



## **LL.B. VI TERM**

### **LB-6034 Minor Act and Supreme Court Rules**

**Cases Selected and Edited By**

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## LL.B. VI Term

### Paper – LB – 603 - Minor Acts and Supreme Court Rules

[The Registration Act, 1908, The Indian Stamp Act, 1899, The Court Fees Act, 1870, The Suits Valuation Act, 1887, Transfer of Property Act, 1882 and The Supreme Court Rules, 2013]

**Note:** Students are advised to refer to the bare Acts and the following mentioned cases. However, the list of cases given below is not exhaustive. During the semester any other important case may also be referred, so as to elaborate any particular issue.

#### Part I :THE REGISTRATION ACT, 1908

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2	<b>Ghulam Ahmad v. GhulamQadir</b> , AIR 1968 J & K 35	07
3	<b>Raghunathv. KedarNath</b> , (1969) 1 SCC 497: AIR1969 SC 1316	12
4	<b>Swaminathan v. Koonavalli</b> , AIR 1982 Mad. 276	16
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**Part II :THE INDIAN STAMP ACT, 1899**

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17	<b>Govt. of U.P. v. Raja Mohd. Amir Ahmad Khan,</b> (1962) 1 SCR 97 : AIR 1961 SC 787	84
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21	<b>The Madras Refineries Ltd. v. The Chief Controlling Revenue Authority, Board of Revenue,</b> (1977) 2 SCC 308 : AIR 1977 SC 500	98
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## **PURPOSE OF LAW IS TO HAVE PEACE IN THE SOCIETY**

It is needless to emphasize the importance of peace in society, since we cannot enjoy life to its fullest extent without peace. This aspect is further substantiated in terrorist-stricken world of today, where in the agenda of every world leader 'peace' finds top priority. In fact, peace means and exists when there is no dispute. The dispute arises only when a person claims his right over a particular thing and the same is disputed by the other, which creates tension and ultimately leads to breach of peace. Here law plays a very vital and significant role in the society, because through justice delivery system it adjudicates these kinds of disputes, arising out of clash of interests amongst the people.

## **LAW CAN BE SUBSTANTIVE LAW OR PROCEDURAL LAW**

The law can be substantive law or procedural law. The substantive law is the one which actually decides the rights, liabilities and duties of the respective persons. On the other hand, the procedural law is the one which lays down guidelines as to how to decide those rights, liabilities and duties. In other words, the procedural law lubricates substantive law. It helps in determining the rights, liabilities and duties of the litigants. It is procedural law which puts life into the substantive law by providing remedy for enforcement of those rights and liabilities. In this way, both the branches of law are complementary to each other and at the same time independent of each other. Indian Penal Code, 1860, Customs Act, 1962, Prevention of Food Adulteration Act, 1954, Sale of Goods Act, 1930, Transfer of Property Act, 1982 and Rent Control Legislations, etc. are the examples of substantive laws, whereas Code of Criminal Procedure, 1973, Code of Civil Procedure, 1908, Indian Evidence Act, 1872, etc. are procedural laws. However, there are certain laws, regarding which, due to the nature of their provisions and the object, for which they were legislated, it is difficult to point out as to whether they are substantive laws or procedural laws. In such cases, on one hand the provision of such a law provides procedure for enforcement of certain rights and at the same time violation of that procedure leads to taking away of that substantive right of the violator. For example, under the Registration Act, 1908 if a particular document, which requires compulsory registration, is not registered then the party to that document, claiming right on the strength of the contents of the said document would not be able to establish his substantive right under that unregistered instrument. Similarly, the Indian Stamp Act, 1899 falls in the same category.

## **“MINOR ACTS AND SUPREME COURT RULES” DIVIDED INTO FOUR DIFFERENT PARTS**

In this particular subject of “Minor Acts and Supreme Court Rules”, we have divided our study into four different parts namely: (1) The Indian Registration Act,

1908, (2) The Indian Stamp Act, 1899, (3) The Court-Fees Act, 1870, and The Suit Valuation Act, 1887, which substantially form part of procedural laws. Besides this, fourthly, we would be studying Supreme Court Rules framed by the Supreme Court under article 145 of the Constitution, enabling it to regulate its own practice and procedure.

### **INDIAN STAMP ACT, 1899 AND THE REGISTRATION ACT, 1908, FALL UNDER 'CONVEYANCING', WHEREAS THE COURT-FEES ACT, 1870 AND THE SUIT VALUATION ACT, 1887 RELATE TO PLEADINGS BEFORE THE COURT**

**Meaning of pleadings:** In order to understand the provisions of the Indian Stamp Act, 1899 and the Registration Act, 1908, it would be beneficial to distinguish between the pleadings and conveyancing. The dictionary meaning of the term 'plead' means 'to state and argue a case'. Therefore, pleading comprises of respective contentions of the parties in a dispute, which are reduced into writing. The term pleading would be applicable to the Court proceedings including filing of the complaint/plaint, etc., replies thereto and other incidental documents related to the dispute filed by either of the parties. Needless to mention here that, our legal system is adversary legal system wherein there are two contesting parties. One party stakes its claim or right to a particular thing, which is disputed by the opposite side before the Court. Under these circumstances each of the parties in support of its claim files in writing various contentions and submissions in terms of the different provisions under the law before the Court. All these documents constitute pleadings. It is only after the completion of the pleadings that a matter is argued and subsequently the dispute is adjudicated by the Court.

**Meaning of conveyancing:** On the other hand the dictionary meaning of the 'conveyance' is 'an act by which property is conveyed or voluntarily transferred from one person to another by means of a written statement and other formalities'. It also means 'instrument' itself. Therefore, the term conveyancing does not apply to the Court proceedings, rather it is applicable to the instrument, which have been documented not for the purpose of Court proceedings, rather for the purpose of creating evidence of a particular transaction, which may be used before the Court in case of any dispute. So broadly speaking the pleading and conveyancing may be distinguished by simply stating that while the pleadings are applicable to Court proceedings and conveyancing is applicable to the documentation done outside the Court and not meant for the Court proceedings particularly, though they may be used in the Court proceeding, in order to substantiate a particular contention, claim or submission. Therefore, these two parts of the subject, namely Indian Stamp Act, 1899

and the Registration Act, 1908, fall under ‘conveyancing’, whereas the Court-Fees Act, 1870 and the Suit Valuation Act, 1887 relate to pleadings before the Court.

## 1. THE INDIAN REGISTRATION ACT, 1908

In this part of the subject, we would be studying as to which kind of document, in respect of transfer of property, requires compulsory registration. In fact, Statement of Objects and Reasons of this Act states that the provisions relating to the registration of documents, being scattered in different enactments, the Act has been brought into existence to consolidate those provisions.

**Sanctity to a document/deed is provided by registration:** Transfer of movable property may be affected by transferring its physical possession from transferor to transferee. However, in case of immovable properties this is not possible due to their immovable nature. Therefore, such a transfer takes place by way of writing a deed in this regard. Sanctity to such a document/deed is provided by registration with a Central Agency called “Registrar”, wherein name of the seller and purchaser alongwith the details of the property on the date of transaction are recorded. Purpose of the registration is that before purchasing the property in question the purchaser may verify its history from the office of the Registrar, so as to find out who is the real owner of that particular property. That is why the general principle involving transaction of immovable property is that “purchaser beware”. This aspect is substantiated by section 17(1) of the Registration Act, 1908, which makes it obligatory to get some particular kinds of documents registered with the “Registrar”. Therefore, under this part of the subject the basic question would remain as to whether it is obligatory to register a particular document, involving transfer of property, under the Registration Act, 1908 and, further, what is the consequence of non-registration of such a document.

## 2. THE INDIAN STAMP ACT, 1899

**The whole purport of the Indian Stamp Act is to collect revenue:** The Indian Stamp Act, 1899 is a fiscal measure enacted to secure revenue for the State on certain classes of instruments. If a document is not sufficiently stamped, in terms of the said Act, it also carries certain consequences, the way a document, requiring compulsory registration under the Registration Act, 1908, if is not registered, is held to be inadmissible in evidence. But at the same time, the Act is not enacted to arm a litigant with a weapon of such a technicality to meet the case of his opponent. It has been rightly observed by the Apex Court in a case that, the endeavour should be to avoid snap decisions and to afford litigants a real opportunity of fighting out their cases fairly and squarely. Costs will be adequate compensation in many cases and in other Court has almost unlimited discretion about the terms it can impose provided always the discretion is judicially exercised and is not arbitrary (*Sangram Singh v. Election*

Tribunal, Kotah, BhureyLalBaya, AIR 1955 SC 425). The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. This object is achieved by making those documents inadmissible in evidence, if they are not properly stamped according to the Indian Stamp Act, 1899. The Court generally does not encourage the objections taken merely on account of the insufficiency of stamps, the matter really relating to the revenue. Objects and Reasons in this regard may be looked into to find out as to what mischief is sought to be remedied and how the Government proposed to get over the situation faced by it by seeking to amend the law. Further, it is pertinent to mention here that, the enactment is prohibitory in nature and not confined to affording a party a protection of which he may avail himself or not as he pleases. Although the protection of revenue is its primary object, it is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the penalty limited in cases for which a penalty is exigible. Further, the whole purport of the Indian Stamp Act is to make available certain dues and to collect revenue but it does not mean and imply overriding the effect over another statute operating in a completely different spheres.

### **3. THE COURT-FEES ACT, 1870 AND THE SUIT VALUATION ACT, 1887**

**Under both the legislations value of the suit is fixed:** For the purpose of adjudication his dispute with the defendant plaintiff has to pay fees to the Government in the form of court fees, which is to be computed in terms of the provisions contained in the Court Fees Act, 1870. The Court-Fees Act, 1980 and the Suits Valuation Act, 1887 cannot be treated as forming a Code, nor they are *parimateria* with regard to their respective provisions. In other words, they cannot be read together. The only common feature between the two Acts is that under both the legislations value of the suit is fixed. Generally, under Suits Valuation Act, 1887, the value is fixed for the purpose of jurisdiction and under the Court Fee Act, 1870, the value of the suit is fixed in order to determine the amount of Court-fee to be paid to the Court.

Invariably, one of the preliminary objections taken by the Advocates in their written statements to the plaints is with regard to valuation of the suit. Since the question whether or not a suit has been properly valued goes to the root of the matter, the same ought to be decided at the first instance and the trial Court should not wait till the conclusion of the case and the same should be determined by the Court, which has to try the case. If on examining the plaint, the Court finds that the relief claimed is undervalued it should require the plaintiff to correct the valuation within a time and consequently on his failure to do so, the plaint is liable to be rejected under Order VII, rule 11 of the Civil Procedure Code, 1908. If the matter requires investigation,

the Court may record evidence of the parties bearing on the point and consequently adjudicate the issue at the earliest after staying further proceedings in the matter. It is pertinent to mention here that section 10 of the Court-Fees Act, 1870 specifically provides that if the plaintiff fails to make good the deficiency despite the directions of the Court, within specified period, the suit shall be dismissed. Before parting with this introductory portion, it is necessary to reiterate with regard to the Court-Fees Act, 1870 that, like the Registration Act, 1908 and the Indian Stamp Act, 1899, even this statute is a fiscal statute and, consequently, must be interpreted strictly. Therefore, it is further reiterated that the present statute is not intended to arm a litigant with the weapon of technicality but to secure revenue to the State.

#### **4. SUPREME COURT RULES**

**With a view to regulate its own practice and procedure has been empowered to frame Supreme Court Rules, 1966 under article 145 of the Constitution:** The Constitution seeks to ensure the independence of Supreme Court Judges in various ways. A Judge of the Supreme Court cannot be removed from office except by an order of the President passed after an address in each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of members present and voting, and presented to the President in the same Session for such removal on the ground of proved misbehavior or incapacity. Similarly, Supreme Court, with a view to regulate its own practice and procedure has been empowered to frame Supreme Court Rules, 1966 under article 145 of the Constitution. In *Navavati, K.M. v. State of Bombay* (1961(1) SCR 497: AIR1961 SC 112) the Supreme Court laid down that the power to make rules to regulate its own procedure is in aid of the power of the Apex Court under article 142, to make such order as is necessary for doing complete justice in any cause or matter pending before it. However, this rule making power of the Supreme Court is subject to laws made by Parliament and being subordinate legislation, having been framed under article 145 in exercise of delegate power, such Rules cannot override the provisions of the Constitution of India. Therefore, the power cannot be exercised so as to affect the fundamental rights conferred under Part III of the Constitution of India. The students would be required to study particular Supreme Court Rules form the examination point of view.

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**THE REGISTRATION ACT, 1908**

***Hansia v. Bakhtawarmal***

AIR 1958 Raj. 102

**K. N. WANCHOO, C. J.** – This is a second appeal by two out of four defendants against the judgment and decree of the Civil Judge, Sojat, in a suit for redemption of mortgage. It has been referred to a Division Bench by a learned single Judge as an important question of law is involved in it.

(2) Respondent Nos. 1 and 2 are plaintiffs. Their case was that their father and uncle had mortgaged a house situate in village Sawrad with Sobha, Tiloka and Bhoma, predecessors-in-title of the defendants for Rs. 209/- in Samwat 1967. The said mortgage was to be redeemed after a period of 31 years. When the plaintiffs sought to redeem the property after the expiry of this period, the defendants refused to accept the money and hand over possession.

Consequently, the plaintiffs brought this suit for redemption against the defendants. Two of the defendants, namely Bhanja and Benia, sons of Tiloka admitted the plaintiffs' claim. The other two Hansia and Achalia, contested this suit. They denied the mortgage and asserted that the property belonged to themselves. They also pleaded with respect to the document produced in support of the mortgage by the plaintiffs that as the document was not registered, it was of no avail to the plaintiffs.

(3) The suit of the plaintiffs was for redemption. The plaint, as it was drafted, was a pure and simple plaint in a suit for redemption based on the mortgage of Samwat 1967. The prayer was for redemption and possession of the house in dispute.

(4) Three issues were framed by the trial court, of which two are relevant for our purposes. They are these:

1. Did the predecessors of the plaintiffs mortgage with possession the house in suit for Rs. 209/- in Samwat 1967 to the predecessors of the defendants?
2. Whether the mortgage-deed in suit was compulsorily registrable.
3. The trial court held that the mortgage in suit was founded on an unregistered mortgage-deed which was inadmissible in evidence and, therefore, the suit was dismissed. There was an appeal by the plaintiffs which was allowed and a preliminary decree for redemption was passed. The appellate court held that the unregistered mortgage-deed could be referred to for looking into the character of possession and also for determining the quantum of interest for which the defendants had prescribed under the invalid mortgage.

Hence this second appeal.

4. The main question, therefore, which falls for decision is whether a suit for redemption can be maintained on an unregistered mortgage-deed of this kind. The document in question was executed in Samwat 1967 i.e. in 1910 A.D. and we have to look to the law in force in the former State of Marwar in this matter at that time.

There was no Transfer of Property Act in force at that time. There was, however, a Registration Act in force of 1899. Under S. 7 of that Act, as amended on 1-10-1907, any usufructuary mortgage of the value of Rs. 200/- and upwards was compulsorily registrable.

Further, under S. 18 of that Act, it was provided that if any unregistered document, which was compulsorily registrable, was produced in court, it would not be admitted in evidence. Thus the mortgage-deed in suit, being compulsorily registrable under the law then in force, was inadmissible in evidence to prove its terms.

The present suit was filed in January 1949. By that time, the Marwar Registration Act, 1934 had come into force and contained S. 49 of the Indian Registration Act, Section 18 of the Marwar Law of 1899 may be taken to be more or less equivalent to S. 49 of the Indian Registration Act. In addition to that, the Transfer of Property Act also came into force in Marwar from 5-3-1949 and S. 59 provides that where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

(5) The lower appellate court has, held relying on **Purusottam Das v. S. M. Desouza** [AIR 1950 Ori. 213] that as the mortgage was in existence for more than 12 years, the mortgagee has prescribed for the mortgagee's interest and, therefore, a suit for redemption will lie and that in effect twelve years' possession on the basis of a mortgage-deed, which was invalid and inadmissible in evidence when it was executed, would give rise to a valid mortgage which the mortgagor could redeem. It is this view which is being challenged before us by the appellants.

(6) We have, therefore, to examine the view taken in **Purusottamdas** case. In that case, the learned Judges held that the possession of the mortgagee under a void mortgage could not be adverse in respect of the absolute title of the owner. They further held that the suit for redemption in such circumstances was really in the nature of a suit to recover back possession given away under the limited interest by way of a mortgage and was thus a suit to recover back possession of the limited interest in immovable property under Article 144 of the Limitation Act, and therefore, if the person has been in possession for over twelve years, the right of the mortgagor under the invalid mortgage to recover back possession of the limited interest without payment is extinguished and the mortgagee under the invalid mortgage becomes a full-fledged mortgagee as if the mortgage was valid and must be redeemed. This case was decided in a State where S. 59 of the Transfer of Property Act and S. 49 of the Registration Act were in force.

With all respect, we find it very difficult to understand how a mortgage, which is void under S. 59 of the Transfer of Property Act, can become a valid mortgage after twelve years' possession of the mortgagee under the invalid mortgage. This would be holding something directly against the statutory provision in S. 59 of the Transfer of Property Act which lays down that the only way in which a mortgage of immovable property of the value of one hundred rupees and upwards can be created is by means of a registered instrument.

It would also amount to setting at naught S. 49 of the Registration Act, which makes unregistered mortgages inadmissible in evidence (this corresponds to S. 18 of the Marwar Registration Act of 1899) except for collateral purposes.

(7) Article 144 of the Limitation Act certainly provides for a suit for possession of immovable property or of an interest therein. But can it be said that a mortgage, which is invalid from its very inception, creates any interest in the mortgagee? We feel that it is not possible to say that there is any interest in the property in the mortgagee on the basis of an invalid mortgage in view of S. 59 of the Transfer of Property Act or S. 49 of the Registration Act.

In these circumstances, there can, in our opinion, be no question of a suit for possession of a limited interest based on an invalid mortgage, for the interest contemplated under Act. 144 is an interest which can arise in law. But if no interest can arise in law at all of the character envisaged in **Purusottam Das** case, there can, in our opinion, be no question of prescribing for that kind of limited interest.

(8) We may also point out that Article 144 is a residuary article for it provides for suits for possession of immovable property or any interest therein not hereby otherwise specially provided for. Now suits against a mortgagee to redeem or to recover possession are specifically provided for in Art. 148 where the period of limitation is 60 years. Therefore Article 144 does not apply to usufructuary mortgages at all and the time needed for prescribing for the interest of a mortgagee (assuming that this is at all possible) would be 60 years and not 12 years.

(9) The authority in **Purusottam Das** case has been followed in **Sukra Oraon v. Jagat Mohan Singh** [AIR 1957 Pat 245]. In this case, the learned Judges of the Patna High Court held another Division Bench ruling of their own court, namely **Bhukhan Mian v. Radhika Kumari Debi** [AIR 1938 Pat 479] as incorrect. In **Bhukan Mian** case, the Acting Chief Justice remarked as follows:

“I am aware of a number of cases in India which appear to have the effect of holding that a person can prescribe for a limited interest but I must say that I always fail to understand them, as both a tenancy and a mortgage are creatures of contract, and on fundamental principles I find it difficult to hold the view that a contract can be brought into existence by prescription”.

(10) Manohar Lall J. observed as follows at page 483:

“I cannot understand how by a mere oral assertion a person can acquire rights as against a true owner as a mortgagee : it is necessary to have a contract to that effect either oral or unregistered, where the amount advanced is below Rs. 100/- and necessarily a registered document where the money advanced is above Rs. 100/-. If the mere oral declaration of the parties would be held sufficient in law to establish the relationship of mortgagor and mortgagee, in the latter case, in my opinion, it would be stultifying and openly violating the Statute”.

(11) In **Ma Kyi v. Maung Thon** [AIR 1935 Rang 230 (FB)], the Rangoon High Court held that where a usufructuary mortgage for over Rs. 100/- is not registered, a suit by the owner for

the possession of the property on redemption is not competent. The proper course for the plaintiff would be to sue for possession relying on his title.

(12) The same view was taken in **Maung Daw Na v. Maung** [AIR 1941 Rang 261 (FB)]. In that case it was held that although a person cannot sue for redemption on the strength of an abortive or invalid usufructuary mortgage, yet if he sues for possession and proves his title and then the defendant sets up adverse possession the plaintiff may prove that the character of the possession was not adverse to him by giving evidence of the factum of the unregistered mortgage though not of its terms.

(13) We are therefore of opinion that where a mortgage is invalid in view of the provisions of the Transfer of Property Act or any other law like a Tenancy Act or is inadmissible in evidence in view of S. 49 of the Registration Act or analogous law, there can be no question of a mortgage coming into existence on the mere basis of twelve years' possession by the mortgagee under the invalid mortgage. If this were to be allowed, we would be clearly going against the provisions of the statute.

Nor can the proviso to S. 49 be used to show the nature of possession where the suit is based on the mortgage-deed and the prayer is for redemption of the mortgaged. The proviso to S. 49 allows an unregistered document affecting immovable property, which is compulsorily registerable, to be received as evidence of any collateral transaction not required to be effected by registered instrument. It has been held by the Privy Council in **Varada Pillai v. Jeevarathnammal** [AIR 1919 PC 44] that an unregistered document like this can be given in evidence to explain the nature and character of the possession held in that case by the defendant.

