

In the High Court of Punjab and Haryana, at Chandigarh

1. Regular Second Appeal No. 4733 of 2012 (O&M)

Indra Vashist
... Appellant(s)

Versus

Krishan Kumar Vashist and Others
... Respondent(s)

2. Regular Second Appeal No. 4737 of 2012 (O&M)

Indra Vashist
... Appellant(s)

Versus

Ganga Sarup Vashist and Others
... Respondent(s)

3. Regular Second Appeal No. 5186 of 2012 (O&M)

Krishan Kumar Vashist
... Appellant(s)

Versus

Smt. Beena Jain and Others
... Respondent(s)

4. Regular Second Appeal No. 5267 of 2012 (O&M)

Indra Vashist
... Appellant(s)

Versus

Hemant Kumar Vashist and Others
... Respondent(s)

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5. Regular Second Appeal No. 1382 of 2013 (O&M)

Hemant Kumar Vashist
... Appellant(s)

Versus

Smt. Beena Jain and Others
... Respondent(s)

6. Regular Second Appeal No. 1606 of 2013 (O&M)

Hemant Kumar Vashist
... Appellant(s)

Versus

Smt. Beena Jain and Others
... Respondent(s)

AND

7. Regular Second Appeal No. 2313 of 2013 (O&M)

Hemant Kumar Vashist
... Appellant(s)

Versus

Smt. Beena Jain and Others
... Respondent(s)

**RESERVED ON: 07.03.2024
PRONOUNCED ON: 14.03.2024**

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Aashish Chopra, Senior Advocate
with Ms. Rupa Pathania, Advocate
for the appellant(s) (In RSA-4733-2012, RSA-4737-2012
and RSA-5267-2012).

Mr. Sudhir Aggarwal, Advocate
for the appellant (In RSA-5186-2012).

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Mr. Sanjay Vij, Advocate
for the appellant (In RSA-1382-2013, RSA-1606-2013
and RSA-2313-2013).

Mr. Aditya Jain and Mr. Rahul Vohra, Advocates
for proforma respondent No.1 (In RSA-5186-2012,
RSA-1382-2013, RSA-1606-2013 and RSA-2313-2013)
and for proforma respondent No.2 (In RSA-4733-2012,
RSA-4737-2012 and RSA-5267-2012).

Anil Kshetarpal, J.

1. Brief Facts of the Case

1.1 With the consent of the learned counsel representing the parties, a batch of seven regular second appeals filed to challenge the common judgment passed by the First Appellate Court shall stand disposed of by this order.

1.2 Smt. Indra Vashist (defendant No.2 in the suit) has filed Regular Second Appeals No. 4733, 4737 and 5267 of 2012. Krishan Kumar (plaintiff No.1) has filed Regular Second Appeals No. 5186 and 1382 of 2012, whereas Hemant Kumar (plaintiff No.2) has filed Regular Second Appeals No. 1606 and 2313 of 2013.

1.3 The parties, hereinafter, shall be referred to by their status in the suit. There are three different sets of claims which are required to be explained in order to understand the controversy involved in the present case.

First Set of Claims

1.4 Krishan Kumar and Hemant Kumar (plaintiff No.1 and 2) filed a suit for decree of declaration to the effect that the alleged Will dated

07.07.1993 is void *ab initio* and nullity and the property between all the

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members of the family was distributed as per the memorandum of family settlement dated 23.12.1993 and defendant No.,1 (Smt. Beena Jain) has no right, title or interest in the property. The plaintiffs also prayed for decree of permanent injunction restraining defendant No.1 to 3 from alienating the suit property.

1.5 In the aforesaid suit, Smt. Beena Jain was defendant No.1 and Smt. Indra Vashist was defendant No.2 were the main contesting defendants, although there were as many as ten defendants including Sh.Ganga Sarup.

Second Set of Claims

1.6 Smt. Beena Jain (defendant No.1) claims half share in the plot measuring 10 kanals 15 marlas comprised in khasra N o. 428.

Third Set of Claims

1.7 Smt. Indra Vashist (defendant No.2) who claims that on the basis of the Will dated 07.07.1996, executed by her mother, Smt. Shanti Devi, she is the exclusive owner of the property left behind by her mother.

