is made before the appeal from the preliminary decree is presented has been considered by many High Courts of different States in India and

¹ AIR 1962 Raj 57

² As reported in 1961 OnLine Raj 37

the reasons given in those cases would be helpful in determining the question which arises in the present case. Two situations may arise in the case of an appeal from an order of remand just as they arise in the case of a preliminary decree. *The first situation would be where an appeal is preferred against the preliminary decree or the order of remand before the passing of the final decree and, in that case, the question would arise whether the passing of the final decree affects the maintainability of the appeal (already filed) from the order of remand or the preliminary decree.* The second situation would arise where an appeal against a preliminary decree or an order of remand is preferred after the final decree has been passed in the suit. Now, in the case of an appeal from a preliminary decree in the first situation most of the High Courts have held that the passing of a final decree subsequent to the institution of the appeal would not affect the maintainability of the appeal. Reference in this connection may be made to **Kanhaiyalal v. Tribeni Sahai**³, **Ramian v. Veerappudian**⁴, **Gokul Kalwar v. Chander Sekhar**⁵, **Madhu Sudan Kundu v. Chhahmaddin Ahammad**⁶, **Gurmukh Singh v. Malik Shivram**⁷, **Basawant Mallappa Neje v. Kallappa Virbhadrappa Kotiwale**⁸, **Madhorao Paikaji v. Ekanathrao Balappa**⁹ and **Uppala Subbaiah v. Chitralla Narsimloo**¹⁰. The reasoning adopted in all these cases was that preliminary decree had an independent existence and it could not be attacked upon in an appeal from the final decree. *The final decree was dependent upon the preliminary decree and if the preliminary decree was set aside, the final decree would also fall to the ground.* Even in the second situation, i.e. where an appeal against the preliminary decree was filed after the passing of the final decree it was held in **Ramien v. Veerappudian**¹¹ case that the right of a party to appeal against a preliminary decree was not affected by the subsequent passing of the final decree. The same view was followed in **Lakshmi v. Marudevi**¹² and **Wajihunnissa v. Bankebe hari Singh**¹³. In **Gurmukh Singh's**⁷ case it was held that “the preliminary decree has an independent existence and as the person aggrieved by it is bound to appeal from it, that right cannot be taken away by a final decree being passed either before or after the presentation of an appeal from the preliminary decree”.

15. Learned counsel for the respondent has referred to **Nanibala Dasi v. Ichhamoyee Dasi**¹⁴ in which it was held that an appeal against a preliminary decree filed on a date subsequent

³ AIR 1914 Allh., 380

⁴ AIR 1914 Madras 473 (2)

⁵ AIR 1926 Allh. 665

⁶ AIR 1928 Cal., 167

⁷ (AIR 1935 Lahore 482

⁸ AIR 1938 Bom. 222

⁹ AIR 1948 Nag 56

¹⁰ AIR 1956 Hyd. 161

¹¹ AIR 1914 Madras 473 (2)

¹² AIR 1915 Mad. 197

¹³ AIR 1930 Patna 177

¹⁴ AIR 1925 Cal 218

to the date of the final decree was barred, but in that case the appeal from the preliminary decree was allowed to be converted into an appeal from final decree. Moreover, that decision cannot be taken to be correct in view of the later Full Bench decision of that Court in **Taleb Ali v. Abdul Aziz**¹⁵. In that case, the question which was referred to the Full Bench was whether an appeal from a preliminary decree was incompetent if a final decree was made before the appeal was presented. That question was answered in the negative. It was observed by learned Rankin, C.J. that it was altogether unreasonable to treat a preliminary decree as a mere interlocutory order whose force was spent when the suit was disposed of. He further proceeded to observe that *“In my judgment the final decree is, in its nature, dependent and subordinate because it is a decree which has been passed as a result of proceedings directed and controlled by the preliminary decree and based thereon.....When a preliminary decree is set aside the final decree is superseded whether the appeal was brought before or after the passing of the final decree and that in my judgment an appellate court when setting aside or varying a preliminary decree can, and indeed should, give direction for the setting aside or varying of the final decree if the existence of the final decree is brought to its notice as in all cases it ought to be”*.