But it is one thing to use the document as evidence of a collateral transaction under S. 49 and another to use it for the very purpose of proving the mortgage. In a suit for redemption based on such an invalid mortgage, the use of the document is not for any collateral purpose, but for the very purpose of proving the mortgage which the Registration law forbids. The proviso to S. 49 therefore, cannot be availed of by a plaintiff in support of a suit for redemption.

It would be a different thing if the plaintiff brought a suit for possession and he was met by a plea of adverse possession; he can then use the unregistered document to show the nature of the defendant's possession and prove that it was never adverse. That would be using the document for a collateral transaction to meet the case of the defendant based on adverse possession.

The conclusion, therefore, at which we arrive is that where there is an invalid mortgage which is required by law to be registered, it cannot be used in evidence and the fact that the mortgagee under the invalid mortgage has been in possession for over twelve years can not convert him into a mortgagee who is to be redeemed and cannot make the document which was inadmissible into a **Ram Narain Prasad v. Atul Chander Mitra** document conferring the interest of a mortgagee on the person in possession. The only remedy for the plaintiff in such a situation is to sue for possession based on title which must be proved by evidence other than the invalid mortgage deed.

If in such a suit for possession, he is challenged by the defendant on the ground of adverse possession under Article 144 (for there can be no question of the application of Art. 142 in a case of this kind, as there has been no dispossession or discontinuance of possession) he can then use the invalid mortgage-deed to show the nature of the defendant's possession, namely that it was not adverse to him.

But the mere fact that the defendant in such a suit has been in possession on the basis of an invalid mortgage for more than twelve years would not make the transaction a valid mortgage and the defendant a mortgagee.

(14) Learned counsel for the respondents relied on a single Judge decision of this Court in **Ramchandra v. Ramhans** [1955 Raj LW 190]. In that case Bapna J. differed from the view of Manoharlal J. in **Bhukhan Mian** case where he laid down that the possession of the so-called mortgagee became adverse to the plaintiff from the very date of the invalid mortgage. With respect, we agree with the view taken by Bapna J. on this point and cannot accept the view of Manohar Lal J. that in such a case, the so-called mortgagee's possession is adverse from the very day of the invalid mortgage. A further question was raised before Bapna J. namely that the suit should have been for possession and not for redemption. He did not hold in that case that a suit for redemption would lie. What he held was that there was no difference between a suit for possession containing a prayer for allowing the defendant such sums of money as may be due to him and a suit for possession on payment of the mortgage amount.

He, therefore, held that the lower court was quite right in granting a decree for possession to the respondent on his paying Rs. 400/- This seems to show that there was no decree for redemption as such in that case and Bapna J. did not hold that an invalid mortgage becomes a full-fledged valid mortgage after the so-called mortgagee has been in possession for twelve years.

(15) This brings us to the second question which arises in this case. That question is whether in this suit for redemption we should grant a decree for possession to the plaintiffs on payment of the amount which they admitted as due. It is in this connection also that reliance was placed on Bapna J's. view in **Ramchandra** case.

(16) Reliance is also placed on **Appamma v. Chinnaveadu** [AIR 1924 Mad 292] on which Bapna J. also relied. In Appamma's case, there was a difference of opinion between two judges and the matter was referred to Ramesam J. and his observations at page 296 are pertinent to the case before us.

"Even if the defendants acquired no mortgage or other limited interest by adverse possession, the plaintiffs can succeed if they are able to prove their title. It cannot be said that the character of the suit is changed. In the first place, even as the suit is framed it is a suit for possession based on title as against defendants Nos. 5 to 8 and the suit is not a suit for mere redemption. But apart from this, I agree with the decision in **Annada Hait v. Khudiram Hait** [AIR 1914 Cal 894] where it was held that a suit to redeem a usufructuary mortgage is substantially a suit for possession".

(17) It is true that in some respects, a suit for possession and a suit for redemption are similar. But there are vital differences also. These differences arise on account of court-fee and

limitation. In a suit for redemption, the limitation is sixty years; in a suit for possession, it is only twelve years.

In these circumstances, it may not always be convenient to treat a suit for redemption as a suit for possession, though there may be cases in which this may be done. As Ramesam J. pointed out in **Appamma** case that suit was already partly for possession and there was, therefore, little difficulty in converting it wholly into a suit for possession.

This will depend upon the facts of each case. But speaking generally, where the suit is wholly one for redemption and no more, it should be dismissed and the plaintiff left to a remedy by a separate suit for possession. We do not think in such a suit it would be right after so many years to permit the plaintiff to amend the plaint and convert it into a suit for possession. In the present case, the plaint was a pure and simple plaint in a suit for redemption.

The issues framed also were issues in a suit for redemption. The defendants never raised the question of twelve years adverse possession as they might very well have done if it was a suit for possession. In these circumstances, we are of opinion that the present suit which is a pure and simple suit for redemption must be dismissed and the plaintiffs left to their remedy by a suit for possession, to which the defendants may be able to raise such defences as are open to them.

In the present case, the character of the suit would be completely changed if it is turned into a suit for possession, and, therefore, the plaintiffs must file a separate suit for possession. The matter might have been different if the facts were as in the Madras case namely that the suit was partly for possession against some of the defendants and in such a case, there might not be any difficulty in allowing amendment and turning it into a suit for possession against all of them.

We are, therefore, of opinion that in this case, we cannot treat this as a suit for possession, nor can we permit amendment after such a long time. The plaintiffs must file a proper suit for possession based on title separately. We, therefore, allow the appeal and dismiss the suit.

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***Ghulam Ahmad v. Ghulam Qadir***

AIR 1968 J & K 35

**J. N. BHAT, J.** – This is a revision petition directed against the order of the Sub-Registrar Munsiff Srinagar dated 13-4-66 whereby he has held a document dated 14th Baisakh 2008 (B) to be admissible in evidence and has overruled the contention of the defendant petitioner that the document was inadmissible in evidence for want of stamp and registration. This document was presented along with the plaint. In para (7) the plaintiff made reference to this document. It was contended on behalf of the defendant that the document was a forged one and was inadmissible in evidence because it was not duly stamped or registered. Although a specific issue (issue 5) which is as under:

“Is the document dated 14th Baisakh 2008 a forged one and is the same inadmissible in evidence by reason of its not being stamped and registered?”

was taken, the trial court by order dated 25<sup>th</sup> July 64 held the document to be a memorandum and therefore did not require registration or stamp duty. A revision was preferred against that order in the High Court and the case was sent back to the trial court by His Lordship the C.J. on 6<sup>th</sup> August 1965. Later on during the statement of one of the witnesses Mohd. Subhan Bhat an objection was again taken by the defendant that the document was inadmissible in evidence. The trial court by order under revision upheld the finding of its predecessor dated 25<sup>th</sup> July 1964 and held the document to be a memorandum and not a partition deed and further held it to be admissible in evidence without stamp duty and registration. Against this order the present revision has been preferred.

(2) A preliminary objection has been taken by the learned counsel appearing for the respondent that this revision does not lie, as it is against an interlocutory order. He has drawn my attention to a reported ruling of this court, but I need not comment upon that authority, because in this very case formerly a revision petition was entertained on the same point and no objection about the maintainability of revision was raised on behalf of the respondent. That is sufficient to reject the preliminary objection raised by the learned counsel for the respondents. The matter which was then the subject matter of revision is exactly the same as in the present revision petition. Therefore two contradictory findings cannot be recorded on the same point involved at two different occasions in the same case. Even otherwise the objection is without substance as revision applications on such points have been entertained by this court and other courts and decided. It would therefore be sheer waste of time to prove into this preliminary objection further.

(3) Now let us come to the merits of the matter. The learned counsel for the petitioner has argued that the decision of the lower court is erroneous on the face of it. The document in question is a partition deed and it creates, extinguishes and limits the rights of the parties in immoveable property. Therefore it should have been stamped as well as registered.

(4) The learned counsel for the respondents has reiterated the findings of the Sub-Registrar dated 25-7-64 and 13-6-66 and termed the document as a mere memorandum of some previous family arrangement and therefore not hit by the provisions of S. 17 of the

Registration Act. Mr. Sunder Lal has further argued that this document at best can be considered to be a family arrangement and not a partition deed. According to him a deed of partition requires two ingredients. It must fix the shares of the parties and it must demarcate the property by metes and bounds. A family arrangement is arrived at to set at rest certain differences between the members of a family with respect to family property and result in some sort of adjustment not in accordance with the shares of the parties therein. This document, according to Mr. Sunder Lal, makes mention of some previous document and simply reiterates some of the provisions with minor modifications of the earlier document. He further argued that the document could not be admitted to registration because it did not specify the property as required by S. 21 of the Registration Act which lays down that what a non-testamentary document relating to immoveable property should contain. Then he read certain clauses, namely cls. 8 and 13 of the document.

(5) I have given due weight to the argument of Mr. S. K. Lal. The argument based on S. 21 of the Registration Act has no bearing on the facts of this case. We are not considering whether the document is complete for registration and satisfies all the conditions which a document should possess before a document is registered by a registering authority. What we are concerned with is to see whether the terms of the document render it compulsorily registrable under S. 17 of the Registration Act. If the document is compulsorily registrable under the Act, then would come the stage of examining the document and seeing whether it could be admitted to registration in view of S. 21 of the Act. In other words the test is if the document is hit by any of the provisions of S. 17, the application or non-application of S. 21 does not at all arise for consideration, because as already indicated, that is a second step in the chain of steps which complete registration formalities.

(6) The argument that it is a family arrangement, I am afraid, is not correct. A family arrangement presumes an admission of a previously existing title. A Full Bench case of the Allahabad High Court in AIR 1928 All. 641 (FB) has laid down that “n the usual type of a family arrangement in which there is no question of any property, the admitted title to which rests in one of the parties, being transferred to the other parties, there is no transfer of ownership such as is necessary to bring the transaction within the definition of exchange in S. 118, T.P. Act . A binding family arrangement of this type may be made by a word of mouth. It made orally, there being no document no question of registration arises. If the terms are not reduced in the form of a document registration is not necessary, but if they are reduced to writing they may not be used as a document of title but as a piece of evidence for what it may be worth, e.g. as corroborative of other evidence, as an admission of the transaction. But this authority as well as a subsequent authority. AIR 1954 All 769 have held that if the contending parties come to an oral agreement in respect of disputed rights, which is subsequently, reduced into writing the writing must be **Ram Narain Prasad v. Atul Chander Mitra** registered. When the agreement is purely mutual and a family one fro the enjoyment of property without limiting or extinguishing anybody’s rights it may not be registered.

(8) The argument of the learned counsel was that the document in question was a partition deed which created and extinguished rights and limited them. It was a formal document. Hence it was compulsorily registrable.

(9) In the Supreme Court authority, B. P. Sinha J. has held:-



“Partition in the Mitakshara sense may be only a severance of the joint status of the members of the coparcenary, that is to say, what was once was a joint title has become a divided title though there has been no division of properties by metes and bounds. Partition may also mean what ordinarily is understood by partition amongst cosharers who may not be members of a Hindu coparcenary. For partition in the former sense, it is not necessary that members of the joint family should agree, because it is a matter of individual volition. For partition in the latter sense of allotting specific properties or parcels to individual coparceners, agreement amongst all the coparceners is absolutely necessary. Such a partition may be effected orally, but if the parties reduce the transaction to a formal agreement which is intended to be the evidence of the partition it has the effect of declaring the exclusive title of the coparcener to whom a particular property is allotted by partition, and is thus within the mischief of S. 17 (1)(b)...”

(10) Now the only clause of the document in question which is the subject matter of the present dispute between the parties is cl. (4). It reads as under:

“With respect to the dispute of immovable property the parties have agreed that agricultural land measuring 8 kanals which stands in the name of Haji Sahib deceased is divisible in equal shares between the parties and should be entered as such because the said land has been purchased when the parties lived joint. An application for mutation should be moved that the property be entered in the revenue papers in equal shares of the parties”.

The document of 14th Baisakh 2008 has been styled as a Tasfianama or a compromise deed. That aspect of the case shall be discussed later. First let me examine this clause of the document separately because it is permissible to hold a document compulsorily registrable for some purposes and not so for other purposes. A document which comes within the terms of S. 17(1)(b) of the Act is compulsorily registrable. Whatever is saved from the operation of this clause, of the section is not compulsorily registrable. In this behalf an authority of this court AIR 1964 J & K may be cited which is itself based on a number of authorities from different High Courts.

(11) The terminology or the name that may be given to this document or this class of documents need not detain us whether we call it as a partition deed or as a compromise deed; it does not make the slightest difference because the language of S. 17(1)(b) is as follows.

(12) In the Act of India there is a further rider that the immoveable property must be of the value of Rs. 100 or upwards which is absent in our Act which in other words means our law makes all documents relating to immovable property whether their value is below or above Rs. 100 compulsorily registrable provided other conditions of this sub-section are involved in the matter.

(13) The words document and instrument in this section are in my opinion interchangeable. There are different definitions of the word document in different Acts, for instance S. 3 of the Evidence Act. S. 29 of the I.P.C. and S. 16 of the General Clauses Act so on and so forth. In the words of Stephen a document is any substance having any matter expressed or described upon it by marks capable of being read. In English Law all material substances on which

thoughts of men are represented by writing or any species of conventional marks are said to be documents. In the India law it is the matter written and not the substance on which the matter is expressed or described which is said to be a document. Therefore as I already indicated, by whatever name we call the present writing the substance of the matter so far as the point involved is concerned is not at all affected.

(14) Let us examine now the implications of cl. 4 of this document. It mentions some immovable property. Further it says that 8 kanals of agricultural land stand in the name of Haji Sahib, who may perhaps be the ancestor of the parties. There is a stipulation that land is divisible between the parties in equal shares. There is an admission that it has been purchased while the family was joint. There is a further stipulation that it will be got entered in equal shares in the name of the parties in the revenue records.

(15) Now in my opinion this document satisfies most of the requirements of S. 17(1)(b) of the Act. It is a document which creates rights in the immovable property vis-à-vis the parties. Further it declares their rights, it limits the rights of one party; at the same time extinguishes them as well as creates the rights in favour of either one or both the parties.

(16) All the words which are used in this Sub-section have been the subject matter of judicial comment from time to time. The requirements of this sub-s (1) broadly speaking are the document.

- 1) must be a non-testamentary instrument other than an instrument of gift.
- 2) It must relate to immovable property.
- 3) It must create, declare, assign, limit or extinguish any right, title or interest in such property.

(17) Now what is to be understood by the words, creating, declaring, limiting and extinguishing of rights. The word “create” in legal terminology means to bring into being to invest with a new title, or to produce. Therefore every non-testamentary instrument which means to, or has the effect of originating some right, title or interest in immovable property will be governed by the word create. (18) The word declare has been defined by West. J. in (1880-81) ILR 5 Bom. 232 as under:—

“The word declare implies a declaration of will not merely a statement of fact and that a deed of partition which causes a change of legal relations to the property divided amongst all the parties to it is a declaration in the intended sense...”

(19) In AIR 1932 PC 55 their Lordships of the Privy Council said that ‘though the word declare might be given a wider meaning they are satisfied that the view originally taken by West J. is right. The distinction is between a mere recital of a fact and something which is itself creates a title’.

(21) Similarly the word ‘limit’ connotes restriction of some right or interest in immovable property. It has been held an agreement allocating particular days for holding the bazar coupled with the condition that the parties are not to be allowed to hold the bazar on certain

other days limits the general right possessed by the owner of the land to hold the market on his lands whenever he wishes to do so and requires registration AIR 1931 Oudh 110.

(22) The same is the scope of the word extinguish. Extinguish is a counterpart of the word 'create'. In the document in question a right is created in the parties equally and it is extinguished equally. The rights of the parties are further limited to the extent of half each.

(23) Another argument has been advanced that this document is a compromise deed and recites the decision arrived at by the parties on 6th Katik 2007 on which date another document had been executed and therefore it does not require registration. For this purpose two arguments are advanced. One that it is simply a memorandum and secondly that it is a compromise and as such not registrable. I am afraid neither argument is tenable. A non-testamentary instrument which varies the right or interest made by an earlier instrument has as much the effect of creating some new right or extinguish an old one as an absolutely fresh document would do. Such a document also requires registration. (AIR 1957 Assam 10).

(24) The word memorandum is not a legal expression. Memoranda of past transactions are no doubt exempted from registration because such memoranda by themselves do not create, declare, assign or limit or extinguish any right, but make a recital of what has been done in the past. Otherwise the word memorandum has no separate legal definition.

(25) In this case as already stated, no recital of a previous document is made in the relevant clause (4) of the same, but new rights are created, extinguished and limited. Therefore this argument of the learned counsel or of the court below is without any significance.

(26) The last argument is that the document is a compromise and does not require registration. A compromise is a settlement of disputed claim and applies to demands of all sorts. Where it merely contains a recital of a previous agreement, it does not require registration, but where the compromise itself declares a right to immovable property, it operates as a contract and requires registration (AIR 1938 Pat 212). It has been held that the true test to apply to a transaction like a compromise, in order to decide whether it comes within the purview of S. 17(1)(b) of the Act, is whether it speaks for the present and it does not say that it was some past agreement and whether by itself it creates the title claimed. If it is intended to be the evidence of the agreement mentioned therein and with that end in view it is reduced to a formal agreement, it requires a declaration of will and as such it has the effect of declaring the title mentioned therein within the meaning of S. 17(1)(b) of the Act which makes it compulsorily registrable.

(27) So applying all these tests to the document in question. I am of the opinion that cl. (4) of this document is hit by the provisions of S. 17(1)(b) of the Registration Act. For the reasons given by me the document is inadmissible in evidence to that extent. To that extent the revision petition succeeds and is hereby accepted with costs. DRR.

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***Raghunath v. Kedar Nath***

(1969) 1 SCC 497: AIR1969 SC 1316

**V. RAMASWAMI, J.** - In the suit which is the subject-matter of these appeals the plaintiff alleged that one Dwarka Prasad took a loan of Rs. 1,700/- from Madho Ram, father of the defendants, and that on 27th July, 1922, Dwarka Prasad along with one Mst. Kunta, his maternal grandmother, executed a possessory mortgage deed of the disputed house for Rs 1,700/- in favour of Madho Ram. The terms of the mortgage deed were that the mortgagor was to pay interest of Rs 12/12/- per month out of which the rent amounting to Rs 6/- which was the agreed usufruct of the house in suit was to be adjusted and the mortgagor was to pay Rs 6/12/- per month in cash towards the balance of the interest. The parties agreed that the mortgage would be redeemable within twenty years after paying the principal amount and that portion of interest which was not discharged by the usufruct and other amounts. When Dwarka Prasad was unable to pay the amount of Rs 6/12/- per month, he delivered possession of the house to Madho Ram who let out the house on a monthly rent of Rs 25/-. The mortgagors Dwarka Prasad and Mst. Kunta died leaving Mst. Radha Bai as Dwarka Prasad's heir. Radha Bai sold the house in dispute to the plaintiff on 2nd February, 1953, and executed a sale deed. The plaintiff, therefore, became entitled to redeem the mortgage and asked the defendants to render accounts. The defendants contested the suit on the ground that Madho Ram was not the mortgagor nor were the defendants mortgagees. It was alleged that in the locality where the house was situated, there was a custom of paying Haq-e-chaaharum and to avoid that payment, the original deed, dated 27th July, 1922, was drafted and executed in the form of a mortgage though it was actually an out-right sale. According to the defendants, the house was actually sold to Madho Ram and was not mortgaged. The defendants also pleaded that if the deed, dated 27th July, 1922, was held to be a mortgage, the mortgagees were entitled to get the payment of Rs 6,442/8/- as interest, Rs 2,315/- as costs of repairs etc. The trial Court held that the deed, dated 27th July, 1922, was a mortgage deed, that Dwarka Prasad did not sell the house to Madho Ram and that the plaintiff was entitled to redeem the mortgage on payment of Rs. 1,709/14/-. The Trial Court accordingly decreed the plaintiff's suit for redemption on payment of Rs 1,709/14/-. Against the judgment of the Trial Court, the defendants preferred an appeal before the District Judge, Varanasi, who allowed the appeal and dismissed the plaintiff's suit. The plaintiff took the matter in second appeal to the High Court which framed an issue and remanded the case back to the lower appellate court for a fresh decision. The issue framed by the High Court was "Have the defendants become the owners of the property in dispute by adverse possession"? The High Court also directed the lower appellate court to decide the question of admissibility of Exts. A-25 and A-26. After remand the lower appellate court held that the deed, dated 27th July, 1922, was a mortgage deed and not a sale-deed, and, therefore, the plaintiff was entitled to redeem the mortgage. The lower appellate court further held that the defendants had failed to prove that they had acquired title by adverse possession. The lower appellate court made the following order: "The appeal is allowed with half costs in this way that the suit is decreed for the redemption of the mortgage in question if the plaintiff pays within six months Rs 1,700/- as principal, Rs 9'87 np. Prajawat paid before this suit and any Prajawat paid by the defendants during the pendency of this suit till the plaintiff deposits the entire sum due under this decree and the

interest at the rate of Rs. 6/12/- per month from 27th July, 1922, till the plaintiff deposits the entire sum due under this decree. The costs of the Trial Court are made easy. Let the preliminary decree under Order XXXIV, Rule 7, C.P.C., be modified accordingly”.