1.8 Except Smt. Beena Jain, defendant No.1, late Sh. Ganga Sarup Vashist is the common ancestor of the remaining parties. Smt. Shanti Devi was his wife who died on 01.01.1994. They were blessed with three sons, namely Krishan Kumar, Hemant Kumar and Davinder Kumar and seven daughters including Smt.Indra Vashist.

1.9 On 11.11.1971, Smt.Shanti Devi and defendant No.1 Smt.Beena Jain have jointly purchased a plot measuring 10 kanals and 15 marlas comprised in khasra No. 428, situated in the revenue estate of Sohna, Tehsil and District Gurgaon. Thereafter, on 17.01.1972, they formed a

partnership to construct a movie theatre. As per the partnership deed, it was

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agreed that a movie theatre 'Dev Chitralok' shall be constructed and the business of the partnership firm shall include cinema house exhibition, running the attached restaurant or any other business decided upon by the partners from time to time, in and around other places. Both the partners were entitled to 50% share each. On 31.12.1982, the partnership firm was dissolved between the parties. Clause No. (2), (3), (4) and (5) of the Dissolution Deed are extracted as under:-

“2. That the account of the assets and liabilities of the partnership have been taken and duly audited and a final Profit and Loss account as well as final Balance Sheet ins been prepared after mutually assessing the Stock, Goodwill, Actionable Claima, and all other assets, Movable and Immovable and undertaking of the firm, which has been signed in duplicate by each of the partners, as on 31.10.1982. The accounts of the assets and liabilities of the partnership determined as stated above FORM Annexure 1 of this Dissolution Deed. The parties have agreed that the said accounts are final and binding on all the parties hereto and shall not be open to question.

3. That the assets and liabilities as per Balance Sheet along with the Goodwill of the business have been allotted and assigned to SAT: SHANTI DEVI VASHIST W/O SURI GANGA SWAROOP, the FIRST PARTY, who has agreed to discharge all the said liabilities of the fire whether Past, Present or Future.

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Party No: SECOND declares that on receipt of the amount due to her hereunder she shall cease to have any interest whatsoever in any of the assets of the firm made over to Party No: FIRST as recorded herein. Party No: FIRST hereby indemnifies Party Nos SECOND from all liabilities, obligations, statutory or Contractual, Past, Present and Future and in particular all liabilities Past. Present or Future towards Income-tax, Sales Tax of any other tax, duty, cess or fee.

4. *Party No. SECOND is entitled to be paid an amount of 2. 3,85,201-23 in full and final settlement of her share in the assets of the firm as on 31.10.1982.*

XXXX XXXX XXXX XXXX XXXX

5. *Party No: SECOND hereby releases all the accounts books, documents and other relevant papers of the partnership firm to the sole custody and possession of Party No: FIRST. Both the partners i.e. Party No: FIRST and Party No: SECOND hereby expressly declare that the present firm M/S DEV CHITERLOK at SOHNA Distt: Gurgaon (Haryana) has been dissolved and has been taken over by Party M FIRST, with all its assets and liabilities, with effect from 31.12.1982 (Thirty First day of October, nineteen hundred eighty two)."*

1.10 Subsequently, Smt. Shanti Devi inducted her three sons, namely Davinder Kumar (defendant No.3), Krishan Kumar (plaintiff No.1) and Hemant Kumar (plaintiff No.2) in the partnership and continued running

their movie theatre. During the lifetime of Smt.Shanti Devi, a memorandum

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of family settlement was signed by Sh.Ganga Sarup, Smt. Shanti Devi, Davinder Kumar, Krishan Vashist and Hemant Vashist. An oral family settlement was reduced into writing in the form of memorandum of family settlement and it was decided that the property of movie theatre, namely 'Dev Chitralok', located in the revenue estate of Sohna, Tehsil and District Gurgaon, which was previously owned Smt.Shanti Devi but later on become property of the partnership firm consisting of Smt. Shanti Devi, Davinder Kumar, Krishan Kumar and Hemant Kumar would be sold. It was agreed that Davinder Kumar, Krishan Kumar and Hemant Kumar shall be entitled to receive ₹10,00,000/- each upon the sale of the property (i.e. the theatre), whereas Smt.Shanti Devi would handover the balance sale price to Ganga Sarup who would then distribute ₹1,00,000/- each to his six married daughters. Thereafter, out of the remaining amount, he will marry his seventh daughter Kumari Indra Vashist. After receiving ₹10,00,000/- each, none of her son would have any right, title or interest in the remaining amount.