(Emphasis supplied)

15.1.4 Though the Full Bench of the High Court of Calcutta thus held, in **Taleb Ali**¹⁵, that, even if the challenge before the appellate court was only against the preliminary decree, the appellate court, if it chose to set aside the preliminary decree, was also required to set aside the final decree, which was dependent on the preliminary decree, that position may be questionable in view of para 7 of the judgment of the Supreme Court in **Sital Parshad v. Kishori Lal**¹⁶, in which it was held thus:

“7. There can in our opinion be no doubt that if in appeal the preliminary decree is reversed, the final decree must fall to the ground for there is no preliminary decree thereafter in support of it. It is not necessary in such a case for the defendant to go to the court passing the final decree and ask it to set aside the final decree. Even if the defendant does not make an application to the court for setting aside the final decree within three years because the preliminary decree has been reversed, the decree-holder cannot get the right to execute the final decree which has no preliminary

¹⁵ AIR 1929 Cal 689

¹⁶ AIR 1967 SC 1236

decree in support of it. If an execution petition is made on such a final decree even though more than three years after the decree in appeal has been reversed, the defendant has simply to ask the court where the execution petition is made to refuse to execute the decree on the ground that the preliminary decree in support of it has been set aside. It seems to us that in such a case it is the duty of the executing court to take note of the fact that the preliminary decree in support of the final decree has been reversed and it should refuse to execute the final decree even though the fact is brought to its notice more than three years after the decree in appeal reversing the preliminary decree. In such a case in our opinion no question of limitation arises.”

Thus, according to the Supreme Court, the setting aside of the preliminary decree would *ipso facto* result in setting aside of the final decree, even without an order of the Court to that effect, and it would not be open to the plaintiff, in whose favour the preliminary decree was passed, to seek execution of the final decree merely on the ground that no formal order, setting aside the final decree, had been issued by any Court. The executing Court would only have to be intimated that the preliminary decree had been set aside, for it to refuse to execute the final decree, which perished with the preliminary decree by operation of law.

15.1.5 Point (i), which arises for determination has, therefore, to be decided in the negative, by holding that the present appeal has not become infructuous merely because of the passing of the final decree dated 29th November 2019.

15.2 Re. Point (ii)

15.2.1 The next issue which arises for consideration is the effect of the family settlement dated 10th July 1997, which was admittedly executed as per the wishes of Ami Chand and according to which Property No 169 was distributed between Defendants 1 and 3 and

Property No 185 was distributed between the plaintiff and Defendant 2. The impugned judgment holds the family settlement to be devoid of legal force and effect as it was not registered, as required by Section 17(i)(b)¹⁷ read with Section 49¹⁸ of the Registration Act.

15.2.2 This controversy, too, is no longer *res integra*. In paras 9.4 and 9.5 of the report in *Thulasidhara v. Narayanappa*¹⁹, the Supreme Court holds thus:

“9.4. It is required to be noted that the deed dated 23-4-1971, under which the suit property had gone/devolved in favour of Krishnappa, was reduced in writing before the panchayat and panchas, and the same was signed by the village people/panchayat people and all the members of the family including even the plaintiff. Though the plaintiff disputed that the partition was not reduced in writing in the form of document Ext. D-4, on considering the entire evidence on record and even the deposition of the plaintiff (cross-examination), he has specifically admitted that the oral partition had taken place in the year 1971. He has also admitted that he has got the share which tallies with the document dated 23-4-1971 (Ext. D-4). Execution of the document/partition deed/Palupatta dated 23-4-1971 has been established and proved by examining different witnesses. The High Court has refused to look into the said document and/or consider document dated 23-4-1971 (Ext. D-4) solely on the ground that it requires registration and therefore as it is unregistered, the same cannot be looked into. However, as observed by this Court in *Kale v. Director of Consolidation*²⁰ that such a family settlement, though not registered, would operate as a complete estoppel against the parties to such a family settlement. In the aforesaid decision, this Court considered its earlier decision in *S. Shanmugam Pillai v. K.*

¹⁷ 17. **Documents of which registration is compulsory.**—(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been examined on or after the date on which, Act XVI of 1864, or the Indian Registration Act, 1866 (20 of 1866), or the Indian Registration Act, 1871 (8 of 1871), or the Indian Registration Act, 1877 (3 of 1877), or this Act came or comes into force, namely—