Against the judgment and decree of the lower appellate court both the plaintiff and the defendants filed appeals before the High Court. The plaintiff prayed that the decree of the lower appellate court should be set aside and the decree of the Trial Court should be restored. The defendants, on the other hand, prayed that the decree of the lower courts should be set aside and the plaintiff's suit should be dismissed with costs. By its judgment, dated 27th April, 1964, the High Court dismissed the second appeal preferred by the defendants but allowed the plaintiff's appeal and set aside the judgment of the lower appellate court and restored the judgment of the trial court. The High Court further remanded the case to the lower appellate court with the direction that “the defendants be asked to render accounts before they claim any payment from the plaintiff at the time of redemption of the mortgage”. The present appeals are brought by special leave against the judgment of the Allahabad High Court, dated 27th April, 1964, in Second Appeal Nos. 4940 and 3660 of 1961.

2. In support of these appeals it was contended by Mr Sinha that the deed, Ex. 4, dated 27th July, 1922, was a sale deed and not a mortgage deed. It was pointed out that there was a subsequent deed of sale, dated 8th October, 1922, Ex. A-26 which is named ‘Titimma Bainama’. The contention was that the document Ex. 4, dated 27th July, 1922, must be construed along with Ex. A-26 which forms part of the same transaction and so construed the transaction was not a usufructory mortgage but was an outright sale. We are unable to accept the argument put forward on behalf of the appellant. Ex. A-26, dated 8th October, 1922, is not a registered document, and is hence not admissible in evidence to prove the nature of the transaction covered by the registered mortgage deed, Ex. 4, dated 27th July, 1922. If Ex. 4 is taken by itself, there is no doubt that the transaction is one of mortgage. The document Ex. 4 recites that in consideration of money advanced the executants mortgage the said house ‘Bhog Bhandak’ Bearing No. 64/71, situate Mohalla Gola Dina Nath. Clause 2 provides a period of twenty years for redemption of the mortgage. Clause 6 of the document stipulates that the cost of repairs will be borne by the mortgagors. Clause 1 states:

“That the said sum of rupees seventeen hundred half of which is rupees eight hundred and fifty will carry interest at the rate of twelve annas per cent monthly. The sum of rupees six will be deducted towards rent monthly from the interest which will accrue. The possession of the house has been delivered to the said mortgagee Mahajan (money lender). The mortgagors will pry the balance of rupees six, annas twelve, month by **Ram Narain Prasad v. Atul Chander Mitra** month, to the said mortgagee, after deducting the rent of rupees six after giving the possession of the said house and shop.”

Clause 4 provides:

“That we well go on paying the said Mahajan the sum of rupees six twelve annas the balance of the interest monthly. If the whole or part of the interest remains unpaid we will pay at the time of redemption. If this amount of interest is not paid the said house shall not be redeemed.”

The reading of these terms clearly show that Ex. 4 was a mortgage deed and not a sale deed. It was contended on behalf of the appellants that in order to avoid the payment of Hagechaharum, the original deed, dated 27th July, 1922, was drafted and executed in the form of a mortgage but it was actually meant to be an out right sale. In support of this argument reference was made to Ex. A-26, dated 8th October, 1922. As we have already said Ex. A-26, was required to be registered under Section 54 of the Transfer of Property Act. In the absence of such a registration this document cannot be received in evidence of any transaction affecting the property in view of Section 49 of the Registration Act. It was, however, urged on behalf of the appellants that the effect of Section 4 of the Transfer of Property Act was not to make Section 49 of the Registration Act applicable to documents which are compulsorily registrable by the provisions of Section 54, Paragraph 2 of the Transfer of Property Act. In support of this contention reliance was placed on the decision of the Full Bench of the Allahabad High Court in **Sohan Lal v. Mohan Lal**. [ILR 50 All 986].

3. Section 4 of the Transfer of Property Act states:

“The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Registration Act, 1872.

And Sections 54, Paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908.”

Section 54 of the Transfer of Property Act reads:

“ ‘sale’ is a transfer of ownership in exchange for a price paid or promised or part paid and part-promised.

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.”

Section 49 of the Registration Act prior to its amendment in 1929 read:

“No document required by Section 17 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.”

By Section 10 of the Transfer of Property (Amendment) Supplementary Act, 1929, Section 49 was amended as follows:

“No document required by Section 17 or by any provision of the Transfer of Property Act, 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:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be affected by registered instrument.”

The inclusion of the words “by any provision of the Transfer of Property Act, 1882”, by the Amending Act, 1929, settled a doubt entertained as to whether the documents of which the registration was compulsory under the Transfer of Property Act, but not under Section 17 of the Registration Act, were affected by Section 49 of the Registration Act. Section 4 of the Transfer of Property Act enacts that “Section 54, Paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908”. It was previously supposed that the affect of this section was merely to add to the list of documents of which the registration was compulsory and not to include them in Section 17 so as to bring them within the scope of Section 49.

We are however absolved in the present case from examining the correctness of these decisions. For these decisions have been superseded by subsequent legislation, i. e. by the enactment of Act 21 of 1929, which by inserting in Section 49 of the Registration Act the words “or by any provision of the Transfer of Property Act, 1882”, has made it clear that the documents in the supplemental list, i. e. the documents of which registration is necessary under the Transfer of Property Act but not under the Registration Act fall within the scope of Section 49 of the Registration Act and if not registered are not admissible as evidence of any transaction affecting any immovable property comprised therein, and do not affect any such immovable property. We are accordingly of the opinion that Ex. A-26 being unregistered is not admissible in evidence. In our opinion, Mr Sinha, is unable to make good his argument on this aspect of the case.

4. Mr Sinha contended that in any event the High Court should not have remanded the case to the lower appellate court with a direction that the defendants should be asked to render accounts before they claim any payment from the plaintiff at the time of redemption of the mortgage. It was pointed out that the plaintiff did not file an appeal against the decree of **Ram Narain Prasad v. Atul Chander Mitra** the Trial Court and in the absence of such an appeal the High Court was not legally justified in giving further relief to the plaintiff than that granted by the Trial Court. In our opinion, there is justification for this argument. We accordingly set aside that portion of the decree of the High Court remanding the case to the lower appellate court with a direction that the defendants should be asked to render accounts. Otherwise we affirm the decree of the High Court allowing the plaintiff’s appeal with costs and setting aside the judgment and decree of the lower appellate court and restoring judgment and decree of the Trial Court, dated 31st October, 1956. Subject to this modification we dismiss these appeal.

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## *Swaminathan v. Koonavalli*

AIR 1982 Mad. 276

**RAMANUJAM, J.** - The unsuccessful plaintiffs in O.S. No. 308 of 1970 on the file of the District Munsif, Palani, are the appellants herein. They filed the said suit for partition and separate possession of their 1/4th share in the suit property with past and future mesne profits. Their case was that the suit property formed part of the joint family properties, that 1/4th share of the suit property was allotted under a family arrangement, dated 19-9-1953, to their father, that in pursuance of the said family arrangement, their father was receiving his share of the rent till his death in 1967, and that as it is no longer possible to enjoy the property in common, it should be divided by metes and bounds and their share allotted to them.

2. Defendants 1 to 4 were the lessees and they merely filed a written statement setting out the terms of the lease in their favour. Defendants 5 to 6 alone contested the suit. Their case was that their father Palanimalai Pandaram and the plaintiff's father Kandasami Pandaram divided their properties by metes and bounds on 6-3-1953, by a registered instrument and from that time onwards Palanimalai Pandaram and Kandasami Pandaram became divided in status. The said Palanimalai Pandaram subsequently acquired the suit property under a sale deed dated 27-3-1940 and as such Kandasami Pandaram, the plaintiffs' father, had no interest or right in the suit property. They also denied the truth and the validity of the family arrangement dated 19-9-1953 and stated that the family arrangement, Ex A. 1 dated 19-9-1953 being unregistered cannot confer on the plaintiffs any rights as they had no pre-existing title in the suit property.

3. Thus the main question to be decided by the trial court was whether the family arrangement, Ex A. 1, dated 19-9-1953, on the basis of which the plaintiffs claim title to 1/4th share in the suit property was true and whether the said document being unregistered is admissible.

4. The trial court found that the family arrangement Ex. A. 1, was true, but however, held that as the plaintiffs' father, Kandasami Pandaram, had no antecedent title to any portion of the property, Ex. A. 1, should be taken to create an interest in the suit property and, therefore, Ex. A. 1 is not admissible in evidence, as it is unregistered. In support of the said view as to the admissibility of Ex. A. 1. the trial court relied on the decisions in **Raghava Rao v. Gopala Rao**, AIR 1942 Mad 125 and **Bibi Aziman v. Saleha** [AIR 1963 Pat 62]. Since the trial court held that Ex. A. 1 is inadmissible in evidence the suit was dismissed.

4-A. On appeal, the lower appellate court also took the view that Ex. A. 1 the family arrangement creates an interest in the suit property in favour of the plaintiffs' father who had no pre-existing right therein, it requires registration and, therefore, Ex. A.1. cannot be admitted in evidence, In this view, the lower appellant Court dismissed the appeal.

5. This second appeal filed by the plaintiffs has been admitted on the following substantial question of law:- Whether Ex. A. 1 is a family arrangement and if so, whether it is not admissible for want of registration?



6. As already stated, both the courts below have taken the view that as the plaintiff's father Kandasami Pandaram did not have any pre-existing or antecedent title in the suit property in respect of which the family arrangement Ex. A. 1 was entered into, the family arrangement should be taken to create an interest in the suit property in favour of the plaintiffs' father and, therefore, it is inadmissible in evidence for want of registration.

The learned counsel for the appellants submits that the view taken by the courts below is erroneous in the fact of the decision in **Ramcharan Das v. Girja Nandini Devi** [AIR 1966 SC 323], **T. Ramayamma v. T. Mathummal** [AIR 1974 Mad 321], and **Seethalakshmi Ammal v. Ramesham** [(1976) 2 Mad LJ 30]. In the first case, the Supreme Court held that a family arrangement is not a transfer or creation of interest in the property within the meaning of Sec. 37 (a) of the U.P. Court of Wards Act, 1912, that courts give effect to a family settlement upon the broad and general ground that its objects is to settle existing or future disputes regarding property amongst members of a family, that the word 'family' in this context is not to be given a narrow meaning and that it is not necessary as has been held by the Privy Council in **Rangaswami Gounden v. Nachaippa Gounden** [AIR 1918 PC 196] that every party taking benefit under a family settlement must necessarily be shown to have under the law, a claim to a share in the property and all that is necessary is that the parties must be related to one another in some way and have a possible claim to the property or claim or even a semblance of a claim on some other ground. as say affection. The above decision has been considered and followed by this court in **T. Ramayamma v. T. Mathummal** [AIR 1974 Mad 321].

In that case, it was held that a person who benefits under a family arrangement, need not necessarily have a share in the family property and that it is sufficient that the parties are related to each other in some way and have a possible or even a semblance of claim to that property. **Seethalakshmi Ammal v. Ramesham** [(1976) 2 Mad LJ 30], also followed the said decision of the Supreme Court and held that a family arrangement stands on a peculiar footing and having regard to the purport of such an arrangement courts will more readily give assent to a bona fide family arrangement than avoid it and that considering the object of the family arrangement courts have placed the settlements on such a high pedestal that they have gone to the extent of laying down that principles which apply to the case of an ordinary compromise between strangers do not equally apply to the case of compromise in the nature of family arrangements, and that since there is no transfer of interest as envisaged by the Transfer of Property Act in a family arrangement, family arrangement can be arrived at orally.

7. However, there is another decision of the Supreme Court reported in **Tek Bahadur Bhujil v. Debi Singh** [AIR 1966 SC 292] wherein it was held that when a family arrangement is brought about by a document such a document requires registration as it would amount to a document of title declaring for future what rights and what properties the parties possess. But the same case has laid down that if a document is no more than a memorandum of what had been agreed to by the parties earlier, it does not require registration as required by Sec. 17 of the Registration Act, for a family arrangement as such can be recorded in writing as a memorandum of what has been agreed upon. Thus, the question whether the document Ex. A. 1, requires registration will depend upon the fact whether Ex. A. 1 is a record of family

arrangement which has been arrived at earlier or whether it actually operates in praesenti as a family arrangement.

8. The learned counsel for the respondents contends that Ex. A. 1 itself brings about a division on the basis of the family settlement and therefore, it should be by itself taken to convey interest in the suit property and, therefore it is inadmissible for want of registration, However, I am not inclined to agree with the learned counsel for the respondents that the documents itself effects a division in pursuance of the family arrangement which was brought about by the panchayatdars. The recitals in the document clearly indicate that there was an earlier decision by the Panchayatdars and as per the decision, the properties have been divided and the document is brought into existence only to record the earlier division Ex. A. 1 nowhere says that it itself effects a division in praesenti. Therefore, the document can be taken to be one which records an earlier transaction of partition suggested by the Panchayatdars. In this view, of the matter, I have to hold that Ex. A. 1 is admissible in evidence even though it has not been registered.

9. In this case both the courts below have held that Ex. A. 1 is inadmissible in evidence and the plaintiffs cannot claim any rights thereunder. Now that this court has found that Ex. A. 1 is admissible in evidence, the matter has to go back to the lower appellate court for a decision on the other issues.

10. The Second Appeal is therefore, allowed and the matter is remitted to the lower appellate court for fresh disposal in the light of the observations made by this court.

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## ***Budh Ram v. Ralla Ram***

(1987) 4 SCC 75

**G.L. OZA, J.** - This is an appeal by the tenant against an order of eviction granted by the Rent Controller and maintained by the appellate authority and revision petition against which was dismissed by the High Court. The eviction was sought on the ground of arrears of rent. It was alleged that the shop in dispute was let out to the appellant-tenant @ Rs 5000 per annum whereas according to the appellant-tenant the rent was Rs 2500 per annum and not Rs 5000 per annum. It was pleaded in the application on behalf of the landlord that the rent note was executed on March 25, 1975. This was for one year and the rent fixed was Rs 5000. According to the tenant, it was pleaded that the rent was Rs 2500. The signature on the rent note was disputed.

2. After recording evidence the courts below have come to the conclusion that the rent note was executed by the appellant-tenant. The rent note mentions that it is for one year. It appears in evidence that initially Rs 5000 were paid by the appellant and later on Rs 2500 were returned. According to the landlord this was returned as it was agreed that the tenant will remain in the premises only for 6 months and not for one year and therefore Rs 2500 were returned. It is alleged that in the rent note there is also a term that the rent will be paid in advance.

3. The landlord before the Rent Controller claimed that the tenant was in arrears of rent to the extent of Rs 2500 for the period commencing from October 1, 1975 to March 31, 1976 and was in arrears of Rs 5000 for the period commencing from April 1, 1976 to March 31, 1977. It is not in dispute that on July 30, 1976, the tenant-appellant tendered a sum of Rs 2500 saying that it is the advance rent from April 9, 1976 to April 8, 1977. He also tendered Rs 52 by way of interest and Rs 30 as costs, and it is on this basis that it was contended that as this amount of rent was tendered on the first date of hearing, the landlord was not entitled to eviction under Section 13 of the East Punjab Rent Restriction Act. The courts below came to the conclusion that the contention of the tenant that the annual rent was Rs 2500 is not established. It was further held that therefore on July 30 when the tenant tendered Rs 2500 it was not rent up to date as he was in arrears not only of the amount of Rs 2500 for the year ending on March 1976 but he was in arrears for the next year.

4. It was also held that if this rent note could not be used as a piece of evidence for lease from year to year and the lease came to an end after one year, the tenant could only be said to be a tenant holding over and thus he could only be treated as a monthly tenant and even in that view of the matter within the language of Section 13, the tenant will be in arrears at least for 2 months rent i.e. April and May even if the term in the rent note of payment of yearly rent in advance is also not given effect to and in this view of the matter the order of eviction has been maintained.

5. The main contention advanced on behalf of the appellant is that as the rent note is for one year and it fixed yearly rent and talks of yearly rent in advance it clearly is a lease from year to year and therefore as it is not registered in view of Section 17 of the Registration Act and Section 107 of the Transfer of Property Act, this could not be admitted in evidence and therefore the term could not be enforced which talked of payment of yearly rent in advance

and it was therefore contended that the tenant at the most could be held to be in arrears to the tune of Rs 2500 as Rs 2500 was paid in advance and on this basis it was contended that the decree for eviction could not be maintained.

7. It is no doubt true that this document talks of payment of yearly rent in advance but it clearly is a lease for one year and it is therefore clear that this document could not be considered as a piece of evidence for the proof of a lease from year to year, on the basis of yearly rent. But the High Court took the view and rightly that the lease came to an end after the expiry of one year and thereafter even if the tenant is held to be holding over still he is expected to pay rent as contemplated in the provisions of the Rent Act itself and in that view of the matter it could not be disputed that the petitioner appellant is expected to pay rent from month to month and that rent has to be paid in the succeeding month before the end of the month and in this view of the matter it is not disputed that on the day when the appellant tendered the rent in the court in addition to what he had deposited he was in arrears of rent at least for two months which he did not tender and in this view of the matter the courts below were right in coming to the conclusion that the landlord was entitled to a decree for eviction on that ground.

8. In our opinion, the courts below were right in holding that the appellant-tenant was in arrears of rent and on the first day of hearing he did not tender or pay the whole amount of arrears and therefore the courts below were right in granting a decree for eviction. We therefore see no reason to entertain this appeal. It is therefore dismissed with costs. The respondents shall be entitled to the costs of this appeal.

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## ***Roshan Singh v. Zile Singh***

AIR 1988 SC 881

**A.P. SEN, J.** – This appeal by special leave by the defendants arises in a suit for a declaration and injunction brought by the plaintiffs and in the alternative for partition. They sought a declaration that they were the owners in possession of the portions of the property delineated by letters B2, B3, B4 and B5 in the plaint map which had been allotted to them in partition, and in the alternative claimed partition and separate possession of their shares. The real tussel between the parties is to gain control over the plot in question marked B2 in the plaint map, known as Buiyanwala gher. Admittedly, it was not part of the ancestral property but formed part of the village abadi, of which the parties were in unauthorised occupation. The only question is whether the plaintiffs were the owners in possession of the portion marked B2 as delineated in the plaint map. That depends on whether the document Exh. P-12 dated 3rd August, 1955 was an instrument of partition and therefore inadmissible for want of registration under S. 49 of the Indian Registration Act, 1908, or was merely a memorandum of family arrangement arrived at by the parties with a view to equalisation of their shares.

2. The facts giving rise to this appeal are that the plaintiffs who are four brothers are the sons of Soonda. They and the defendants are the descendants of the common ancestor Chhatar Singh who had two sons Jai Ram and Ram Lal. Soonda was the son of Ram Lal and died in 1966. Jai Ram in turn had two sons Puran Singh and Bhagwana. The latter died issueless in 1916-17. Puran Singh also died in the year 1972 and the defendants are his widow, three sons and two daughters. It is not in dispute that the two branches of the family had joint ancestral properties, both agricultural and residential in Village Nasirpur, Delhi Cantonment. The agricultural land was partitioned between Puran Singh and Soonda in 1955 and the names of the respective parties were duly mutated in the revenue records. This was followed by a partition of their residential properties including the house, gher/ghetwar etc. The factum of partition was embodied in the memorandum of partition Exh. P-12 dated 3rd August, 1955 and bears the thumb impressions and signatures of both Puran Singh and Soonda. In terms of this partition, the ancestral residential house called rihashi and the open space behind the same shown as portions marked A1 and A2 in the plaint map Exh. PW 25/1, fell to the share of Puran Singh. Apart from this, Puran Singh was also allotted gher shown as A3 in the plaint map admeasuring 795 square yards. Thus, the total area falling to the share of Puran Singh came to 2417 square yards. The plaintiffs' ancestor Soonda on his part got a smaller house called baithak used by the male members and visitors marked B1 in the plaint map having an area of 565 square yards. Apart from the house marked B1, Soonda also got gher marked B2 to B5, demarcated in yellow in the plaint map and thus the total area got by Soonda also came to 2417 square yards.

3. In terms of this partition, the plaintiffs claim that the parties have remained in separate exclusive possession of their respective properties. However, in February, 1971 the plaintiffs wanted to raise construction over the gher marked B2 in the plaint map and started constructing a 30 April, 1972 declared that the second party, namely Puran Singh, father of defendants Nos. 1-3, was in actual possession of the disputed piece of land marked B2 on the date of the passing of the preliminary order and within two months next before such date and

accordingly directed delivery of possession thereof to him until evicted in due course of law. On revision, the Additional Sessions Judge, Delhi by order dated 4th March, 1974 agreed with the conclusions arrived at by the learned Sub-Divisional Magistrate. On further revision, a learned single Judge (M.R.A. Ansari, J.) by his order dated 6th August, 1975 affirmed the findings reached by the Courts below on condition that while party No. 2 Puran Singh would remain in possession of the property in dispute, he would not make any construction thereon. The plaintiffs were accordingly constrained to bring the suit for declaration and injunction and in the alternative, for partition.