1.11 Thereafter, Davinder Kumar, Krishan Kumar and Hemant Kumar filed a civil suit against Sh. Ganga Sarup, their father on the basis of memorandum of family settlement dated 23.12.1993. In the aforesaid suit, Ganga Sarup appeared and admitted the claim of the plaintiffs i.e. his three sons resulting in the judgment and decree dated 08.03.1994. On 30.04.1994, Krishan Kumar, his wife and Hemant Kumar filed another civil suit for the grant of decree of declaration that Krishan Kumar (plaintiff No.1) and Hemant Kumar (plaintiff No.2) are the owners in possession of the land

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measuring 1 kanal comprised in khasra No. 3800/24/1700/33 situated in village Gurugram and mutation of the aforesaid land in the name of Smt. Indra Vashist is illegal. The suit was filed against Smt. Indra and Davinder Kumar. While contesting the suit, Smt. Indra and Davinder Kumar claimed that Smt. Shanti Devi had bequeathed the property in favour of Smt. Indra by virtue of will dated 07.07.1993. The suit was decreed by the Trial Court vide judgment dated 31.07.2003 which in appeal was reversed by the First Appellate Court vide judgment and decree dated 30.04.2005. It has been stated by the learned counsel representing the parties that the regular second appeal against the aforesaid judgment is pending in this Court.

1.12 On 08.04.1994, Krishan Kumar and Hemant Kumar filed yet another civil suit against Smt. Beena Jain and others for the grant of decree of declaration that the alleged Will dated 07.07.1993, and consequent mutation No. 6507 are illegal, null and void and not binding on their rights and the suit property described in para No. 2 of the plaint is liable to be disposed of only in accordance with the family settlement, which was reduced into writing on 23.12.1993 and defendant No.1 has no right, title or interest on any part of the suit property with a consequential relief of permanent injunction restraining defendant No.1 to 3 from alienating the suit land. Defendant No.1-Smt. Beena Jain filed a counter-claim on 26.04.1995. She prayed for the grant of decree of partition of the property on which the movie theatre had been constructed by claiming 50% share. Defendant No.2-Smt. Indra Vashist while filing the written statement claimed that the

Will dated 05.12.1993, is a forged and fabricated instrument and she is the

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exclusive owner of the property by virtue of the Will dated 07.07.1993.

1.13 Defendant No.4 to 8 and 10 filed their separate written statement claiming that Smt. Shanti Devi executed a Will on 05.12.1993, in favour of defendant No.10 i.e. Sh. Ganga Sarup (her husband) and the dispute between the family members was settled by virtue of an oral family settlement which was later on reduced into writing on 23.12.1993.

2. Summary of Findings Recorded by the Trial Court

2.1 The dissolution of the partnership dated 31.12.1982 does not result in divesting Smt. Beena Jain with her 50% share in the suit property i.e. the plot underneath the movie theatre. The plot continues to be owned by Smt.Shanti Devi and Smt. Beena Jain in equal share and therefore, she has 50% share in the aforesaid property.

2.2 A preliminary decree for partition was passed in favour of Smt. Beena Jain by declaring her to be the owner of 50% share. Neither the memorandum of family settlement is signed by defendant No.2 and 4 to 9, nor they are party to the civil suit decided on 08.03.1994, hence, the same is not binding on their rights. Moreover, Smt.Shanti Devi was the exclusive owner of 50% share of the suit property and the same could not be transferred without any registered instrument. It was also held that the genuineness of the Will dated 07.07.1993, has already been decided by the Additional District Judge vide judgment dated 30.04.2005 (Ex.PX). Hence, Smt.Indra Vashist is entitled to 50% share in the movie theatre.