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

¹⁸ 49. **Effect of non-registration of documents required to be registered.**—No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall—

(a) affect any immovable property comprised therein, or
(b) confer any power to adopt, or
(c) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered:

¹⁹ (2019) 6 SCC 409

²⁰ (1976) 3 SCC 119

Shanmugam Pillai²¹ in which it was observed as under: (***S. Shanmugam Pillai***²¹ case SCC pp. 319 & 321, paras 13 & 22)

“13. Equitable, principles such as estoppel, election, family settlement, etc. are not mere technical rules of evidence. They have an important purpose to serve in the administration of justice. The ultimate aim of the law is to secure justice. In the recent times in order to render justice between the parties, courts have been liberally relying on those principles. We would hesitate to narrow down their scope.

22. As observed by this Court in ***T.V.R. Subbu Chetty's Family Charities v. M. Raghava Mudaliar***²² case, that if a person having full knowledge of his right as a possible reversioner enters into a transaction which settles his claim as well as the claim of the opponents at the relevant time, he cannot be permitted to go back on that agreement when reversion actually falls open.”

9.5. As held by this Court in ***Subraya M.N. v. Vittala M.N.***²³, even without registration a written document of family settlement/family arrangement can be used as corroborative evidence as explaining the arrangement made thereunder and conduct of the parties. In the present case, as observed hereinabove, even the plaintiff has also categorically admitted that the oral partition had taken place on 23-4-1971 and he also admitted that 3 to 4 panchayat people were also present. However, according to him, the same was not reduced in writing. Therefore, even accepting the case of the plaintiff that there was an oral partition on 23-4-1971, the document, Ext. D-4 dated 23-4-1971, to which he is also the signatory and all other family members are signatory, can be said to be a list of properties partitioned. Everybody got right/share as per the oral partition/partition. Therefore, the same even can be used as corroborative evidence as explaining the arrangement made thereunder and conduct of the parties. Therefore, in the facts and circumstances of the case, the High Court has committed a grave/manifest error in not looking into and/or not considering the document Ext. D-4 dated 23-4-1971.”

15.2.3 Thus, the position, in law, is that a document partitioning immovable property, even if unregistered, operates as estoppel against the signatories to the document. The plaintiff, as a signatory to the family settlement dated 10th July 1997, whereby the suit properties

²¹ (1973) 2 SCC 312

²² AIR 1961 SC 797

²³ (2016) 8 SCC 705 : (2016) 4 SCC (Civ) 163

were divided amongst the plaintiff and Defendants 1 to 3, is estopped from disputing the said document, or questioning its force and effect. The document, therefore, evidences the decision of Ami Chand to partition the suit properties, with Property No 169 going to Defendants 1 and 3, and Property No 185 going to the plaintiff and Defendant 2. The plaintiff, therefore, would have no right in Property No 169, his right being limited to one half of Property No 185. Admittedly, the plaintiff was in possession and ownership of one half of Property No 185, consequent on the devolution of properties in terms of the family settlement dated 10th July 1997. The claim of the plaintiff-Respondent 1, in the suit, for partition of the suit properties among the plaintiff and Defendants 1 to 3 cannot, therefore, sustain.

15.2.4 Para 9 of *Kale*²⁰ provides yet another reason as to why the plaintiff cannot maintain the claims in the suit. It reads as under:

“9. Before dealing with the respective contentions put forward by the parties, we would like to discuss in general the effect and value of family arrangements entered into between the parties with a view to resolving disputes once for all. By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made. In this connection, Kerr in his valuable treatise *Kerr on Fraud* at p. 364 makes the following pertinent observations regarding the nature of the family arrangement which may be extracted thus:

“The principles which apply to the case of ordinary compromise between strangers do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend.”

The object of the arrangement is to protect the family from long-drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of

the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain and uphold the unity and homogeneity of the family which ultimately results in the unification of the society and, therefore, of the entire country, is the prime need of the hour. A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is undoubtedly a milestone in the administration of social justice. That is why the term “family” has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successionis so that future disputes are sealed for ever and the family instead of fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits. The law in England on this point is almost the same. In *Halsbury's Laws of England*, Vol. 17, Third Edition, at pp. 215-216, the following apt observations regarding the essentials of the family settlement and the principles governing the existence of the same are made:

“A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term “family arrangement” is applied.