4. After an elaborate discussion of the evidence adduced by the parties, the learned single Judge by his judgment dated April 18, 1980 came to the conclusion, on facts, that the plaintiffs were the owners in possession of the property marked as B1, a smaller house known as Balthak, and the disputed plot B2, and the properties marked as A1, the ancestral residential house called Rihaishi and A2, the open space behind the same, belonged to the defendants. Taking an overall view of the evidence of the parties in the light of the circumstances, the learned single Judge came to the conclusion that the gher marked B2 belonged to the plaintiffs and it had fallen to their share in the partition of 1955 and later confirmed in the settlement dated 31st January, 1971. In coming to that conclusion, he observed:

I have little hesitation that the portions marked A-1 and A-2 and B-1 and B-2 were ancestral residential houses or Gher of the parties and Soonda and Puran had equal share in them. The residential house shown as A-1 and the open space behind that marked as A-2 were admittedly given to Puran in the partition of 1955. Similarly B-1 was allotted to Soonda. I am unable to hold that B-2 was also allotted to Puran. This would have been wholly unequitable and could not have by any stretch reflected the equal division of these joint properties. Puran in that case apart from getting the residential house for which he paid Rs. 3,000/- to Soonda would have also got area far in excess if defendants' case that Gher B-2 also belongs to them is accepted. In any natural and equitable division of the properties, that allotment of the residential house marked 'A' and the open space behind the same to Puran, Balthak B-1 and Gher No. 1 could have been naturally been given to Soonda. That it was actually done so, gets clarified in the document Ex. P1 dated 31-1-1971 which was written in the presence of a number of villagers between Puran and Soonda'.

The learned Judge went on to say that the document Exh. P-12 was executed by Puran Singh and Soonda in the presence of the villagers who attested the same, and there was some attached to it. What is rather significant is that Puran Singh was required to pay Rs. 3,000 as owelty money for equalisation of shares.

5. Aggrieved, the defendants preferred an appeal under Cl. 10 of the Letters Patent. A Division Bench of the High Court (D.K. Kapur, C.J. and N.N. Goswamy, J.) by its judgment dated 4<sup>th</sup> August, 1986 affirmed the reasoning and conclusion arrived at by the learned single Judge and accordingly dismissed the appeal. Both the learned single Judge as well as the Division Bench have construed the document Exh. P-12 to be a memorandum of family arrangement and not an instrument of partition requiring registration and therefore admissible

in evidence under the proviso to S. 49 of the Act and have referred to certain decisions of this Court in support of that conclusion.

6. In support of the appeal Shri S.N. Kacker, learned counsel for the appellants has mainly contended that the document Exh. P-12 is an instrument of partition and the – before required registration under S. 17 of the Act. It is urged that the High Court has on a misconstruction of the terms wrongly construed it to be a memorandum of family arrangement and admissible for the collateral purpose of showing nature of possession under the proviso to S. 49 of the Act. In substance, the submission is that the document does not contain any recital of a prior, completed partition but on its terms embodies a decision which is to be the sole repository of the right and title of the parties i.e. according to which partition by metes and bounds had to be effected. WE regret, we find it rather difficult to accept the contention.

7. In order to deal with the point involved, it is necessary to reproduce the terms of the document Exh. P-12 which read:

“Today after discussion it has been mutually agreed and decided that house rihaiishi (residential) and the area towards it west which is lying open i.e. the area on the back of rihaiishi (residential) house has come to the share of Chaudhary Pooran Singh Jaildar.

2. House Baithak has come to the share of Chaudhary Soonda. The shortage in area as compared to the house rihaiishi and the open area referred to will be made good to Chaudhary Soonda from the field and gitwar in the eastern side.

3. Rest of the area of the field and gitwar will be half and half of each of co-sharers. The area towards west will be given to Chaudhary Pooran Singh and towards east will be given to Chaudhary Soonda.

4. Since house rihaiishi has come to the share of Chaudhary Pooran Singh therefore he will pay Rs. 3000/- to Chaudhary Soonda.

5. A copy of this agreement has been given to each of the co-sharers.

D/- 3-8-1955

Sd/- in Hindi Pooran Singh Zaildar LTI Ch. Soonda

8. According to the plain terms of the document Exh. P-12, it is obvious that it was not an instrument of partition but merely a memorandum recording the decision arrived at between the parties as to the manner in which the partition was to be effected. The opening words of the document Exh. P-12 are: “Today after discussion it has been mutually agreed and decided that...”. What follows is a list of properties allotted to the respective parties. From these words, it is quite obvious that the document Exh. P-12 contains the recital of past events and does not itself embody the expression of will necessary to effect the change in the legal relation contemplated. So also the Panch Faisla Exh. P-1 which confirmed the arrangement so arrived at, opens with the words “Today on 31-1-1971 the following persons assembled to effect a mutual compromise between Chaudhary Puran Singh and Chaudhary Zile Singh unanimously decided that...” The purport and effect of the decision so arrived at is given thereafter. One of the terms agreed upon was that the gher marked B2 would remain in the share of Zile Singh, representing the plaintiffs.

9. It is well-settled that while an instrument of partition which operates or is intended to operate as a declared volition constituting or severing ownership and causes a change of legal relation to the property divided amongst the parties to it, requires registration under S.17(1)(b) of the Act, a writing which merely recites that there has in time past been a partition, is not a declaration of will, but a mere statement of fact, and it does not require registration. The essence of the matter is whether the deed is a part of the partition transaction or contains merely an incidental recital of a previously completed transaction. The use of the past tense does not necessarily indicate that it is merely a recital of a past transaction. It is equally well-settled that a mere list of properties allotted at a partition is not an instrument of partition and does not require registration. Section 17(1)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property. Therefore, a mere recital of what has already taken place cannot be held to declare any right and there would be no necessity of registering such a document. Two propositions must therefore flow: (1) A partition may be effected orally; but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it. If it be not registered. S. 49 of the Act will prevent its being admitted in evidence. Secondly evidence of the factum of partition will not be admissible by reason of S. 91 of the Evidence Act, 1872. (2) Partition lists which are mere records of a previously completed partition between the parties, will be admitted in evidence even though they are unregistered, to prove the fact of partition:

10. The tests for determining whether a document is an instrument of partition or a mere list of properties, have been laid down in a long catena of decisions of the Privy Council, this Court and the High Courts. The question was dealt with by Vivian Bose, J. in **Narayan Sakharam Patil v. Co-operative Central Ban, Malkapur** [AIR 1938 Nag 434]. Speaking for himself and Sir Gilbert Stone. C.J. the learned Judge relied upon the decisions of the Privy Council in **Bageshwari Charan Singh v. Jagarnath Kuari** [AIR 1932 PC 55] and **Subramanian v. Lutchman** [AIR 1923 PC 50] and expressed as follows:

“It can be accepted at once that mere lists of property do not form an instrument of partition so would not require registration, but what we have to determine here is whether these documents are mere lists or in themselves purport to ‘create, declare, assign, limit or extinguish... any right, title or interest’ in the property which is admittedly over Rs. 100 in value. The question is whether these lists merely contain the recital of past events or in themselves embody the expression of will necessary to effect the change in the legal relation contemplated”.

Sir Gilbert Stone, CJ speaking for himself and Vivian Bose, J. in **Ganpat Gangaji Patil v. Namdeo Bhagwanji Patil** [AIR 1941 Nag 209] reiterated the same principle.

11. Even otherwise, the document Exh. P 12 can be looked into under the proviso to S. 49 which allows documents which would otherwise be excluded, to be used as evidence of any collateral transaction not required to be effected by a registered instrument’. In **Varada Pillai v. Jeevarathnammal** [AIR 1919 PC 44] the Judicial Committee of the Privy Council allowed an unregistered deed of gift which required registration, to be used not to prove a gift ‘because



no legal title passed' but to prove that the donee thereafter held in her own right. We find no reason why the same rule should not be made applicable to a case like the present.

12. Partition, unlike the sale or transfer which consists in its essence of a single act, is a continuing state of facts. It does not require any formality, and therefore, if parties actually divide their estate and agree to hold in severalty, there is an end of the matter.

13. On its true construction, the document Exh. P-12 as well as the subsequent confirmatory panch faisla Exh. P-1 merely contains the recitals of a past event, namely, a decision arrived at between the parties as to the manner in which the parties would enjoy the distinct items of joint family property in severalty. What follows in Exh. P-12 is a mere list of properties allotted at a partition and it cannot be construed to be an instrument of partition and therefore did not require registration under S. 17(1)(b) of the Act. That apart, the document could always be looked into for the collateral purpose of providing the nature and character of possession of each item of property allotted to the members.

14. The matter can be viewed from another angle. The true and intrinsic character of the memorandum Exh. P-12 as later confirmed by the panch faisla Exh. P-1 was to record the settlement of family arrangement. The parties set up competing claims to the properties and there was an adjustment of the rights of the parties. By such an arrangement, it was intended to set at rest competing claims amongst various members of the family to secure peace and amity. The compromise was on the footing that there was an antecedent title of the parties to be properties and the settlement acknowledged and defined title of each of the parties. The principle governing this was laid down by the Judicial Committee in **Khunni Lal v. Gobind Krishna Narain** [(1911) 38 Ind App 87]. Ameer Ali, J. delivering the judgment of the Privy Council quoted with approval the following passage from the judgment in **Lalla Oudh Beharee Lall v. Raneew Mewa Koonwer** [(1868) 3 Agra HCR 82, 84]:

“The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct on each other, that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement’.

15. This view was adopted by the Privy Council in subsequent decisions and the High Courts in India. To the same effect is the decision of this Court in **Sahu Madho Das v. Mukand Ram** [AIR 1955 SC 481]. The true principle that emerges can be stated thus : If the arrangement of compromise is one under which a person having an absolute title to the property transfers his title in some of the items thereof to the others, the formalities prescribed by law have to be complied with, since the transferees derive their respective title through the transferor. If, on the other hand, the parties set up competing titles and the differences are resolved by the compromise, there is no question of one deriving title from the other, and therefore, the arrangement does not fall within the mischief of S. 17 read with S. 49 of the Registration Act as no interest in property is created or declared by the document for the first

time. As pointed out by this Court in **Sahu Madho Das** case, it is assumed that the title had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary.

16. In the present case, admittedly there was a partition by metes and bounds of the agricultural lands effected in the year 1955 and the shares allotted to the two branches were separately mutated in the revenue records. There was thus a disruption of joint status. All that remained was the partition of the ancestral residential house called rihashi, the smaller house called baithak and gher/ghetwars. The document Exh. P-12 does not effect partition but merely records the nature of the arrangement arrived at as regards the division of the remaining property. A mere agreement to divide does not require registration. But if the writing itself effects a division, it must be registered. It is well-settled that the document though unregistered can however be looked into for the limited purpose of establishing a severance in status, though that severance would ultimately affect the nature of the possession held by the members of the separated family as co-tenants. The document Exh. P-12 can be used for the limited and collateral purpose of showing that the subsequent division of the properties allotted was in pursuance of the original intention to divide. In any view, the document Exh. P-12 was a mere list of properties allotted to the shares of the parties.

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***Dina Ji v. Daddi***

(1990) 1 SCC 1 : AIR 1990 SC 1153

**G.L. OZA and M. FATHIMA BEEVI, JJ.**

**ORDER**

1. This appeal arises out of the judgment dated December 13, 1971 of the High Court of Madhya Pradesh in Second Appeal No. 617 of 1989, wherein the learned Judge of the High Court dismissed the second appeal filed by the present appellant.

2. The present appellant filed a suit for injunction and possession on the basis of a registered sale deed dated April 28, 1966 executed by Smt. Yashoda Bai in his favour with respect to immovable property including agricultural lands and houses.

3. The property originally belonged to her husband and after his death she got it as a limited owner and by influx of time and by coming into force of the Hindu Succession Act, she acquired the rights of an absolute owner. On April 28, 1963, she adopted respondent Nain Singh as her son and executed a document said to be the Deed of Adoption. This document is not a registered document and the trial court admitted it in evidence in proof of adoption. This document, in addition to recital of the factum of adoption in presence of panchayat in accordance with the custom of the community also contained a covenant wherein she had stated that after this deed of adoption her adopted son will be entitled (hakdar) to the whole property including movable and immovable and she will have no right to alienate any part of the property after this deed of adoption.

4. The trial court decreed the suit. The first appellate court dismissed the suit setting aside the decree passed by the trial court. The learned Judge of the High Court considering the impact of Section 12 of the Hindu Adoptions and Maintenance Act rightly held that the adopted son, in view of the proviso (c) to Section 12, will only be entitled to property after the death of the adoptive mother but the learned Judge felt that the further covenant in the adoption deed deprived her of that right and conferred that right on the adopted son, on this basis the learned Judge of the High Court came to the conclusion that the widow after executing this deed of adoption had no right left in the property and therefore a transfer executed by her will not confer any title on the plaintiff. It is on this basis that the High Court maintained the judgment of the lower appellate court dismissing the suit of the plaintiff-appellant. Against this, by special leave, this appeal has come to this Court.

5. Learned counsel for the appellant contended that the document which is described as a deed of adoption, in substance, is in two parts. One recites the factum of adoption and the second contains the covenant wherein she has relinquished her rights in the property and conferred rights on adopted son. According to the learned counsel, so far as it refers to adoption, the courts below were right in admitting the document as an evidence of adoption but so far as it refers to a deed of relinquishment or conferment of right on the adopted son, it will be hit by Section 17(1)(b) read with Section 49 of the Indian Registration Act and, therefore, the High Court was not right in relying on this clause to come to the conclusion that the widow Smt. Yashoda Bai had no right to transfer the property in favour of plaintiff-appellant.

6. Section 12 of the Hindu Adoptions and Maintenance Act reads as follows:

**“12. Effects of adoption.-** An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that:

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.”

7. Proviso (c) of this section departs from the Hindu general law and makes it clear that the adopted child shall not divest any person of any estate which has vested in him or her before the adoption. It is clear that in the present case, Smt. Yashoda Bai who was the limited owner of the property after the death of her husband and after Hindu Succession Act came into force, has become an absolute owner and therefore the property of her husband vested in her and therefore merely by adopting a child she could not be deprived of any of her rights in the property. The adoption would come into play and the adopted child could get the rights for which he is entitled after her death as is clear from the scheme of Section 12 proviso (c).

8. Section 13 of the Hindu Adoptions and Maintenance Act reads:

**“13. Right of adoptive parents to dispose of their properties. -** Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer inter vivos or by will.”

9. This section enacts that when the parties intend to limit the operation of proviso (c) to Section 12, it is open to them by an agreement and it appears that what she included in the present deed of adoption was an agreement to the contrary as contemplated in Section 13 of the Hindu Adoptions and Maintenance Act.

10. Section 17(1)(b) of the Registration Act clearly provides that such a document where any right in movable property is either assigned or extinguished will require registration. It could not be disputed that this part of the deed which refers to creation of an immediate right in the adopted **Ram Narain Prasad v. Atul Chander Mitra** son and the divesting of the right of the adoptive mother in the property will squarely fall within the ambit of Section 17(1)(b) and therefore under Section 49 of the Registration Act, this could not be admitted if it is not a registered document. Unfortunately, the Hon'ble Judge of the High Court did not notice this aspect of the matter and felt that what could not be done because of the proviso (c) to Section 12 has been specifically provided in the document itself but this part of the document could not be read in evidence as it could not be admitted. In view of this, the appeal

is allowed. The judgments of the High Court and that of the lower appellate court are set aside and that of the trial court is restored. In view of these special circumstances, there is no order as to costs.

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***S.V. Chandra Pandian v. S.V. Sivalinga Nadar***

f(1993) 1 SCC 589

**A.M. AHMADI, J.** -The four appellants and respondents 1 and 2 are brothers. They were carrying on business in partnership in the name and style of Messers Sivalinga Nadar & Brothers and S.V.S. Oil Mills, both partnerships being registered under the Partnership Act, 1932. Most of the properties were acquired by the firm of Sivalinga Nadar & Brothers. The firm of Messrs S.V.S. Oil Mills merely had leasehold rights in the parcel of land belonging to the first-named firm on which the superstructure of the oil mill stood. Both the partnerships were of fixed durations. Disputes arose between the six brothers in regard to the business carried on in partnership in the aforesaid two names. For the resolution of these disputes the six brothers entered into an arbitration agreement dated October 8, 1981, which was as under:

“We are carrying on business in partnership together with other partners under several partnership names. We are also holding shares and managing the Public Limited Company, namely, the Madras Vanaspati Ltd., at Villupuram. Disputes have arisen among us with respect to the several business concerns, immovable and moveable properties standing in our names as well as other relatives.

We are hereby referring all our disputes, the details of which would be given by us shortly to you, namely, Sri B.B. Naidu, Sri K.R. Ramamani and Sri Seetharaman.

We agree to abide by your award as to our disputes.”

All the three arbitrators were fairly well-conversant with the business carried on in different names by the aforesaid two partnership firms; the first two being their Tax Consultants and the third being their Chartered Accountant. The parties, therefore, had complete faith and trust in their objectivity and impartiality.

2. The arbitrators accepted and entered upon the reference and after giving the disputants full and complete opportunity to place their rival points of view before them, circulated a draft award and after considering the response and reaction of the disputants thereon made their final award on July 9, 1984. The arbitrators then proceed to set out the properties belonging to or claimed to belong to the aforesaid two firms in paragraphs 6 to 24 of their award. Paragraph 25 is a residuary clause which says that any asset left out or realised hereafter or any liability found due other than those reflected in the account books, shall, likewise, be divided and/or borne equally among the disputants. Paragraphs 26 and 27 deal with the use of the firm names. Paragraph 28 refers to the claim of Smt C. Kanthimathi, sister of the six partners, with which we are not concerned in these appeals. Paragraph 29 refers to the business carried on by the relatives of the disputants in the names of Sri Brahasakthi Agency and Srimagal Finance Corporation. The arbitrators have recognised the fact that even though the said business is not carried on by the disputants it would be desirable to dissolve the said firms also w.e.f. July 24, 1984 in the larger interest of peace and amity among the disputants and their relatives. Paragraph 30 refers to the properties standing in the name of the father of the six disputants, i.e., partners of the two firms in question. It is stated that although initially the disputants had shown an inclination to refer the dispute concerning the properties owned by their father to the arbitration of the three arbitrators but when it was noticed that the

deceased had left a will disposing of the properties the need for resolution of the dispute through arbitration did not survive. In paragraph 31 the arbitrators have determined their fees and have directed the disputants to bear them equally. At the end of the award the properties falling to the share of the disputants have been set out in detail in Schedules 'A' to 'F' referred to earlier.

3. After the award was made on July 9, 1984, O.P. No. 230 of 1984 was filed by S.V. Chandrapandian and Others for a direction to the arbitrators to file their award in Court which was done. Thereupon, the applicants S.V. Chandrapandian and others filed a Miscellaneous Application No. 3503 of 1984 requesting the Court to pass a decree in terms of the award. Before orders could be passed on that application, O.P. Nos. 247 and 275 of 1984 were filed by S.V. Sivalinga Nadar and S.V. Harikrishnan respectively under Section 30 of the Arbitration Act to set aside the award. The said applications came up for hearing before a learned Single Judge of the High Court. Various points were raised and decided by the learned Single Judge but it would be sufficient for our purpose to refer to the one which we are called upon to decide in these group of appeals. That is to be found in paragraph 71 of the judgment of the learned Single Judge. The contention urged was that having regard to the allotment of partnership properties under the award, it was incumbent that the award should have been registered as required by Section 17(1) of the Registration Act and since it lacked registration, the Court had no jurisdiction to make it the rule of the Court and grant a decree in terms thereof.

4. The learned Single Judge answered the aforesaid contention in paragraph 72 of his judgment as under:

“The learned counsel for the respondents also contended that the award falls under Schedule I Article 12 of the Stamp Act and the allocation of properties owned by partnership firm on dissolution to the erstwhile partners is not partition of immovable properties. In this connection, learned counsel for the respondents placed reliance on the decision reported in **Addanki Narayanappa v. Bhaskara Krishtappa** [AIR 1959 AP 380] which decision has been confirmed in **Addanki Narayanappa v. Bhaskara Krishnappa** [AIR 1966 SC 1300]. It was submitted by the learned counsel for the respondents that the contentions with regard to stamp and registration put forward by the petitioner cannot be accepted. It is to be pointed out that the award has been submitted for registration long ago on October 27, 1984 itself and it is stamped and if there is any deficiency, the registering authority could direct proper stamp to be affixed and therefore I feel there could be no impediment for the award being made a rule of the Court and a decree being passed in terms of the award as contended by the learned counsel for the respondents.”

The learned Single Judge thereafter proceeded to make the final order in paragraph 78 of the judgment in the following terms:

“Thus on a careful consideration of the materials available and the contentions of either side it has to be decided that Application No. 3505 of 1984 in O.P. No. 230 of 1984, filed by the petitioners therein praying for a decree in terms of the arbitration award dated July 9, 1984 has to be allowed and O.P. Nos. 247 and 275 of 1984 and the applications filed in those two

petitions, i.e., Application Nos. 3474, 3476, 5030, 5031, 5032, 2827, 2828, 3773, 3762, 3874 of 1984 and 4886 and 4887 of 1985, are dismissed. The petitioner in O.P. No. 230 of 1984 and the applicants in Application No. 3505 of 1984 are directed to take steps for getting the award registered. The parties in all these proceedings are directed to bear their own costs.”

5. It may here be mentioned that after the making of the award one of the arbitrators Shri B.B. Naidu passed away on October 20, 1984. At the request of some of the parties the surviving arbitrators presented the award before the District Registrar, Madras, for registration on October 27, 1984. Even though the signature of the deceased arbitrator was identified by the surviving arbitrators the document was kept pending for registration. In the meantime, on January 23, 1987, advocate for Sivalinga Nadar served notice on the Registrar not to register the document and threatened to take proceedings in Court if the document was registered. It will thus be seen that the registration of the document was blocked by one of the disputants Sivalinga Nadar on the premise that the High Court had in O.P. No. 247 of 1984 granted a stay against the operation of the award on September 5, 1984.