3. Reasons Recorded by the First Appellate Court

3.1 As many as three first appeals were filed, two by the plaintiffs

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and one by the defendants. While modifying the judgment and decree passed by the Trial Court, the First Appellate Court has recorded the following reasons:-

- I) Smt. Beena Jain is the owner of 50% of the plot underneath the movie theatre because in the revenue record, the property continues to be recorded as 'joint' between Smt. Shanti Devi and Smt. Beena Jain.
- II) The dissolution deed (Ex.PW.9/B), dated 31.12.1982 included the property of partnership, however, it does not affect the rights of Smt. Beena Jain and Smt. Shanti Devi as the plot was not the property of the partnership firm. The omission to include 50% share in the plot underneath movie theatre in the wealth tax return of Smt.Beena Jain does not result in divesting her of title in the property.
- III) Though defendant No.2 was not given an opportunity to file reply to the counter claim filed by defendant No.1, however, the correctness of an interlocutory order passed by the Trial Court has not been challenged.
- IV) The correctness of the Will dated 07.07.1993, has already been upheld by the Additional District Judge (the First Appellate Court) in the judgment dated 30.04.2005, against which a regular second appeal is pending.
- V) The memorandum of family settlement does not require registration and the same has been acknowledged to be

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correct in a consent judgment and decree passed on 08.03.1994.

VI) Ultimately, defendant No.1 (Smt. Beena Jain) was declared owner of one half share in the land measuring 10 kanals and 15 marlas. Defendant No.2 (Smt. Indra Vashisht) is not entitled to any share in the movie theatre.

VII) The correctness of the family settlement was also upheld by the First Appellate Court.

4. Arguments put forth by the learned counsel representing the parties

4.1 Challenging the correctness of the aforesaid judgment of the First Appellate Court, these seven appeals as already noticed have been filed by the plaintiffs and the defendants.

4.2 Heard the learned counsel representing the parties at length and with their able assistance, perused the paper-book along with the lower Courts' requisitioned record.

4.3 The learned counsel representing Smt. Indra Vashist has submitted that the correctness of the Will dated 07.07.1993, has been upheld in the separate civil proceedings. Smt.Indra Vashist is not a party to either the family settlement or to the Civil Court's judgment and decree dated 08.03.1994. It is evident that the family settlement is not in the form of a memorandum and hence, it necessitates registration.

4.4 Per contra, the learned counsels representing Krishan Kumar and Hemant Kumar contend that the plot in question became the partnership

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property on 17.01.1972 and on 31.10.1982, the same vested in the dissolved partnership firm which was reconstituted with Smt. Shanti Devi, Davinder Kumar, Hemant Kumar and Krishan Kumar. After the year 1982, Smt. Beena Jain has never claimed her share in the property till filing of the counter claim in the year 1995. Smt. Indra Vashist has failed to prove the Will dated 07.07.1993 as no attesting witness has been examined to prove the authenticity of the Will

4.5 The learned counsel representing Smt. Beena Jain has contended that the judgments passed by the First Appellate Court require no interference. He vehemently supported the reasons given by the First Appellate Court.

5. Issues framed by this Court and discussion

5.1 Keeping in view the aforesaid facts, this Court is of the considered view that the following issues require adjudication:-

- I) Whether the plot measuring 10 kanals and 15 marlas which was jointly purchased on 11.11.1971 became the property of the partnership firm?
- II) Whether the settlement dated 23.12.1993 is a memorandum of family settlement and hence, binding on all the family members with respect to the suit property?
- III) Whether Smt. Shanti Devi had bequeathed her share in favour of Smt. Indra Vashist (defendant No.2) by virtue of testamentary disposition dated 07.07.1993?

First Issue

With regard to the first issue, it is important to note the

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following facts:-

- a) On 11.11.1971, Smt. Shanti Devi and Smt. Beena Jain jointly purchased a plot measuring 10 kanals and 15 marlas for a sum of ₹20,000/-.
- b) On 07.01.1972, both the aforesaid co-owners constituted a partnership firm in the name of 'Dev Chitralok' to construct a movie theatre and a restaurant on the aforesaid parcel of the land. The shares of each partner in the profits and losses were kept 50:50.
- c) It was agreed between them that the partners shall invest more capital according to the requirement.