Family arrangements are governed by principles which are not applicable to dealings between strangers. The court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements.”

15.2.5 Besides underscoring the importance of maintaining adherence to family settlements as arrangements and instruments aimed at maintaining peace and harmony in the family institution, the afore-extracted passage from *Kale*²⁰ also holds that, a party who has derived

benefits from the family settlement is estopped from questioning it, or seeking reliefs which would undo the family settlement. It is an admitted position, pleaded in the plaint itself, that the plaintiff-Respondent 1 was receiving rent from the tenants who were in occupation of the plaintiff share in Property No 185, which devolved on him as per the family settlement dated 10th July 1997. Though, for other reasons, Defendant 3 discontinued transmitting, to the plaintiff, the rent received from the tenants in occupation of the said portion of Property No 185, the plaintiff, having received the rent for a certain period of time cannot, now, seek to question the enforceability of the family settlement, or seek partition of the properties which already stand partitioned in terms of the said family settlement.

15.2.6 Point (ii), framed hereinabove, therefore, has to be answered in the negative. It is held that the plaintiff was estopped from questioning the family settlement dated 10th July 1997, in terms of which the suit property is already stand partitioned among the plaintiff and Defendants 1 to 3.

15.2.7 Suppression of Fact: I am constrained to observe that there is complete suppression and misstatement, in the plaint, regarding the family settlement dated 10th July 1997. There is a mere reference, in para-3 of the plaint, that “late Ami Chand orally gave property no. 185, measuring 100 Sq. yards village Haiderpur, Delhi-11042 only the plaintiff and defendant no. 2 i.e. 50 Sq. yards each but as no Regd.Sale Document or any WILL executed by Late Ami Chand in favour of plaintiff and defendant no. 2, as such, plaintiff is claiming only his 1/4th share in property no. 185, measuring 100 sq. yards, Village Haiderpur, Delhi-110042, in accordance with the law of inheritance.”

On the defendants, in their written statement, drawing attention to the family settlement dated 10th July 1997 and the partition of the suit properties thereby, the affidavit-in-evidence of the plaintiff, as PW-1, again, misleadingly avers that “the family settlement dated 10/07/1997 was as per the wishes of Late Ami Chand but the said family settlement dated 10/07/1997 was not Regd. And as such having no value.” The existence of a written family settlement is, thus, not explicitly admitted even in the affidavit-in-evidence of the plaintiff as PW-1. When cross-examined on the point, the plaintiff, as PW-1, stated, thus:

“It is correct that we all four brother set together to arrive at a family settlement regarding the suit properties, however, I do not remember whether it was 10.07.1997 on that day.”

Thus, even in cross-examination, the plaintiff, as PW-1, did not choose to come clean regarding the execution of the written family settlement on 10th July 1997. It was only immediately after the recording of the above extracted statement, when he was shown the actual document dated 10th July 1997, that the plaintiff, finding himself in a *cul de sac* as it were, acknowledged the execution of the document and his signature thereon, at not one but at two places. The plaintiff was, therefore, economical with the truth not only at the time of filing of the plaint, but also in his affidavit-in-evidence and, thereafter, in cross-examination.

15.2.8 The attitude of the plaintiff directly attracts the following censorious observations of the Supreme Court in ***S.P. Chengalvaraya Naidu v. Jagannath***²⁴:

“The principle of “finality of litigation” cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for

²⁴ (1994) 1 SCC 1

imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.”

15.2.9 The plaintiff is, therefore, disentitled to the reliefs sought in the suit both on merits as well as in equity, as the plaintiff has approached the Court with unclean hands.

15.3 Re. Point (iii)

15.3.1 In the circumstances, the suit instituted by the plaintiff is liable to be dismissed.

Conclusion

16. The impugned order dated 27th February 2019 passed by the learned ADJ is, therefore quashed and set aside. CS 578024/2016 filed by the plaintiff (Respondent 1) stands dismissed. The appeal stands allowed accordingly, with no orders as to costs.

C. HARI SHANKAR, J

APRIL 6, 2023

rb