6. Against the judgment of the learned Single Judge, the matter was carried in appeal to a Division Bench of the High Court of Madras. The Division Bench of the High Court reversed the aforesaid finding recorded by the learned Single Judge and came to the conclusion that the award required registration under Section 17(1) of the Registration Act. In this view that it took, it did not think it necessary to go into the other contentions dealt with by the learned Single Judge. It held that since the award required registration and was in fact not registered no proceeding for making the award the rule of the Court could be entertained because in the absence of a valid award the Court had no jurisdiction to grant a decree in terms of the award. It, however, took note of the fact that the award was presented for registration but on account of the conduct of one of the disputants it could not be registered as the registering authority was threatened with civil consequences. The correspondence in this behalf was sought to be placed on record as additional evidence but the Division Bench thought that would not alter the situation since the fact remained that the award was not registered even on the date of its judgment. It, therefore, made the following observation in paragraph 46 of the judgment:

“It, however, does not mean that if the award is validly registered and presented to be made a rule of the Court in accordance with law, the Court cannot entertain the same.”

In this view of the matter the Division Bench allowed the appeal and set aside the impugned judgment of the learned Single Judge and held that as the award was not registered it could not be made the rule of the Court. It made no order as to costs. It is against this decision of the Division Bench of the High Court that the present appeals by special leave have been filed.

8. The provisions [of the Partnership Act, 1932] make it clear that regardless of the character of the property brought in by the partners on the constitution of the partnership firm or that which is acquired in the course of business of the partnership, such property shall become the property of the firm and an individual partner shall only be entitled to his share of profits, if any, accruing to the partnership from the realisation of this property and upon dissolution of the partnership to a share in the money representing the value of the property. It is well settled



that the firm is not a legal entity, it has no legal existence, it is merely a compendious name and hence the partnership property would vest in all the partners of the firm. Accordingly, each and every partner of the firm would have an interest in the property or asset of the firm but during its subsistence no partner can deal with any portion of the property as belonging to him, nor can he assign his interest in any specific item thereof to anyone. By virtue of the implied authority conferred as agent of the firm his action would bind the firm if it is done to carry on, in the usual way, the business of the kind carried on by the firm but the act or instrument by which the firm is sought to be bound must be done or executed in the firm name or in any other manner expressing or implying an intention to bind the firm. His right is merely to obtain such profits, if any, as may fall to his share upon the dissolution of the firm which remain after satisfying the liabilities set out in the various sub-clauses (i) to (iv) of clause (b) of Section 48 of the Act.

9. In the present case the six brothers who were carrying on business in partnership fell out on account of disputes which they could not resolve inter se. The partnership being of fixed durations could not be dissolved by any partner by notice. As they could not resolve their disputes they decided to resort to arbitration. The three arbitrators chosen by them were men of their confidence and they after giving the partners full and complete opportunity took care to first circulate a proposed award to ascertain the reaction of the disputants therein. The letter written to the arbitrators by S.V. Sivalinga Nadar dated February 16, 1983 indicates that he was quite satisfied with the hearing given by the arbitrators. He was also by and large satisfied with the proposed award but thought it warranted certain adjustments to make it acceptable and rational. He was of the view that the award should provide for the reallocation of the shareholdings of Madras Vanaspati Ltd., whereas Brahmasakthi Tin Factory owned by his sons should be kept out of the purview of the arbitrators since it was not the subject-matter of arbitration. Then he raised some objection as to the percentage of his share and the amount found due to him. In the subsequent letter written on September 9, 1983 he has reiterated these very objections while raising certain questions regarding valuation of partnership properties. Even the application filed under Sections 30 and 33 of the Arbitration Act in the High Court the objections to the award as enumerated in paragraph 15 mainly concerned (i) the conduct of the arbitrators who, it is alleged, acted negligently, with bias and against principles of natural justice (ii) deliberate act in leaving out certain properties from consideration e.g., shareholdings of Madras Vanaspati Ltd., stock-in-trade and cash deposits, the properties of Velayudha Perumal Nadar, etc., and (iii) failure to grant him a higher share to which he was entitled. No contention was raised regarding the want of registration of the award. However, being a question of law, the learned Single Judge entertained the plea and rejected it but it found favour with the Division Bench.

The submission made in this behalf before the courts below was that the award involved a partition of immovable properties as a consequence of dissolution of the firms and since the value of the immovable properties which are the subject-matter of the award indisputably exceed the value of Rs 100, the award was compulsorily registrable in view of the mandatory nature of the language of Section 17(1) which uses the expression 'shall be registered'. On the mandatory character of the provision there is no dispute. The question which requires determination is whether on the dissolution of the partnership the distribution of the assets of

the firm comprising both moveable and immovable properties after meeting its obligations on settlement of accounts amongst the partners of the firm in proportion to their respective shares amounts to a partition of immovable properties or a relinquishment or extinguishment of a share in immovable property requiring registration under Section 17 of the Registration Act if the allocation includes immovable property of the value of Rs 100 and above? In other words the question to be considered is whether the interest of a partner in partnership assets is to be treated as moveable property or both moveable and immovable depending on the character of the property for the purposes of Section 17 of the Registration Act? This question has been the subject-matter of decision in a few cases.

11. In **Addanki Narayanappa v. Bhaskara Krishnappa**, the members of two joint Hindu families, the Addanki family and the Bhaskara family, had entered into partnership for carrying on business of hulling rice, etc.; each family having half share in that business. The capital of the partnership comprised, among other things, certain lands belonging to the two families. The firm acquired more lands in the course of business. Differences arose whereupon two members of the Addanki family filed a suit for dissolution of the partnership and accounts. All the members of the two families were made parties to the suit either as plaintiffs or as defendants. The Bhaskara family contended in defence that the partnership was dissolved in 1936 and accounts were settled between the two families under a karar executed in favour of Bhaskara Gurappa Setty, the karta of the Bhaskara family, by five members of the Addanki family representing that family. The defendants, therefore, contended that the plaintiffs had no cause of action and the suit for dissolution of partnership and accounts was not maintainable. The relevant part of the agreement-karar reads as under:

“As disputes have arisen in our family regarding partition, it is not possible to carry on the business or to make investment in future. Moreover, you yourself have undertaken to discharge some of the debts payable by us in the coastal parts in connection with our private business. Therefore, from this day onwards we have closed the joint business. So, from this day onwards, we have given up (our) share in the machine etc., and in the business, and we have made over the same to you alone completely by way of adjustment. You yourself shall carry on the business without ourselves having anything to do with the profit and loss. Herefore, you have given up to us the property forming our Venkatasubbayya’s share which you have purchased and delivered possession of the same to us even previously. In case you want to execute and deliver a proper document in respect of the share which we have given to you, we shall at your own expense, execute and deliver a document registered.”

Ex facie this document disclosed that the partnership business had come to a halt and the Addanki family had given up their share in the machine, etc., in the business and had made it over to the Bhaskara family. It also recites that the Addanki family had already received certain properties purchased by the partnership as its share in the partnership assets. The submission was that since the partnership assets included immovable property and the document recorded relinquishment by the members of the Addanki family of their interest therein which exceeded Rs 100 in value, the document required registration under Section 17(1)(c) of the Registration Act. After referring to the provisions of law, treatise and the case-law, both of English and Indian courts, this Court reproduced the following passage from the

decision in **Ajudhia Pershad Ram Pershad v. Sham Sunder** [AIR 1947 Lah 13] with approval:

“These sections require that the debts and liabilities should first be met out of the firm property and thereafter the assets should be applied in rateable payment to each partner of what is due to him firstly on account of advances as distinguished from capital and, secondly on account of capital, the residue, if any, being divided rateably among all the partners. It is obvious that the Act contemplates complete liquidation of the assets of the partnership as a preliminary to the settlement of accounts between partners upon dissolution of the firm and it will, therefore, be correct to say that, for the purposes of the Indian Partnership Act, and irrespective of any mutual agreement between the partners, the share of each partner is, in the words of Lindley : ‘his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged’.”

12. In **CIT v. Juggilal Kamalapat** [AIR 1967 SC 401], the facts were that three brothers and one J entered into a partnership business. The firm owned both moveable and immovable properties. Sometime thereafter the three brothers created a Trust with themselves as the first three trustees and simultaneously executed a deed of relinquishment relinquishing their rights in and claims to all the properties and assets of the firm in favour of J and of themselves in the capacity of trustees. Thereafter a new partnership firm was constituted between J and the Trust with specified shares. The Trust brought a sum of Rs 50,000 as its capital in the new firm. The new firm applied for registration under Section 26-A of the Income Tax Act, 1922 but the application was rejected by the authorities. The Tribunal held that the deed of relinquishment being unregistered could not legally transfer the rights and the title to the immovable properties owned by the original firm to the Trust. Since the immovable properties were not separable from the other business assets it held that there was no legal transfer of any portion of the business assets of the original firm in favour of the Trust. A reference was made to the High Court on the question whether the new partnership legally came into existence and as such should be registered under Section 26-A. The High Court held that there was no impediment to its registration. The matter was brought in appeal before this Court. This Court pointed out that the deed of relinquishment was in respect of individual interests of the three brothers in the assets of the partnership firm in favour of the Trust and consequently, did not require registration, even though the assets of the partnership included immovable property.

13. Again in **CIT v. Dewas Cine Corporation** [AIR 1968 SC 676], the partnership firm was dissolved and on dissolution it was agreed between the partners that the theatres should be returned to their original owners who had brought them into the books of the partnership as its assets. In the books of accounts of the partnership the assets were shown as taken over on October 1, 1951 at the original price less depreciation, the depreciation being equally divided between the two partners. In the proceedings for the assessment year 1952-53 the firm was treated as a registered firm. The Appellate Tribunal held that restoration of the two theatres to the original owners amounted to transfer by the firm and the entries adjusting the depreciation and writing off the assets at the original value amounted to total recoupment of the entire

depreciation by the partnership and on that account the second proviso to Section 10(2)(vii) of the I.T. Act, 1922 applied. The High Court in reference upturned the decision of the Tribunal and held in favour of the assessee against which the Revenue appealed to this Court. This Court after referring to Sections 46 and 48 of the Partnership Act held that on the dissolution of the partnership each partner must be deemed to be returned to the original owner in satisfaction partially or wholly of his claim to a share in the residue of the assets after discharging the debts and other obligations. In law there was no sale or transfer by the partnership to the individual partners in consideration of their respective share in the residue. In taking this view reliance was once again placed on the decision of this Court in **Addanki Narayanappa**.

14. In **CIT v. Bankey Lal Vaidya** [AIR 1971 SC 2270], this Court pointed out that on dissolution of partnership the assets of the firm are valued and the partner is paid a certain amount in lieu of his share of the assets, the transaction is not a sale, exchange or transfer of assets of the firm and the amount received by the partner cannot be taxed as capital gains.

15. Again in **Malabar Fisheries Co. v. CIT** [AIR 1980 SC 176], the facts were that the appellant firm which was constituted on April 1, 1959 with four partners carried on six different businesses in different names. The firm was dissolved on March 31, 1963 and under the deed of dissolution the first business concern was taken over by one of the partners, the remaining five concerns by two of the other partners and the fourth partner received his share in cash. It appears that during the assessment years 1960-61 to 1963-64 the firm had installed various items of machinery in respect of which it had received Development Rebate under Section 33 of the I.T. Act, 1961. On dissolution, the Income Tax Officer took the view that Section 34(3)(b) of the Act applied on the premises that there was a sale or transfer of the machinery by the firm whereupon he withdrew the Development Rebate earlier allowed to the firm by amending the orders in that behalf. The appeal filed on behalf of the dissolved firm was dismissed by the Appellate Assistant Commissioner but was allowed by the Tribunal. At the instance of the Revenue a reference was made to the High Court and the High Court allowed the reference holding that there was a transfer of assets within the meaning of Section 34(3)(b). The dissolved firm approached this Court in appeal. This Court after referring to the definition of the expression 'transfer' in Section 2(47) of the Act and the case-law on the point concluded as under:

“Having regard to the above discussion, it seems to us clear that a partnership firm under the Indian Partnership Act, 1932 is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate rights of its own in the partnership assets and when one talks of the firm's property or firm's assets all that is meant is property or assets in which all partners have a joint or common interest. If that be the position, it is difficult to accept the contention that upon dissolution the firm's rights in the partnership assets are extinguished. The firm as such has no separate rights of its own in the partnership assets but it is the partners who own jointly in common the assets of the partnership and, therefore, the consequence of the distribution, division or allotment of assets to the partners which flows upon dissolution after discharge of liabilities is nothing but a mutual adjustment of rights between the partners and there is no question of any extinguishment of the

firm's rights in the partnership assets amounting to a transfer of assets within the meaning of Section 2(47) of the Act.”

16. From the foregoing discussion it seems clear to us that regardless of its character the property brought into stock of the firm or acquired by the firm during its subsistence for the purposes and in the course of the business of the firm shall constitute the property of the firm unless the contract between the partners provides otherwise. On the dissolution of the firm each partner becomes entitled to his share in the profits, if any, after the accounts are settled in accordance with Section 48 of the Partnership Act. Thus in the entire asset of the firm all the partners have an interest albeit in proportion to their share and the residue, if any, after the settlement of accounts on dissolution would have to be divided among the partners in the same proportion in which they were entitled to a share in the profit. Thus during the subsistence of the partnership a partner would be entitled to a share in the profits and after its dissolution to a share in the residue, if any, on settlement of accounts. The mode of settlement of accounts set out in Section 48 clearly indicates that the partnership asset in its entirety must be converted into money and from the pool the disbursement has to be made as set out in clause (a) and sub-clauses (i), (ii) and (iii) of clause (b) and thereafter if there is any residue that has to be divided among the partners in the proportions in which they were entitled to a share in the profits of the firm. So viewed, it becomes obvious that the residue would in the eye of law be moveable property i.e. cash, and hence distribution of the residue among the partners in proportion to their shares in the profits would not attract Section 17 of the Registration Act.

Viewed from another angle it must be realised that since a partnership is not a legal entity but is only a compendious name each and every partner has a beneficial interest in the property of the firm even though he cannot lay a claim on any earmarked portion thereof as the same cannot be predicated. Therefore, when any property is allocated to him from the residue it cannot be said that he had only a definite limited interest in that property and that there is a transfer of the remaining interest in his favour within the meaning of Section 17 of the Registration Act. Each and every partner of a firm has an undefined interest in each and every property of the firm and it is not possible to say unless the accounts are settled and the residue or surplus determined what would be the extent of the interest of each partner in the property. It is, however, clear that since no partner can claim a definite or earmarked interest in one or all of the properties of the firm because the interest is a fluctuating one depending on various factors, such as, the losses incurred by the firm, the advances made by the partners as distinguished from the capital brought in the firm, etc., it cannot be said, unless the accounts are settled in the manner indicated by Section 48 of the Partnership Act, what would be the residue which would ultimately be allocable to the partners. In that residue, which becomes divisible among the partners, every partner has an interest and when a particular property is allocated to a partner in proportion to his share in the profits of the firm, there is no partition or transfer taking place nor is there any extinguishment of interest of other partners in the allocated property in the sense of a transfer or extinguishment of interest under Section 17 of the Registration Act. Therefore, viewed from this angle also it seems clear to us that when a dissolution of the partnership takes place and the residue is distributed among the partners

after settlement of accounts there is no partition, transfer or extinguishment of interest attracting Section 17 of the Registration Act.

17. Strong reliance was, however, placed by the learned counsel for the respondents on two decisions of this Court, namely, (1) **Ratan Lal Sharma v. Purshottam Harit** [(1974) 3 SCR 109] and (2) **Lachhman Dass v. Ram Lal** [(1989) 3 SCC 99]. Insofar as the first-mentioned case is concerned, the facts reveal that the appellant and the respondent who had set up a partnership business in December 1962 soon fell out. The partnership had a factory and other moveable and immovable properties. On August 22, 1963, the partners entered into an agreement to refer the dispute to the arbitration of two persons and gave the arbitrators full authority to decide their dispute. The arbitrators made their award on September 10, 1963. Under the award exclusive allotment of the partnership assets, including the factory, and liabilities, was made in favour of the appellant and it was provided that he shall be absolutely entitled to the same in consideration of a sum of Rs 17,000 plus half the amount of realisable debts of the business to the respondent. The arbitrators filed the award in the High Court on November 8, 1963. On September 10, 1964, the respondent filed an application for determining the validity of the agreement and for setting aside the award. On May 27, 1966, a learned Single Judge of the High Court dismissed the application as barred by time but declined to make the award the rule of the Court because in his view the award was void for uncertainty and created rights in favour of the appellant over immovable property worth over Rs 100 requiring registration. The Division Bench dismissed the appeal as not maintainable whereupon this Court was moved by special leave. Before this Court it was contended (i) that the award is not void for uncertainty; (ii) that the award seeks to assign the respondent's share in the partnership to the appellant and therefore does not require registration; and (iii) that under Section 17 of the Arbitration Act, the court was bound to pronounce judgment in accordance with the award. This Court while reiterating that the share of a partner in the assets of the partnership comprising even immovable properties, is moveable property and the assignment of the share does not require registration under Section 17 of the Registration Act. The legal position is thus affirmed. However, since the award did not seek to assign the share of the respondent to the appellant but on the contrary made an exclusive allotment of the partnership asset including the factory and liabilities to the appellant, thereby creating an absolute interest on payment of consideration of Rs 17,000 plus half the amount of the realisable debts, it was held to be compulsorily registrable under Section 17 of the Registration Act. The Court did not depart from the principle that the share of a partner in the asset of the partnership inclusive of immovable properties, is moveable property and the assignment of the share on dissolution of the partnership did not require registration under Section 17 of the Registration Act. The decision, therefore, turned on the interpretation of the award in regard to the nature of the assignment made in favour of the appellant. So far as the second case is concerned, we think it has no bearing since that was not a case of assignment of partnership property under a dissolution deed. In that case, the dispute was between two brothers in 2-1/2 killas of land situate in Panipat, Haryana. The said land stood in the name of one brother - the appellant. The respondent contended that he was a benamidar and that was the dispute which was referred to arbitration. The Arbitrator made his award and applied to the Court for making it the rule of the Court. Objections were filed by the appellant raising various contentions. The award declared that half share of the ownership of the appellant shall

“be now owned by Shri Ram Lal, the respondent in addition to his half share owned in those lands”. Therefore, the award transferred half share of the appellant to the respondent and since the value thereof exceeded Rs 100, it was held that it required registration. It is, therefore, obvious that this case has no bearing on the point in issue herein.

18. In the present case, the Division Bench of the High Court concluded that the award required registration because of an erroneous reading of the award. The Division Bench after extensively reproducing from the Schedules ‘A’ to ‘F’ of the award proceeded to state in paragraph 39 that the allotments are exclusive to the brothers and they get independent rights of their own under the award in the properties allotted under the schedule and hence it is not a case purely of assignment of the shares in the partnership but it confers exclusive rights to the allottees. On this line of reasoning it concluded that the award required registration. The court next pointed out in paragraph 42 of the judgment that the award also partitions certain immovable properties jointly owned by the disputants. In this connection it has placed reliance on paragraph 10(c) of the award which reads as under:

“(c). Other Lands and Buildings and House properties belonging to S.V. Sivalinga Nadar & Bros. standing in the name of the firm and/or otherwise jointly owned by the disputants. These have been allotted by us to one or other or jointly to some of the disputants as per schedules annexed hereto.”

The reasons which weighed with the Division Bench of the High Court in concluding that the award requires registration appear to be based on an erroneous reading of the award. We have carefully read the award and it is manifest therefrom that the Arbitrators had confined themselves to the properties belonging to the two firms in question and scrupulously avoided dealing with the properties not belonging to the firm. This is manifest from paragraphs 15 to 18 of the award. However, properties standing in the names of disputants, individually or jointly, and others as benamidars but belonging to the firm also came to be included in the distribution of the surplus partnership asset under the award. That is the purport of paragraph 10(c) extracted hereinabove. When on settlement of accounts the residue is required to be divided among the partners in proportions in which they entitled to share profits under sub-clause (iv) of clause (b) of Section 48, the properties will have to be allocated to the partners as falling to their share on the distribution of the residue and, therefore, the Arbitrators indicated in the schedules the properties falling to the share of each brother. Mere statements that a certain property will now exclusively belong to one partner or the other, as the case may be, cannot change the character of the document or the nature of assignment because that would in any case be the effect on the distribution of the residue. The property falling to the share of the partner on the distribution of the residue would naturally then belong to him exclusively but so long as in the eye of law it is money and not immovable property there is no question of registration under Section 17 of the Registration Act. Besides, as stated earlier, even if one looks at the award as allocating certain immovable property since there is no transfer, no partition or extinguishment of any right therein there is no question of application of Section 17(1) of the Registration Act. The reference to other land and buildings and house properties jointly owned by the disputants in clause (c) of paragraph 10 of the award merely indicates that certain properties belonging to the firm stood in the names of individual partners or in their joint names but they belonged to the firm and, therefore, they were taken

into account for the purpose of settlement of accounts under Section 48 of the Partnership Act and distributed on the determination of the residue. The award read as a whole makes it absolutely clear that the Arbitrators had confined themselves to the properties belonging to the two firms and had scrupulously avoided other properties in regard to which they did not reach the conclusion that they belonged to the firm. On a correct reading of the award, we are satisfied that the award seeks to distribute the residue after settlement of accounts on dissolution. While distributing the residue the Arbitrators allocated the properties to the partners and showed them in the schedules appended to the award. We are, therefore, of the opinion that on a true reading of the award as a whole, there is no doubt that it essentially deals with the distribution of the surplus properties belonging to the dissolved firms. The award, therefore, did not require registration under Section 17(1) of the Registration Act.