5.3 As per the deed of dissolution dated 31.12.1982, the partnership firm was dissolved. The assets of the firm including the stocks, goodwill, actionable claim and all other assets including movable and immovable property were settled. It was agreed that the assets of the firm will vest in Smt. Shanti Devi and Smt. Beena Jain has been paid ₹3,85,201.23 in lieu of assets. It was further provided that the assets of the dissolved firm have been taken over by Smt. Shanti Devi with all their assets and liabilities. Ex.PW.9/C is the Wealth Tax Return of Smt. Beena Jain for the year 1975-76. In the details of the movable assets, she had shown investments in Dev Cinema, Sohna to the extent of ₹1,26,657.33. In the note appended, it was declared that the assessee has no other assets i.e. movable or immovable. Hence, it is evident that Smt. Beena Jain on 31.03.1975 treated that the parcel of land jointly purchased by her with Smt. Shanti Devi is the property

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of the partnership firm. Smt. Beena Jain has not stepped into the witness box. Her son, namely Dev Ashish Jain as her attorney appeared. He claimed that his mother is suffering from abnormal blood pressure, diabetes and other diseases. He admits that the cinema hall is being run by a new partnership firm and his mother never asked for any share in the cinema or the plot upto the year 1995. She has not reflected the property in her books/returns. She has never asked for any rent for the plot. She has never paid any tax for the aforesaid property. The firm was dissolved in the year 1982. Except the counter claim filed in the pending suit on 26.04.1995, Smt.Beena Jain never claimed the property in dispute.

5.4 As already noticed, Smt. Beena Jain has not stepped into the witness box. Her attorney can only depose as per the power of attorney executed by her. Smt. Beena Jain was a necessary witness to prove her counter claim. The plaintiffs as well as defendant No.2 to 10 have been deprived of an opportunity to cross-examine her. In these circumstances, an adverse inference is required to be drawn against her. Hence, she has failed to prove her counter claim for partition of the property.

5.5 The First Appellate Court has erred in placing reliance upon the revenue record wherein the property continues to be reflected as 'joint'. The evidentiary value of revenue record carries a rebuttable presumption. In this case, there are several documents and events which conclusively prove that upon formation of the partnership firm on 17.01.1992, the joint property became the property of the partnership firm and upon the dissolution of the firm on 31.12.1982, the property became the exclusive property of Smt.

Shanti Devi, who subsequently constituted a new partnership firm on

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19.02.1983 in which she inducted Davinder Kumar, Hemant Kumar and Krishan Kumar, her three sons, as the partners. Thus, there were four partners of the firm including Smt. Shanti Devi. Thereafter, the property continued to be the property of the partnership firm. This conclusion gets support from the reading of the memorandum of family settlement. In the aforesaid family settlement, it has been settled that the cinema hall is the property of the newly constituted partnership firm and it shall be apportioned in accordance with the aforesaid settlement.

5.6 The First Appellate Court has erred in overlooking the specific recitals in the dissolution deed dated 31.12.1982, which are admitted by the parties. In the aforesaid dissolution deed, which has been reproduced, it is clearly stipulated that the accounts of all the assets of the firm including the movable and immovable assets have been settled. Smt.Beena Jain had invested only ₹10,000/- for the purchase of a plot but she must have further spent ₹1,16,653/- in the construction of the building, hence, she was paid ₹3,85,201.23 as full and final settlement in lieu of her rights in the assets of the firm. In view of the foregoing discussion, it is evident that both the Courts below have erred in recording a finding to the contrary and hence, the same is set aside.

5.7 The Supreme Court in *Addanki Narayanappa and Another vs. Bhaskara Krishtappa (dead) through his heir legal heirs and Others AIR 1966 SC 1300* held that the whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever property

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is brought in would cease to be the trading asset of the person who brought it in. After the assets are included in the firm they become the trading assets of the partnership. In this case, it has been noticed that no evidence has been produced by Smt.Beena Jain to prove that the firm owned any other immovable property except a movie theatre which was constructed on the plot in question. In these circumstances, it is evident that the property was brought in by both the partners who were the joint owners as their capital contribution in the partnership firm. Once the property is included in a partnership firm, it ceases to be the property of individuals. They cannot claim any right, title or interest in the property of the partnership firm. The property after becoming the part of the partnership firm, has to be applied as per the dissolution deed.