19. For the above reasons, we allow these appeals and set aside the impugned orders of the Division Bench and remit the matters to the Division Bench for answering the other contentions which arose in the appeal before it but which were not decided in view of its decision on the question of registration of the award. We also make it clear that the award which is pending for registration may be registered by the Sub-Registrar notwithstanding the objection raised by one of the partners, S.V. Sivalinga Nadar through his lawyer if that is the only reason for withholding registration. The appeals are allowed accordingly with costs.

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## *Sardar Singh v. Krishna Devi*

(1994) 4 SCC 18

**K. RAMASWAMY, J.** - 2. While the appellant was in government service, Kartar Lal (first defendant in the suit), his brother had purchased on 7-4-1959 the house bearing Municipal No. 313, with land admeasuring 222 sq. yards in Karol Bagh from the Ministry of Rehabilitation. On 22-1-1963 the sale certificate was issued in favour of Kartar Lal. Finding it exclusively in the name of Kartar Lal, the appellant raised a dispute which was referred to named private arbitrators for resolution. The two arbitrators by their award dated 16-10-1963 declared that:

“We award that Shri Sardar Singh is the owner of half house bearing Municipal No. 313, Ward No. XVI situate at Gali No. 10, Faiz Road, Karol Bagh, New Delhi, from the date of purchase of the said house, i.e., from 7-4-1959 as he paid Rs 18,100 to Shri Kartar Lal in the shape of claim bonds valued at Rs 11,560.00 and Rs 6540.00 in cash towards the purchase price of the said house and Shri Kartar Lal paid half of the price of the said house in the shape of claim bond and cash. The price of the said house was contributed half and half by both of them. Though, the sale deed was taken by Shri Kartar Lal in his name benami but actually Shri Kartar Lal and Shri Sardar Singh, are the owners of the said house in equal share from the date of its purchase, i.e., from 7-4-1959 and Shri Sardar Singh, is also entitled to half the amount of rent of the said house from the date of its purchase after deducting property taxes paid by Shri Kartar Lal.”

On an application made under Section 14 of the Arbitration Act, 1940 by the appellant, the arbitrators produced the award in Suit No. 299 of 1963 in the Court of the Judge, First Class, Delhi which was made rule of the court under Section 17 thereof by decree dated 28-12-1963. The appellant laid proceedings before the Rent Controller for eviction of their tenants for personal occupation on the ground that he being a government servant was entitled to possession under special procedure prescribed under that Act and accordingly had possession. Kartar Lal entered into a contract of sale of the entire property with Joginder Nath, husband of the first respondent on 15-1-1973 for Rs 90,000 and had received part consideration. The time to execute the sale deed was extended from time to time up to 31-12-1979 by which date Joginder Nath died and the first respondent had entered into fresh contract with Kartar Lal and laid the suit in OS No. 2 of 1983 against Kartar Lal. The appellant, becoming aware of the contract of sale and pending suit, got himself impleaded in that suit as second defendant. The trial court by decree dated 5-5-1986 decreed the suit. On appeal the High Court of Delhi in RFA No. 206 of 1986 by judgment and decree dated 21-11-1990 confirmed the decree.

3. The courts below found that the appellant's title is founded upon the award to acquire title to or to divest the title of Kartar Lal; it is compulsorily registrable under Section 17 of the Registration Act, 1908 and being an unregistered award the same was inadmissible in evidence as source of title under Section 49 thereof. The appellant's claim as owner of the half share in the property was thus negatived. The question, therefore, is whether the award, on the facts and in the circumstances, is compulsorily registrable under Section 17 of the Registration Act.

4. Section 49 declares the effect of non-registration that no document required under Section 17 ... to be registered shall have an effect on any immovable property comprised therein ... or be received as evidence of any transaction affecting such property ... unless it has been registered. A conjoint reading of Section 17(1)(b) and Section 49 of the Registration Act establishes that a non-testamentary instrument which purports or operates to create, declare, assign, limit or extinguish in present or future, any right, title or interest, whether vested or contingent to or in any immovable property of the value of Rs 100 and above, shall compulsorily be registered, otherwise the instrument does not affect any immovable property comprised therein or shall not be received as evidence of any transaction affecting such immovable property. This Court in **Lachhman Dass v. Ram Lal** [(1989) 2 SCR 250, 259], held the purpose of registration that:

“In other words, it is necessary to examine not so much what it intends to do but what it purports to do.

The real purpose of registration is to secure that every person dealing with the property, where such document requires registration, may rely with confidence upon statements contained in the register as a full and complete account of all transactions by which title may be affected. Section 17 of the said Act being a disabling section, must be construed strictly. Therefore, unless a document is clearly brought within the provisions of the section, its non-registration would be no bar to its being admitted in evidence.”

5. The award made by a private arbitrator is a non-testamentary instrument under Section 17(1)(b), though the counsel for the appellant contended contra and we need not dilate on this aspect. In **Satish Kumar v. Surinder Kumar** [AIR 1970 SC 833], an arbitrator was appointed by the parties without reference to the court to partition their immovable properties. An award in that behalf was made and on an application under Section 14 of the Arbitration Act, the award was made a rule of the court. The question arose whether such award was admissible in evidence as affecting partition of the immovable property. This Court held that the award required registration under Section 17(1)(b). Therefore, the award is a non-testamentary instrument.

6. The question, therefore, is whether the award in favour of the appellant creates any right, title and interest in half share of the house in his favour or extinguishes the right, title and interest therein of Kartar Lal. It is, therefore, necessary to examine the award not so much to find what the award intended to do, but what it purports to do and the consequences that would flow therefrom. In this behalf we cannot accept the contention of Shri M.C. Bhandare, learned Senior Counsel, that award does not require registration as it merged in the decree of the civil court making it a rule of the court. As seen in **Satish Kumar** case this Court found that in case the award, if it creates for the first time a right in the immovable property of the value of Rs 100 or above, in the absence of its registration, the awardee would not get title on the award and the title would remain with the party against whom the award was made. The same view was reiterated in **Ratan Lal Sharma v. Purshottam Harit** [(1974) 3 SCR 109] and in **Lachhman Dass** case. In all these cases this Court found that the title was founded on the award.

7. But as said earlier, the crucial question is what the award purports to do? As seen, the arbitrators in the award dated 19-10-1963 declared that Kartar Lal is benamidar, the appellant had contributed half the consideration of the sale price and is the owner of half the house with effect from the date of the purchase, namely 4-4-1959 and both the brothers, each as owner, are entitled to half the rent.

8. The contention of the counsel for the respondents that the award creates therein right, title and interest in favour of the appellant and extinguishes that of Kartar Lal who had sale certificate in accordance with the law; his title gets divested only when the award was registered; its non-registration renders it inadmissible as evidence of title; since the foundation of title, therefore, of the appellant, is based on the award, it cannot be looked into, nor can it be considered, are devoid of force. In **Uttam Singh Duggal v. Union of India** [C.A. No. 162 of 1962, decided on 11-10-1962], the facts therein were that pending civil suit the Union of India called upon the arbitrator to adjudicate the dispute between the appellant and the Union. The award was made after deciding the dispute. It was contended for the appellant that since the award was earlier made and became final, but was not registered, there cannot be a second reference on the same dispute. The High Court held that the first award did not create any bar against the competence of the second reference. On appeal, relying on Sections 33 and 17 of the Arbitration Act this Court held that “all claims which are the subject-matter of the reference to arbitration merged in the award which is pronounced in the proceeding before the Arbitrator and that after the award has been pronounced the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award”, and thereafter no action can be started on the original claim which had been the subject-matter of the reference. An award between the parties is entitled to that respect which is due to the judgment of a court of law to serve. Therefore, it was held that the second reference was incompetent. In **Kashinathsa Yamosa Kabadi v. Narsingsa Bhaskarsa Kabadi** [AIR 1961 SC 1077] on a question whether an award made in arbitration out of court and accepted by the parties, in the absence of registration, could be pleaded in defence as a binding decision between the parties, this Court held thus:

“It may be sufficient to observe that where an award made in arbitration out of court is accepted by the parties and it is acted upon voluntarily and a suit is thereafter sought to be filed by one of the parties ignoring the acts done in pursuance of the acceptance of the award, the defence that the suit is not maintainable is not founded on the plea that there is an award which bars the suit but that the parties have by mutual agreement settled the dispute, and that the agreement and the subsequent actings of the parties are binding. By setting up a defence in the present case that there has been a division of the property and the parties have entered into possession of the properties allotted, defendant 1 is not seeking to obtain a decision upon the existence, effect or validity of an award. He is merely seeking to set up a plea that the property was divided by consent of parties. Such a plea is in our judgment not precluded by anything contained in the Arbitration Act.”

It is, therefore, clear that though the award was not registered, it could be relied on as a defence to show that parties had agreed to refer the dispute to private arbitration, the award made thereon was accepted by the parties and acted upon it.

9. In **Champalal v. Samarath Bai** [AIR 1960 SC 629], this Court held that:

“The filing of an unregistered award under Section 49 of the Registration Act is not prohibited; what is prohibited is that it cannot be taken into evidence so as to affect immovable property falling under Section 17 of that Act.”

10. In **Addanki Narayanappa v. Bhaskara Krishtappa** [AIR 1966 SC 1300], this Court held that a document of dissolution only records the fact that the partnership had come to an end. It cannot be said to convey any immovable property by a partner to another expressly or by necessary implication, nor is there any implication. It was held that such a deed was not compulsorily registrable under Section 17(1)(b) of the Registration Act. In **CIT v. Juggilal Kamalapat** [AIR 1967 SC 401], the deed of relinquishment was accepted by one partner in favour of the other partners in the partnership firm including immovable property. This Court held that the deed of relinquishment was in respect of individual interest of a partner in the assets of the partnership firm including immovable property was valid without registration. All the assets of the partnership firm vested in the new partners of the firm. This Court approved the Full Bench judgment of the Lahore High Court in **Ajudhia Pershad Ram Pershad v. Sham Sunder** [ILR 28 Lah 417], wherein the Full Bench held that assignment of the interest of partnership of a partner is to be regarded as movable property, notwithstanding the fact that at that time when it was charged or sold, the partnership assets included immovable property. In **Lachhman Dass** case this Court noted the distinction between the declaration of an existing right as a full owner of the property in question and creation of a right in immovable property in praesenti. In that case since a new right was created under the award in favour of the respondent, it was held that the award required registration and non-registration rendered the award inadmissible in evidence under Section 49.

11. In **Kale v. Dy. Director of Consolidation** [(1976) 3 SCR 202], this Court held that 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. Family arrangements are governed by principles which are not applicable to dealings between the strangers. The court when deciding the rights of partners under family arrangements, consider what is the broadest view of the matter, having regard to considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account. If the terms of the family arrangement made under the document as a mere memorandum, itself does not create or extinguish any right in immovable property and, therefore, does not fall within the mischief of Section 17(1)(b) of the Registration Act and is, therefore, not compulsorily registrable.

12. It is, thus, well-settled law that the unregistered award per se is not inadmissible in evidence. It is a valid award and not a mere waste paper. It creates rights and obligations between the parties thereto and is conclusive between the parties. It can be set up as a defence as evidence of resolving the disputes and acceptance of it by the parties. If it is a foundation, creating right, title and interest in praesenti or future or extinguishes the right, title or interest in immovable property of the value of Rs 100 or above it is compulsorily registrable and non-registration renders it inadmissible in evidence. If it contains a mere declaration of a pre-existing right, it is not creating a right, title and interest in praesenti, in which event it is not a

compulsorily registrable instrument. It can be looked into as evidence of the conduct of the parties of accepting the award, acting upon it that they have pre-existing right, title or interest in the immovable property.

13. In the light of the above conclusion and of the contents of the award referred to hereinbefore, the necessary conclusion is that the award did not create any right, title or interest in the appellant for the first time, but it declared the pre-existing factum, namely the appellant and Kartar Lal purchased the property jointly and that Kartar Lal was the benamidar and that both of the brothers had half share in the house with a right to enjoyment of the property in equal moiety. Thus the award is not compulsorily registrable. The contention of the counsel for the respondent is that if the unregistered award is accepted as a foundation and received in evidence effecting interest in immovable property, there is possibility of avoiding registration and by indirect process get title conferred, defeating the mandate of Section 17 and Section 49 of the Registration Act. Each case must be considered from its own facts and circumstances; the pre-existing relationship of the parties; the rights inter vivos and the interest or rights they claimed and decided in the award and the legal consequences. On the facts of this case we hold that the appellant and Kartar Lal being tenants in common, migrants from Pakistan after partition, the appellant being government servant, obviously, his brother Kartar Lal purchased the property for their benefit as coparceners or co-owners. In that view it must be held that the award does not have the effect of creating any right in praesenti, nor is it an attempt to avoid law. The award was made rule of the court a decade earlier to the date of the initial agreement of sale.

14. The next question is whether the courts below were justified in decreeing the suit for specific performance. Section 20(1) of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief, merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. The grant of relief of specific performance is discretionary. The circumstances specified in Section 20 are only illustrative and not exhaustive. The court would take into consideration the circumstances in each case, the conduct of the parties and the respective interest under the contract.

15. Section 12 provides for specific performance of part of contract. Sub-section (1) thereof postulates that except as otherwise hereinafter provided in the section, the court shall not direct the specific performance of a part of a contract. Sub-section (4) thereto envisages that when a part of the contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part. Section 10(b) provides that:

“Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced -

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.”

It is contended for the appellant that the first respondent prayed for refund of the earnest money; since the agreement was in respect of the entire property including the half share of the appellant, the courts below, instead of decreeing specific performance of the contract, ought to have awarded refund of the earnest money. The decree for specific performance in the circumstances is illegal.

16. The contention of the respondent that the appellant and Kartar Lal colluded to bring the award into existence to defeat the rights of the first respondent is devoid of substance. The award was made the rule of the court 10 years prior to the contract of sale. Kartar Lal even in this Court stood by his contract in favour of the respondent which would belie the plea of collusion.

17. In view of the finding that the appellant had half share in the property contracted to be sold by Kartar Lal, his brother, the agreement of sale does not bind the appellant. The decree for specific performance as against Kartar Lal became final. Admittedly the respondent and her husband are neighbours. The appellant and his brother being coparceners or co-owners and the appellant after getting the tenant ejected both the brothers started living in the house. As a prudent purchaser Joginder Nath ought to have made enquiries whether Kartar Lal had exclusive title to the property. Evidence of mutation of names in the Municipal Register establishes that the property was mutated in the joint names of the appellant and Kartar Lal and was in joint possession and enjoyment. The courts below, therefore, have committed manifest error of law in exercising their discretion directing specific performance of the contract for the entire property. The house being divisible and the appellant being not a consenting party to the contract, equity and justice demand partial enforcement of the contract, instead of refusing specific performance in its entirety, which would meet the ends of justice. Accordingly we hold that Joginder Nath having contracted to purchase the property, it must be referable only in respect of half the right, title and interest held by Kartar Lal, his vendor. The first respondent being successor-in-interest, becomes entitled to the enforcement of the contract of the half share by specific performance. The decree of the trial court is confirmed only to the extent of half share in the aforesaid property. The appeal is accordingly allowed and the decree of the High Court is set aside and that of the trial court is modified to the above extent.

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## *Chiranjilal Srilal Goenka v. Jasjit Singh*

(2001) 1 SCC 486

**M.B. SHAH, J.** - The aforesaid appeal is filed against the judgment and order passed by the High Court of Delhi in Civil Writ Petition No. 734 of 1971 filed by the deceased Chiranjilal Srilal Goenka of Bombay challenging Order No. 19 of 1971 dated 8-2-1971 passed by the Gold Control Administrator, New Delhi. The appellant, deceased, challenged confiscation of gold by the Customs Authorities under the Gold Control Orders by filing writ petition which was dismissed by the High Court. Against that order, the aforesaid appeal is filed. Pending appeal, the appellant (Chiranjilal Srilal Goenka) died on 24-11-1985. A dispute arose — as to who is the legal heir of the deceased. Firstly, one of the daughters, Sushila Bai N. Rungta claimed under a will dated 29-10-1982 and secondly, Radheshyam Goenka claimed as adopted son and thirdly, Smt Raj Kumari R. Goenka, wife of the adopted son, claimed independently. Keeping the question of right, title and interests in the property open, for continuing the proceedings, all the three were ordered to be brought on record by order dated 7-10-1991. It was also ordered that appeal be listed to consider the possibility of appointing an arbitrator by common consent or by orders of the court for bringing about a settlement. Thereafter, to settle the dispute as to who would be the legal heirs to the estate of Chiranjilal Srilal Goenka, this Court passed an order on 1-11-1991 appointing Mr Justice V.S. Deshpande, retired Chief Justice of the Bombay High Court, as arbitrator which is reproduced hereunder:

“By consent of parties Justice V.S. Deshpande, retired Chief Justice of the Bombay High Court is appointed as arbitrator to settle the dispute as to who would be the legal heirs to the estate of late Chiranjilal Srilal Goenka. The question as to statutory action under the Gold Control Act is left open and is made explicitly clear that it is not a part of the reference. The arbitrator will fix his terms of fees and should function in such a way that the award is made available within four months from now. Parties will be entitled to place the claims before the arbitrator in regard to trust and other institutions but the same may not be finally dealt with by the arbitrator. Arbitration expenses shall be shared equally by the parties corresponding to the share of interest in the property.”

2. For deciding the dispute, on 10-4-1992 the arbitrator framed issues as under:

(1) Does Claimant 1 prove execution of the will dated 29-10-1982 (28-10-1982), and prove the same to be the last and genuine will of the late Shri C.S. Goenka?

(2) If not, does she prove the execution of the will dated 4-7-1978 and prove the same to be the last and genuine will of the late Shri C.S. Goenka?

(3) Does Claimant 2 prove that the late Shri C.S. Goenka duly adopted him on 26-1-1961?

(4) Is the copy of the document dated 26-1-1961 filed by Claimant 2 admissible in evidence?

(5) Is the said document genuine and brought into existence in the way claimed by Claimant 2?

(6) If yes, then does the said document constitute an agreement between Mangalchand and the late Shri C.S. Goenka?

(7) If yes, can the said agreement be said to be the one contemplated by Section 13 of the Hindu Adoptions and Maintenance Act?

(8) If yes, then would the said agreement dated 26-1-1961 prevent the late C.S. Goenka from disposing of and dealing with the estate, according to his wishes by a will?

(9) In view of the finding on the issues above, who are the legal heirs to the estate of the late Shri C.S. Goenka?

3. For Issues 1 and 2, it was pointed out that probate suit is pending in the Bombay High Court, wherein the learned Judge has expressed doubt whether an arbitrator has jurisdiction to decide probate suit. Hence, IA No. 3 of 1992 was filed before this Court to seek clarification. By judgment and order dated 18-3-1993 this Court held that an arbitrator cannot proceed with probate suit and decide Issues 1 and 2 framed by him and the High Court was requested to proceed with Probate Suit No. 65 of 1985. Till the decision in the probate suit, the arbitrator was requested not to decide Issues 1 and 2. The Court observed that it would be open to the arbitrator to proceed with other issues and would conclude his findings on Issues 1 and 2 on the basis of the result in the probate proceedings and make the award according to law.

4. Thereafter, in the probate suit on 27-10-1999 parties filed minutes of order stating as under:

(1) The caveators/defendants concede to the execution and genuineness of the will dated 29-10-1982 of the deceased Chiranjilal Srilal Goenka of which probate is sought by the petitioner. Petition allowed accordingly, as prayed.

(2) The parties agree that this order/decreed will be without prejudice to the rights, claims and contentions of the parties in the arbitration proceedings pending before Justice V.S. Deshpande, retired Chief Justice of the Bombay High Court.

(3) No order as to costs.

On the same date, the Court passed order in terms of minutes of order.

5. Subsequently, after recording the evidence, the arbitrator passed an award on 16-6-2000. He arrived at the conclusion that the will in favour of Sushila Bai N. Rungta executed by Chiranjilal was inoperative and Radheshyam was the sole heir as adopted son. It was also held that Sitabai, Mangal Chand Kedia and Raj Kumari, wife of Radheshyam do not claim to be such heirs.

6. On the basis of that award, on behalf of Radheshyam, IA No. 9 of 2000 is filed for making the award rule of the court and to pass a decree in terms of the award. That award is challenged by Sushila Bai N. Rungta by filing objection under Section 33 read with Section 30 of the Arbitration Act, 1940. As against this, Radheshyam has submitted that there is no error of law or facts apparent on the face of the record and the arbitrator has given a well-reasoned award which does not call for any interference.



7. At the time of hearing, Mr Vinod Bobde, learned Senior Counsel for the objector submitted that he was not challenging the finding given by the learned arbitrator that Radheshyam was the adopted son of Chiranjilal. However, he submitted that the finding of the arbitrator that there was an agreement between Chiranjilal Goenka and the parents of Radheshyam that Radheshyam was given in adoption to Chiranjilal on the conditions mentioned in the so-called photocopy of letter dated 26-1-1961 is, on the face of it, illegal and arbitrary. He further submitted that assuming that the said letter can be considered to be an agreement, it requires registration as it limits the right of the absolute owner Chiranjilal to bequeath the property by will. He further submitted that after codification of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as “the Act”), Sections 12 and 13 govern the rights of the adopted son and the adoptive parents.

8. As against this, Mr Sanghi, learned Senior Counsel submitted that it cannot be said that the award made by the arbitrator is in any way on the face of it, illegal or arbitrary and that when the reasoned award is passed by the learned arbitrator, even if another view is possible on the interpretation of law, it would not be open to this Court to disturb the finding given by the arbitrator.

10. Reading Section 12 proviso (c) and Section 13 together it is apparent that adoption would not divest any person of any estate which is vested in him or her before the adoption. It also does not deprive the adoptive father or mother the power to dispose of his or her property by transfer, inter vivos or by will. However, this power to dispose of the property would be subject to any agreement between the parties.

11. The legislature has codified and crystallised the situation prevailing prior to the enactment of the Act that there was no implied contract on the part of the adoptive father or mother in consideration of the gift of his son by a natural father or mother that he or she would not dispose of the property by transfer or by will. However, in case of a specific agreement to the contrary between the parties, the power to dispose of the property would be subject to the said agreement.

12. Keeping this in the background, we would consider the facts of the present case. It is the case of both the parties that Mr Chiranjilal Goenka had two daughters namely Sitabai, born on 29-10-1938 and another Sushila Bai born on 3-9-1950. Sitabai was married to Mangal Chand Kedia of Kanpur and gave birth to Radheshyam on 8-9-1954 and to another son Govind on 3-8-1956. On 26-1-1961 Chiranjilal adopted Radheshyam. It is the contention of the learned counsel for Radheshyam that on the said date prior to the adoption, a writing recording the terms of an earlier arrived oral agreement was dictated by Chiranjilal in the form of an offer letter from the natural parents, which was recorded by a relative Mr Hanuman Prasad Poddar. Photocopy of the said letter is produced on record, which is in Hindi and its translation is to the following effect:

“Salutations from Mangal Chand Kedia to the respected Shri Chiranjilal Goenka. I am giving you in adoption with much pleasure my son Chiranjeev Radheshyam. From now he is your son alone. And he alone will inherit your entire movable and immovable property. During your lifetime you shall be entitled to your entire movable and immovable property. In case if you die, your wife Smt Bhagwandevi

shall have absolute right. Similarly, if she dies earlier then you will have absolute right. After the death of both of you, Chiranjeev Radheshyam alone shall have full right on the total movable and immovable property. I am writing this letter with pleasure. 26-1-1961 — Magh Shukla 10 Samvat 2017 Thursday.”

13. Questions which would require consideration in these proceedings would be—

(1) whether the writing dated 26-1-1961 can be considered to be an agreement between Chiranjilal and the parents of Radheshyam?

(2) whether it is an agreement as contemplated by Section 13 of the Act limiting the rights of adoptive parents to dispose of the property by will? and if so,

(3) whether it requires registration?

14. It has been contended by the learned Senior Counsel Mr Bobde that the aforesaid letter cannot be considered to be any agreement between Chiranjilal and Mangal Chand Kedia, father of Radheshyam. He further submitted that there is nothing on record to prove that the aforesaid unilateral offer of Kedia was accepted by Chiranjilal. He further pointed out that this letter nowhere provides that the rights of Chiranjilal to dispose of his property by transfer or by will is in any way restricted. It is his contention that even this letter specifically provides that during the lifetime of Chiranjilal, he would be the absolute owner of the property meaning thereby that he would have the right to transfer the property or bequeath the same.

15. As against this, learned Senior Counsel Mr Sanghi submitted that the aforesaid writing specifically provides that Shri Radheshyam shall be the sole heir to the properties of Chiranjilal after his death and the death of his wife. The said writing was signed by Mangal Chand Kedia, his wife Sitabai and witnessed by Hanuman Prasad Poddar and eight other eminent people of the community. After this letter, Chiranjilal took Radheshyam in adoption and therefore, it should be held that the terms of the said letter were accepted by Chiranjilal. On the basis of these facts, if finding is given by the arbitrator, it cannot be said that the award is, on the face of it, illegal. It is submitted that only after the marriage of Sushila Bai with Rungta of Jaipur, disputes arose in 1975 between Chiranjilal and Radheshyam. Maybe that, more than 38 proceedings were initiated between Chiranjilal and Radheshyam and in the proceedings Chiranjilal resiled from his agreement and the factum of adoption in the subsequent affidavit filed by him, but that would not nullify the agreement or the adoption. It is, therefore, submitted that because of the adoption agreement Radheshyam would be the sole and exclusive heir of the assets of the late Chiranjilal after his death. Therefore, the will dated 29-10-1982 executed by him would be inoperative and of no effect. The learned counsel further submitted that parties can enter into a binding oral agreement unless there is any extra requirement by statute to record the same in writing. Section 13 of the Act does not require the agreement to be in writing. He also submitted that the said letter does not require any registration. He finally submitted that the award passed by the arbitrator cannot be said to be illegal which would call for any interference. Hence, it should be made rule of the court.

16. In our view, the photocopy of the letter, presuming that such letter was written by Mangal Das Kedia to Chiranjilal at the time of giving Radheshyam in adoption, there can be no doubt that it does not reflect any agreement between the parties. At the most it was only a

unilateral offer giving the child in adoption on certain expectations. The letter appears to be signed by a number of persons and if really Chiranjilal had accepted it, then he would have placed his signatures on the said letter. There is nothing on record that he accepted the same as it was.

17. Secondly, the letter at the most indicates that from that day, Radheshyam would be the adopted son of Chiranjilal and would inherit his property. However, it was made clear in that very letter that during the lifetime of Chiranjilal and his wife, they were the absolute owners of their properties. There is nothing to indicate in the said letter that it was a covenant or a contract restricting the powers of Chiranjilal or his wife to dispose of the property either by transfer or by will. Nowhere, is it stated that during his lifetime, Chiranjilal will not be entitled to dispose of his property either by transfer or by will. Hence, there is no positive or negative agreement limiting the rights of Chiranjilal to dispose of the property by executing the will. Presuming that the aforesaid letter is an agreement, at the most it can be stated that from the said date Radheshyam would be the son of Chiranjilal and would be entitled to inherit his properties. This also would not mean that there is any agreement that the adoptive father has no right to dispose of his property.

18. However, learned Senior Counsel Mr Sanghi submitted that in the letter, it is mentioned that after the death of Chiranjilal and his wife, Radheshyam alone would have full right on the movable and immovable property belonging to them. He, therefore, submitted that the aforesaid offer implies that the right of Chiranjilal was restricted and he could not execute the will. In our view, this submission has no force. The aforesaid term of the letter only indicates that Radheshyam alone would be the heir and would have full right on the movable and immovable property as heir. That is to say, it would mean that if any property is left by the deceased Chiranjilal which is not transferred or bequeathed, then Radheshyam would be the heir and entitled to receive the same. This would not mean that there was any restraint on the part of Chiranjilal to execute the will. In support of his contention, learned counsel Mr Sanghi referred to the following passage from **Theobald on Wills** by J.B. Clark

**“Contract to leave residue.** - But a covenant to leave the covenantee all the property or a share of the property of the covenantor does not create a debt.

The effect of such a covenant is to leave the covenantor free to dispose of his property in his lifetime by gift or otherwise as he thinks fit, so long as he does not dispose of it in fraud of the covenant. The covenantee is entitled to have the covenant specifically enforced, and he will take subject to payment of the funeral and testamentary expenses and debts of the covenantor.

**Evasion of contract not permitted.** - If the covenant is limited to the personal property of the covenantor and he buys real estate, the real estate is, in the hands of the heir or a devisee, charged with the purchase money. And though the covenantor can dispose of the property in his lifetime, he cannot defeat the covenant by a disposition by will, nor by any disposition which has the same effect as a testamentary disposition, for instance, a voluntary settlement whereby he settles property on himself for life with remainders over.”

19. The aforesaid paragraph in no way supports his contention. On the contrary it specifically mentions the effect of such covenant stating that it leaves the covenantor free to dispose of his property in his lifetime by gift or otherwise as he thinks fit so long as he does not dispose of it in fraud of the covenant. Hence, Chiranjilal was entitled to dispose of the said property either by transfer or by will. Further, in the present case, there is no question of fraud on the part of Chiranjilal. Admittedly, the relations between Chiranjilal and Radheshyam were so much strained that more than 38 litigations were pending between them in various courts. Further, the aforesaid paragraph is to be read in the context of the previous paragraph which provides for a contract to leave residue. In the present case, there is no such contract to leave residue in favour of Radheshyam. In this view of the matter, it cannot be said that by the said letter, there is any agreement limiting the rights of the adoptive parents to dispose of their property by executing a will.

20. The next question would be whether the said letter, if considered as an agreement, restraining or limiting the rights of the adoptive father to bequeath the property requires registration. In support of this contention, learned counsel Mr Bobde referred to the decision of this Court in **Dinaji v. Daddi** [(1990) 1 SCC 1]. In that case a Hindu widow adopted a son on 28-4-1963 by executing a deed of adoption. The document was not registered and the trial court admitted the same in evidence in proof of adoption. Subsequently, by registered sale deed dated 28-4-1966, she transferred immovable property including agricultural land and houses in favour of the appellant Dinaji. On the basis of the sale deed, suit for injunction and possession was filed against the adopted son. After considering the provisions of Section 12(c), this Court held that after the Hindu Succession Act came into force, a widow became absolute owner of the property of her husband and, therefore merely by adopting a child, she could not be deprived of any of her rights in the property. The Court further held “the adoption would come into play and the adopted child could get the rights for which he is entitled after her death as is clear from the schemes of Section 12 proviso (c)”. Thereafter, the Court considered Section 13 of the Act and observed that

“this section enacts that when the parties intend to limit the operation of proviso (c) to Section 12, it is open to them by an agreement and it appears that what she included in the present deed of adoption was an agreement to the contrary as contemplated in Section 13 of the Hindu Adoptions and Maintenance Act”.

However, the Court held that in view of Section 17(1)(b) of the Registration Act, the said part of the deed which refers to the creation of immediate right in the adopted son and the divesting of the right of the adoptive mother in the property will squarely fall within the ambit of Section 17(1)(b) and, therefore, under Section 49 of the Registration Act.

21. As against this, learned Senior Counsel for the respondent Mr Sanghi submitted that the aforesaid letter is not to be construed as a deed, but is to be taken as an offer letter and by the conduct of adopting Radheshyam as son, Chiranjilal could not dispose of the property by will. In our view, this argument is totally devoid of any substance because if reliance is required to be placed on the letter for holding that it restrains Chiranjilal from disposing of the property

by will, then it is required to be read as a document which limits the rights of Chiranjilal to deal with his property including the immovable property. Therefore, it would require registration. In any case, the aforesaid question is not required to be considered in detail because we have already arrived at the conclusion that there is no agreement between the parties before adoption indicating any contrary intention as contended.

22. Finally, we would deal with the contention of learned Senior Counsel Mr Sanghi that when two views are possible and the arbitrator has taken a plausible view, the award cannot be interfered with. For deciding this contention, we would refer to some parts of the award which would reveal that the award is, on the face of it, illegal and erroneous and contrary to what has been discussed above. The arbitrator has misinterpreted the letter as an adoption agreement between Mangal Chand Kedia and late Chiranjilal and thereafter relied upon the part of the said agreement as two terms of the agreement and has held that as per the said terms, Chiranjilal has committed him to have only life interest in the said property for himself and his wife. After their death, Radheshyam would be the successor of their entire property. He, therefore, held that

“there is an implied prohibition against them to transfer any part of their property. Obviously, either of them is incompetent to transfer any part of the property inter vivos or under any will. In this view of the matter, I hold that the adoption agreement covered by the finding on Issue 6 is an agreement to the contrary as contemplated under Section 13 of the Act”.

23. In this view of the matter, we hold that the award dated 16-6-2000 passed by the arbitrator holding that the will executed by Chiranjilal is inoperative and requires to be set aside and we so do. It is held that on the basis of the probated will Sushila Bai N. Rungta is the legal heir of the deceased Chiranjilal.

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## ***Ram Rattan v. Bajrang Lal***

(1978) 3 SCC 236

**D.A. DESAI, J.** - The unsuccessful plaintiff, appellant in this appeal by special leave, who died pending the appeal, seeks a declaration that he is entitled to a right of worship by turn (called Osra) for 10 days in a circuit of 18 months in the temple of Kalyanji Maharaj at Village Diggi, Distt. Tonk, Rajasthan, under the will Ext. I, dated September 22, 1961 executed by deceased Mst. Acharaj, wife of Onkar. The suit was resisted by four amongst five defendants, the 5th defendant having not put in an appearance. Various contentions were raised but the only one surviving for present consideration is whether document Ext. I purporting to be a will of deceased Mst. Acharaj is a will or a gift, and if the latter, whether it is admissible in evidence on the ground that it was not duly stamped and registered as required by law?

2. When the plaintiff referred to the disputed document in his evidence and proceeded to prove the same, an objection was raised on behalf of the defendants that the document was inadmissible in evidence as being not duly stamped and for want of registration. The trial Court did not decide the objection when raised but made a note: "Objected. Allowed subject to objection", and proceeded to make the document as Ext. I. When at the stage of arguments, the defendants contended that the document Ext. I is inadmissible in evidence, the learned trial Judge rejected the contention taking recourse to Section 36 of the Stamp Act. On the question of registration it was held that the document is not compulsorily registrable insofar as the subject-matter of the suit is concerned, viz-, turn of worship which in the opinion of the learned trial Judge was movable property. On appeal by the defendants the judgment of the trial Judge was reversed, inter alia, holding that the document Ext. I was a gift and as it involved gift of immovable property, the document was inadmissible in evidence both on the ground that it is not duly stamped and for want of registration. The plaintiff's second appeal to the High Court did not meet with success.

3. The only question canvassed before this Court is that even if upon its true construction the document Ext. I purports to be a gift of turn of worship as a Shebait-cum-Pujari in a Hindu temple, does it purport to transfer an interest in immovable property, and therefore, the document is compulsorily registrable? On the question whether the document was duly stamped it was said with some justification that it was not open to the court to exclude the document from being read in evidence on the ground that it was not duly stamped because in any event under Section 33 of the Stamp Act it is obligatory upon the court to impound the document and recover duty and penalty as provided in proviso (a) to Section 35»

4. Mst. Acharaj, wife of Onkar had inherited the right to worship by turn for 10 days in a circuit of 18 months in Kalyanji Maharaj Temple. It is common ground that she was entitled during her turn to officiate as Pujari and receive all the offerings made to the deity. During the period of her turn she would be holding the office of a Shebait. She purported to transfer this office with its ancillary rights to plaintiff Ram Rattan under the deed Ext. I purporting to be a will. Upon its true construction it has been held to be a deed of gift and that finding was not controverted, nor was it possible to controvert it, in view of the recital in the deed that: "now Ram Rattan will acquire legal rights and possession of my entire property from the date the

will is written, the details of the property are in Schedule 'A' and after him, his legal heirs will acquire these rights". It appears crystal clear that the document purports to pass the title to the property thereby conveyed in present! and in the face of this recital it could never be said that the document Ext. I purports to be a will.

5. If by document Ext. I the donor conveyed property by gift to donee and the property included the right to worship by turn in a temple, is it transfer of immoveable property which could only be done by a registered instrument which must be duly stamped according to the provisions of the relevant Stamp Act.

6. When the document was tendered in evidence by the plaintiff while in witness box, objection having been raised by the defendants that the document was inadmissible in evidence as it was not duly stamped and for want of registration, it was obligatory upon the learned trial Judge to apply -his mind to the objection raised and to decide the objects in accordance with law. Tendency sometimes is to postpone the decision to avoid interruption in the process of recording evidence and, therefore, a very convenient device is resorted to, of marking the document in evidence subject to objection. This, however would not mean that the objection as to admissibility on the ground that the instrument is not duly stamped is judicially decided; it is merely postponed. In such a situation at a later stage before the suit is finally disposed of it would none-the-less be obligatory upon the court to decide the objection. If after applying mind to the rival contentions the trial Court admits a document in evidence, Section 36 of the Stamp Act would come into play and such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. The court, and of necessity it would be trial Court before which the objection is taken about admissibility of document on the ground that it is not duly stamped, has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case and where a document has been inadvertently admitted without the court applying its mind as to" the question of admissibility, the instrument could not be said to have been admitted in evidence with a view to attracting Section 36. The endorsement made by the learned trial Judge that "Objected, allowed subject to objection", clearly indicates that when the objection was raised it was not judicially determined and the document was merely tentatively marked and in such a situation Section 36 would not be attracted.

7. Mr Desai then contended that where an instrument not duly stamped or insufficiently stamped is tendered in evidence, the court has to impound it as obligated by Section 33 and then proceed as required by Section 35, viz., to recover the deficit stamp duty along with penalty. Undoubtedly, if a person having by law authority to receive evidence and the Civil Court is one such person before whom any instrument chargeable with duty is produced and it is found that such instrument is not duly stamped, the same has to be impounded. The duty and penalty has to be recovered according to law. Section 35, however, prohibits its admission in evidence till such duty and penalty is paid. The plaintiff has neither paid the duty nor penalty till today. Therefore, stricto sensu the instrument is not admissible in evidence. Mr Desai, however, wanted us to refer the instrument to the authority competent to adjudicate the requisite stamp duty payable on the instrument and then recover the duty and penalty which the party who tendered the instrument in evidence is in any event bound to pay and,

therefore, on this account it was said that the document should not be excluded from evidence. The duty and the penalty has to be paid when the document is tendered in evidence and an objection is raised. The difficulty in this case arises from the fact that the learned trial Judge declined to decide the objection on merits and then sought refuge under Section 36. The plaintiff was, therefore, unable to pay the deficit duty and penalty which when paid subject to all just exceptions, the document has to be admitted in evidence. In this background while holding that the document Ext. I would be inadmissible in evidence as it is not duly stamped, we would not decline to take it into consideration because the trial Court is bound to impound the document and deal with it according to law.

8. Serious controversy centered, however, round the question whether right to worship by turn is immovable property gift of which can only be made by registered instrument. Hindu law recognises gift of property to an idol. In respect of possession and management of the property which belongs to the Devasthanam or temple the responsibility would be in the manager who is described by Hindu law as Sin-bait. The devolution of the office of Shebait depends on the terms of the deed or will by which it is created and in the absence of a provision to the contrary, the settlor himself become & a Shebait and the office devolves according to line of inheritance from the founder and passes to his heirs. This led to an arrangement amongst various heirs equally entitled to inherit the office for the due execution of the functions belonging to the office, discharging duty in turn. This turn of worship is styled as 'Pala' in West Bengal and 'Osra' in Rajasthan. Shebaiti being held to be property, in **Angurbala Mullick v. Debabrata Mullick** [1951 SCR 1125], this Court recognised the right of a family to succeed to the religious office of Shebaitship. This hereditary office of Shebait is traceable to old Hindu texts and is a recognised concept of traditional Hindu law. It appears to be heritable and partible in the strict sense that it is enjoyed by heirs of equal degree by turn and transferable by gift subject to the limitation that it may not pass to a non-Hindu. On principles of morality and propriety sale of the office of Shebait is not favoured.

9. The position of Shebait is not merely that of a Pujari. He is a human ministrant of the deity. By virtue of the office a Shebait is an administrator of the property attached to the temple of which he is Shebait. Both the elements of office and property, of duties and personal interest are blended together in the conception of Shebaitship and neither can be detached from the other.

10. The question then is whether the hereditary office of Shebait is immovable property. Much before the enactment of the Transfer of Property Act a question arose in the context of the Limitation Act then in force whether a suit for a share in the worship and the emolument incidental to the same would be a suit for recovery of immovable property or an interest in immovable property. In **Krishnabhat bia Hiragange v. Kanabhat bia Mahalbhat**, 6 Bom HCR 137, after referring to various texts of Hindu law and the commentaries of English commentators thereon, a Division Bench of the Bombay High Court held as under:

Although, therefore, the office of a priest in a temple, when it is not annexed to the ownership of any land, or held by virtue of such ownership, may not, in the ordinary sense of the term, be immovable property, but is an incorporeal hereditament of a personal nature, yet being by the custom of Hindus classed with immovable property, and so regarded in their law.....