Second Issue

5.8 The second issue is with regard to the effect of family settlement which was later on acknowledged in a Court decree on 08.03.1994 and requirement of its registration. Subsequently the civil decree dated 08.03.1994, was registered by the parties.

5.9 The argument of the learned counsel representing Smt. Indra Vashist that the appellant was not a party has no substance because originally the property was a self acquired property of Smt.Shanti who subsequently brought the property in the partnership firm. On 31.12.1982, upon the dissolution of earlier partnership, a new partnership firm was constituted on 19.02.1983. The property again continued to vest in the new partnership firm. Smt. Indra Vashist has no pre-existing right in the property.

Hence, she was not required to be made a party to the aforesaid

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memorandum of family settlement.

5.10 There is also no substance in the next submission of the learned counsel representing Smt. Indra Vashist that the family settlement is not in the form of memorandum. If we carefully read the settlement deed, it is evident that it was recorded as a 'memorandum' because in the very first paragraph, it has been recorded that the parties have earlier settled their dispute and now this document has been reduced into writing to record what was previously settled between the parties. The correctness of such family settlement was subsequently acknowledged in the judgment and decree dated 08.03.1994. Hence, the settlement is in the form of 'memorandum' and not '*In praesenti*'.

5.11 There is also no substance in the argument of the learned counsel representing Krishan Kumar and Hemant Kumar that the Will dated 07.07.1993 has not been proved. It is not in dispute that the aforesaid Will has been proved in the suit *inter partes* which was decreed vide judgment dated 30.04.2005. Hence, the same was not required to be independently proved in this case. In any case, the aforesaid Will shall not operate qua the suit property because it was included in the family settlement and Smt. Shanti Devi, during her lifetime, included her share in the plot in the capital assets of the partnership firm. The Will in favour of Smt. Indra Vashist became operative only after the death of Smt. Shanti Devi which took place on 01.01.1994, whereas the memorandum of family settlement was signed between the parties on 31.12.1993.

5.12 The First Appellate Court has also erred in observing that

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defendant No.2-Smt. Indra Vashist has not challenged the correctness of the interlocutory order passed by the Trial Court failing to provide her an opportunity to file reply to the counter-claim. Under Order XLIII Rule 1A of the Code of Civil Procedure, 1908, when the judgment and decree passed finally by the Court is challenged in appeal, the correctness of all the interlocutory orders passed by the Court are amenable to be questioned in appeal. Once the appeal has been filed against the main judgment and decree, the error in the interlocutory order could be corrected by the First Appellate Court while deciding the appeal against the judgment and decree passed by the Court.

5.13 Moreover, the counter claim was filed by defendant No.1 which adversely impacted the rights of defendant No.2. Hence, she was required to be given an opportunity to contest the same by filing a reply. She was also required to be given an opportunity to cross-examine the witnesses produced by defendant No.1. However, this Court has already dismissed the counter claim filed by Smt. Beena Jain and hence, there shall be no impact on the result of the case.

Third Issue

5.14 The third issue is with regard to the correctness and validity of the Will dated 07.07.1993. It shall be noted here that in the inter-parte suit in which Krishan Kumar and Hemant Kumar are the parties, the validity of the will dated 07.07.1993, has been upheld and it is the subject matter of further appeal before the High Court which is stated to be pending. Hence, the parties shall remain bound by the findings arrived at in a separate

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6. Decision

- 6.1 Keeping in view the aforesaid discussion, the judgments of both the Courts below are modified. It is declared that the suit property, namely the plot measuring 10 kanals and 15 marlas comprised in khasra No. 428, located in the revenue estate of Sohna, Tehsil and District Gurugram, and the building constructed thereupon shall be disposed of in terms of the memorandum of family settlement dated 31.12.1993, which was acknowledged by the judgment and decree dated 08.03.1994. Smt. Beena Jain will have no right, title or interest in the same and her counter-claim shall stand dismissed.
- 6.2 With the aforesaid observations, the judgments passed by both the Courts below stand modified.
- 6.3 The miscellaneous application(s) pending, if any, in all the appeals shall stand disposed of.

**(Anil Kshetarpal)
Judge**

March 14, 2024
“DK”

Whether speaking/reasoned :Yes/No
Whether reportable : Yes/No