11. The privileges and precedence attached to a hereditary office were termed in Hindu law as Nibandha, and the text of Yajnavalkya treated Nibandha, loosely translated as corody, as immovable property. Soon thereafter the question again arose in **Balvantray alias Tatiaji Banaji v. Purshotam Sidheshvar** where, in view of a conflict in decision between **Krishnabhat** and **Baiji Manor v. Dassi Kallianrai Hukmatrai** the matter was referred to a Full Bench of 5 Judges. The question arose in the context of the Limitation Act in a suit to recover fees payable to the incumbent of a hereditary office, viz-, that of a village Joshi (astrologer). The contention was that such a hereditary office of village Joshi is immovable property. After exhaustively referring to the texts of Yajnavalkya and the commentaries thereon, Westropp, C. J., observed that the word 'corody' is not a happy translation of term Nibandha. It was held that Hindu law has always treated hereditary office as immovable property. These two decisions were affirmed by the Judicial Committee of the Privy Council in **Maharana Fattehsangji Jaswantsangji v. Dassi Kallianraiji Hakoomutraiji** The principle that emerges from these decisions is that when the question concerns the rights of Hindus it must be taken to include whatever the Hindu law classes as immovable although not so in ordinary acceptation of the word and to the application of this rule within the appropriate limits the Judicial Committee sees no objection

13. The definition of immovable property in Section 3 of the Transfer of Property Act is couched in negative form in that it does not include standing timber, growing crops, or grass. The statute avoids positively defining what is immovable property but merely excludes certain types of property from being treated as immovable property. Section 2(6) of the Registration Act defines immovable property to include lands, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops or grass. Section 2(26) of the General Clauses Act defines immovable property to include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. It may be mentioned that the definition of immovable property in Registration Act lends assurance to treating Shebait's hereditary office as immovable property because the definition includes hereditary allowances. Office of Shebait is hereditary unless provision to the contrary is made in the deed creating the endowment. In the conception of Shebait both the elements of office and property, duties and personal interest are mixed up and blended together and one of the elements cannot be detached from the other. Old texts, one of the principal sources of Hindu law and the commentaries thereon, and over a century the courts with very few exceptions have recognised hereditary office of Shebait as immovable property, and it has all along been treated as immovable property almost uniformly. While examining the nature and character of an office as envisaged by Hindu law it would be correct to accept and designate it in the same manner as has been done by the Hindu law text writers and accepted by courts over a long period. It is, therefore, safe to conclude that the hereditary office of Shebait which would be enjoyed by the person by turn would be immovable property. The gift of such immovable property must of course be by registered instrument. Exhibit I being not registered, the High Court was justified in excluding it from evidence. On this conclusion the plaintiff's suit has been rightly dismissed. This appeal accordingly fails and is dismissed.

***Yellapu Uma Maheswariv. Buddha Jagadheeswararao***

Civil Appeal No. 8441 of 2015

Arising out of Special Leave Petition (Civil) No. 12788 of 2014

Decided on October 8, 2015

**N.V RAMANA, J.:** 2. This Appeal has been preferred aggrieved by the orders passed by the High Court of Judicature of Andhra Pradesh in CRP No. 3419 of 2013, dt. 27/12/2013 wherein and whereby the learned Judge has dismissed the Revision Petition preferred by the Appellants/Defendant Nos. 1 & 2 by confirming the orders passed in O. S No. 10 of 2004, dt. 08/07/2013 on the file of Principal Senior Civil Judge, Anakapalle.

3. The brief facts which are necessary for adjudicating the dispute involved in the present appeal, in nutshell, are as follows.

4. The 1<sup>st</sup> respondent/plaintiff filed O.S No. 10 of 2004 on the file of Senior Civil Judge Court, Anakapalle against the appellants and others for the relief of partition claiming 1/4<sup>th</sup> share in Item No. 1, 1/2 share in Item No. 2 of the suit schedule properties.

5. It is the specific case of the 1<sup>st</sup> respondent/plaintiff that one Jaggayya, who is the foster father of the plaintiff, had acquired certain properties during his life time and executed a Registered Will dt. 22/05/1964 in a sound and disposing state of mind bequeathing his immovable properties in favour of the plaintiff/respondent and 1<sup>st</sup> defendant/appellant No. 1 by giving life estate in favour of his wife Mahalakshamma, and the said Mahalakshamma died on 20/05/2001, as such plaintiff/respondent No. 1 and the defendant Nos. 1 & 2 appellants became entitled to the plaint Schedule properties in equal shares. On his demand, when the defendants failed to partition the properties by giving him his legitimate right, he has approached the Court by filling the above suit.

6. The appellants herein (Defendant Nos. 1 & 2) resisting the plea of the plaintiff/respondent No. 1 filed the written statement that appellant No. 1 being the sister's daughter of Mahalakshamma and the plaintiff/respondent No. 1 who is the sister's son of late Jaggayya were treated as foster son and daughter as Jaggayya had no issues. In the year 1969 properties were partitioned between the parties. The plaintiff/respondent No. 1, in spite of having his share in the properties, taking advantage of appellant No. 1's innocence and helplessness, has taken other properties which are not allotted to him, having no other go she (appellant No. 1) kept quiet. According to the defendants/appellants, after the partition they have been enjoying the properties fell to their respective shares. It is their further case that on 05-6-1975 plaintiff/respondent No. 1 and the first defendant/appellant No. 1 got executed the Deed of Memorandum of earlier partition. Both the plaintiff/respondent No. 1 and the 1<sup>st</sup> defendant/appellant No. 1 were given pattadar passbooks and title deeds in respect of properties fell to their share and in fact, the plaintiff/respondent No. 1 has alienated some of his properties. Mahalakshamma in a sound and disposing state of mind executed a Registered Will dated 27/03/1999 bequeathing all the properties in favour of 1<sup>st</sup> defendant/appellant No. 1. Further, Mahalakshamma has given away her life estate in favour of appellant No. 1. defendant No. 1 and the plaintiff/respondent No. 1. Hence, it is pleaded that as properties were already partitioned in the year 1969, the question of again partitioning the properties does not arise and sought for dismissal of the Suit.

**7.** The appellant No. 1, defendant No. 1 filed her chief examination affidavit and sought to mark Exhibits B1 to B 48. The plaintiff/respondent No. 1 raised objection with regard to admissibility of Exhibits B-21 and B- 22. Exhibit B-21, dated 05/06/1975 according to the defendant/appellant is Deed of Memorandum witnessing earlier partition effected between the plaintiff/respondent No. 1 and the defendant No. 1, appellant No. 1. Exhibit B-22 is the Agreement dated 04/06/1975 entered between Late Mahalakshamma, plaintiff/respondent No. 1 and the defendant No. 1, appellant No. 1.

**8.** The plaintiff/respondent No. 1 took objection with regard to admissibility of Exhibits B-21 and B-22 on the ground that whole contents referred to in the Memorandum dated 05/6/1975 discloses that the second party thereto relinquished her right through the said documents. Therefore, the Agreement dated 04/06/1975 and Memorandum dated 05/06/1975 have to be construed as relinquishment deeds. A relinquishment deed which is compulsorily registerable document under Sec 17(b) of the Registration Act, 1908 and hence, the unregistered document is not admissible in evidence. The plea of the defendants is that the recitals of the said document discloses past transaction with reference to division of property and further it discloses the intention of the parties to enter into a separate agreement for sharing the properties and that the terms therein have to be implemented in future.

**9.** Both the Trial Court and the High Court upheld the objection raised by the plaintiff/respondent No. 1 and came to a conclusion that two recitals i.e Exhibit B21 and Exhibit B22 are not evidencing the past transaction, but they prima facie disclose the partition of the property and relinquishment of rights by one of the parties. As such, both documents require stamp duty under the Indian Stamp Act, 1899 and registration under the Registration Act, 1908. As Exhibits B21 and B22 are unregistered and unstamped documents, they are not admissible in evidence. The Trial Court gave a specific finding that even both the exhibits are not admissible for collateral purpose also. Aggrieved by that, the present appeal is filed.

**10.** We have heard the learned senior counsel for the appellants/defendant Nos. 1 & 2 and the learned counsel for the respondents/plaintiff.

**11.** It is urged by the learned senior counsel Mr. V. V. S. Rao that Exhibits B21 and B22 are admissible in evidence as both the documents evidence the past transaction which does not require any registration and both the Courts below erred in coming to a conclusion that Exts B21 and B22 require registration ignoring the true nature of the documents. It is urged that the amendment that is brought to the Registration Act in 1986, whereby even the past transaction becomes registerable and the same is not applicable to Exhibits B21 and B22. It is further urged by the learned senior counsel that even assuming that Exhibits B21 and B22 require registration, still the unregistered documents are admissible in evidence for collateral purpose.

**12.** The learned counsel Mr. G.V.R Choudary, appearing for the respondents, on the other hand, has submitted that the Courts below were perfectly right in coming to a conclusion that Exhibits B21 and B22 are compulsorily registerable documents and prayed for dismissal of the Suit.

**13.** Now the issue that falls for consideration is:

Whether the Courts below were right in holding that Exhibits B21 and B22 are not admissible in evidence as they are compulsorily registerable documents?

Whether Exhibits B-21 and 22 are admissible in evidence for collateral purpose?

**14.** Before we go in to the merits of the matter, we deem it appropriate to extract the relevant provisions of the Registration Act, 1908.

Sec. 17 of the Registration Act, 1908

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 executed on or after the date on which, Act No. XVI of 1864, or the Registration Act, 1866, or the Registration Act, 1871, or the Registration Act, 1877, or this Act came or comes into force, namely:-

- (a) Instruments of gift of immovable property;
- (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;
- (c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and
- (d) leases of immovable property;
- (e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates 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;
- (f) any decree or order or award or a copy thereof passed by a Civil Court on consent of the defendants or on circumstantial evidence but not on the basis of any instrument which is admissible in evidence under section 35 of the Indian Stamp Act, 1899 (2 of 1899), such as registered title deed produced by the plaintiff, where such decree or order or award purports or operate to create, declare, assign, limit, 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; and
- (g) agreement of sale of immovable property of the value of one hundred rupee and upwards”,

Provided that the State Government may, by order published in the Official Gazette, exempt from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

Section 49 of the Registration Act, 1908

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:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter-II of the Specific Relief Act, 1877 (3 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument.

**15.** Section 17(1)(b) of the Registration Act mandates that any document which has the effect of creating and taking away the rights in respect of an immovable property must be registered and Section 49 of the Act imposes bar on the admissibility of an unregistered document and deals with the documents that are required to be registered u/s 17 of the Act.

**16.** Coming to the facts on hand, the defendant No. 1 wanted to mark Exhibits B21 and B22, according to her, these two documents are Agreement and a Memorandum which were unregistered and unstamped documents and do not require registration. We have seen Exhibits B21 and B22 which are placed before us. Exhibit B22, dated 04/06/1975 as per the recitals, an Agreement between the plaintiff/respondent No. 1, defendant No. 1.appellant No. 1 and late MahaLakshamma. Clause 1 of the Agreement speaks about relinquishment of rights of Mahalakshamma in favour of plaintiff/respondent No. 1 and defendant No. 1.appellant No. 1 and Clause 4 specifies that the life estate of Mahalakshamma is devolved upon the plaintiff/respondent No. 1 and the defendant No. 1.appellant No. 1 equally. It is further specified that the stock amount of Rs. 50,000/- in the shop was given to Mahalakshamma and left over amount will be divided between plaintiff/respondent No. 1 and defendant No. 1.appellant No. 1 and further it was agreed upon that Mahalakshamma was entitled to reside in the house where she was residing. She was at liberty to reside in the house of the plaintiff/respondent No. 1 and the plaintiff/respondent No. 1 and the defendant No. 1.appellant No. 1 shall not raise any dispute over this. Coming to Exhibit B21, date 05/06/1975 which is an agreement between Mahalakshamma, plaintiff/respondent No. 1 and defendant No. 1.appellant No. 1 wherein at Clauses 4 to 6 the recitals pertain to relinquishment of shares between the parties to the agreement. It is stated in the Memorandum, Ext. B 22, that each of them having partitioned the properties by good and bad qualities, have been enjoying the respective properties that fell to their shares, in proof thereof, the Deed of Memorandum is executed. Taking us through the recitals of these two documents, the learned senior counsel tried to impress upon this Court particularly through the last few lines from Exhibit B-21, that these documents are only evidencing the past transaction of partition that has taken place but through these documents no rights in immovable property have accrued to the parties as envisaged under Sec. 17 of the

Registration Act and which makes these documents out of the purview of Section 49 of the Registration Act.

**17.** It is well settled that the nomenclature given to the document is not decisive factor but the nature and substance of the transaction has to be determined with reference to the terms of the documents and that the admissibility of a document is entirely dependent upon the recitals contained in that document but not on the basis of the pleadings set up by the party who seeks to introduce the document in question. A thorough reading of both Exhibits B-21 and B-22 makes it very clear that there is relinquishment of right in respect of immovable property through a document which is compulsorily registerable document and if the same is not registered, becomes an inadmissible document as envisaged under Section 49 of the Registration Act. Hence, Exhibits B-21 and B-22 are the documents which squarely fall within the ambit of section 17(i)(b) of the Registration Act and hence are compulsorily registerable documents and the same are inadmissible in evidence for the purpose of proving the factum of partition between the parties. We are of the considered opinion that Exhibits B 21 and B22 are not admissible in evidence for the purpose of proving primary purpose of partition.

**18.** Then the next question that falls for consideration is whether these can be used for any collateral purpose. The larger Bench of Andhra Pradesh High Court in *Chinnappa Reddy Gari Muthyala Reddy v. Chinnappa Reddy Gari Vankat Reddy*, AIR 1969 A.P (242) has held that the whole process of partition contemplates three phases i.e severancy of status, division of joint property by metes and bounds and nature of possession of various shares. In a suit for partition, an unregistered document can be relied upon for collateral purpose i.e severancy of title, nature of possession of various shares but not for the primary purpose i.e division of joint properties by metes and bounds. An unstamped instrument is not admissible in evidence even for collateral purpose, until the same is impounded. Hence, if the appellants/defendants want to mark these documents for collateral purpose it is open for them to pay the stamp duty together with penalty and get the document impounded and the Trial Court is at liberty to mark Exhibits B-21 and B- 22 for collateral purpose subject to proof and relevance.

**19.** Accordingly, Civil Appeal is partly allowed holding that Exhibits B-21 and B-22 are admissible in evidence for collateral purpose subject to payment of stamp duty, penalty, proof and relevancy.

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***Phool Patti and Anr.V. Ram Singh (Dead) Through Lrs. & Anr.***

2015 3 SCC 164

**MADAN B. LOKUR, J.** – 1. On 3rd November, 1980 Ram Singh (nephew of Bhagwana) filed Suit No. 630 of 1980 in the Court of the Senior Sub-Judge, Sonapat (Haryana). He stated in the plaint that 52 kanals of land in the revenue estate of Nizampur Majra in district Sonapat was joint Hindu family property. There was also a residential house situated in the village but it is not clear whether the residential house stood on the said land or was on a separate parcel of land. However, the appeal before us proceeded on the basis that the residential house is on the 52 kanals of land.

2. The plaint filed by Ram Singh further stated that some differences had arisen between the members of the joint Hindu family and as a result of a family settlement, the said land was given to him. Ram Singh further stated that he was in cultivating possession of the agricultural land and in physical possession of the residential house.

3. Ram Singh averred that Bhagwana refused to admit his (Ram Singh's) claim to the agricultural land and the residential house and in effect sought to negate the family settlement. Accordingly, Ram Singh prayed for a declaration that he is the owner and in cultivating possession of the agricultural land and in physical possession of the residential house.

4. On 5th November, 1980 Bhagwana filed his written statement admitting the entire claim set up by Ram Singh. It appears that Bhagwana's statement was also recorded subsequently. In view of the written statement as also Bhagwana's oral statement, the Senior Sub-Judge, Sonapat passed a consent decree on 24th November, 1980 and decreed the suit as prayed for by Ram Singh. The result of the decree was that Ram Singh was declared the owner in possession of 52 kanals of land, that is, the agricultural land and the residential house in the revenue estate of Nizampur Majra in district Sonapat.

5. In view of the consent decree, there was no occasion for the Senior Sub-Judge to decide whether there was or was not any family settlement, nor did the occasion arise for him to specifically decide whether the said land was self-acquired or ancestral.

6. However, two conclusions can be drawn quite safely: (i) There was no denial of the existence of a family settlement but on the contrary this was admitted by Bhagwana; (ii) The family settlement could be with reference to both the ancestral property as well as the self-acquired property or only with reference to the ancestral property.

7. Bhagwana had two daughters, namely Phool Patti and Phool Devi. He had no son. On 11th March, 1982 another nephew of Bhagwana, that is, Shobha Ram along with Phool Patti and Phool Devi filed Suit No. 234 of 1982 before the Senior Sub-Judge, Sonapat. In that suit Ram Singh was the first defendant and Bhagwana was the second defendant.

8. It was stated in the plaint that Bhagwana is the owner of 52 kanals of land which was inherited by him from his lineal male ascendant and that the properties are ancestral in his hands. It was averred that Bhagwana could not gift the agricultural land and residential house to anybody thereby depriving his legal heirs (Phool Patti and Phool Devi) of their rights in the disputed property.

9. It was further averred in the plaint that the decree dated 24th November, 1980 was obtained collusively by Ram Singh and that the admissions made by Bhagwana in the suit filed by Ram Singh were without applying his mind. It was stated that there was no family settlement whatsoever and that the decree dated 24th November, 1980 amounted to a gift made by Bhagwana in favour of Ram Singh. This could only be through a written instrument that was duly stamped and registered. Since the gift was neither written, nor stamped, nor registered it could not be acted upon.

10. On the basis of the pleadings, the Trial Court framed three issues as follows:-

Whether judgment and decree dated 24.11.1980 is void, illegal and not binding upon the rights of the plaintiffs?

Whether any family settlement was made between the parties?

Relief.

11. In support of the plaint, Shobha Ram (another nephew of Bhagwana) entered the witness box and stated that there was no family settlement and that Bhagwana was the owner of the ancestral land and house. Phool Patti and Phool Devi did not enter the witness box at all.

12. On 27th January, 1983 Bhagwana entered the witness box and stated that he "gave" the disputed property to Ram Singh under his free will treating him as his son. He also stated that the entire land was not ancestral - 20 kanals were purchased by Bhagwana while 32 kanals were ancestral property.

13. Ram Singh also entered the witness box and stated that Bhagwana had given him his property through the civil suit filed by Ram Singh against Bhagwana and that the disputed property was given by Bhagwana of his own free will. Ram Singh also made a mention of some hibba (gift) but it is not clear whether the reference was to the gift of the disputed property or some other land. However, for the purposes of the present appeal, it is assumed that Ram Singh referred to a hibba of the disputed property in his favour by Bhagwana.

14. The Trial Court gave its decision on 31st May, 1983 and it was held that the decree dated 24th November, 1980 was a collusive decree and a nullity and therefore illegal and void. In effect, Bhagwana made a gift of the disputed property in favour of Ram Singh and that the gift required compulsory registration under Section 17(1)(a) of the Registration Act, 1908. It was also held that there was no family settlement. The Trial Court did not give any finding whether the disputed property was self- acquired or ancestral.

15. Feeling aggrieved by the decision of the Trial Judge, Ram Singh preferred Civil Appeal No. 43/13 in the Court of the Additional District Judge, Sonapat. By its judgment and order, the First Appellate Court held that Shobha Ram had no locus standii in the matter at all, since he had no right, title or interest in the disputed property. As regards the claim of Phool Patti and Phool Devi, it was held that they could not challenge the gift made by Bhagwana in favour of Ram Singh. It was observed that they did not even enter the witness box to challenge the decree dated 24th November, 1980 and that Bhagwana was alive and had supported the judgment and decree. As such, the challenge made by Phool Patti and Phool Devi could not be sustained. The First Appellate Court further held that the decree dated 24th November, 1980 was not a collusive decree since Bhagwana had supported it. Accordingly,



the appeal filed by Ram Singh was allowed and the decree of the Trial Court dated 31st May, 1983 was set aside.

16. The First Appellate Court noted that the learned counsel for Shobha Ram, Phool Patti and Phool Devi did not challenge the transfer of the disputed property but challenged the collusive decree. It appears that in view of this, the First Appellate Court did not examine the question whether there was any family settlement and whether the disputed property was self-acquired or ancestral. The second issue framed by the Trial Court was, therefore, not even adverted to by the First Appellate Court.

17. Feeling aggrieved by the setting aside of the decree of the Trial Court, Phool Patti and Phool Devi preferred Second Appeal No. 2176 of 1985 in the Punjab & Haryana High Court. The respondents in the Second Appeal were Ram Singh, Shobha Ram and Bhagwana.

18. The High Court, by the impugned judgment and order, dismissed the Second Appeal while holding that the disputed property admittedly was the self-acquired property of Bhagwana; the decree suffered by Bhagwana on 24th November, 1980 was of his own free will and was for the services rendered by Ram Singh in looking after and taking care of Bhagwana; only Bhagwana could challenge the decree dated 24th November, 1980 but he did not do so and finally, that Phool Patti and Phool Devi had no locus standi to challenge the decree dated 24th November, 1980.

19. When this appeal came up for consideration on 21st March, 2009 a Bench of two learned judges considered the submissions of learned counsel, particularly with reference to two decisions cited at the Bar, namely, K. Raghunandan and Ors. v. Ali Hussain Sabir & Ors.[1] and Bhoop Singh v. Ram Singh Major.[2] The Bench was of the view that there was an inconsistency in the decision of this Court in the two cases mentioned above. It was observed as follows:-

"9. Since the consent decree dated 24.11.1980 had been held by the First Appellate Court to be not collusive, the High Court in our opinion rightly refused to interfere with that finding of fact.

10. It was then urged by the learned counsel for the appellant that there was violation of the Section 17 of the Registration Act, 1908.

11. In this connection, it may be noted that Section 17(2)(vi) of the Registration Act states that "nothing in clauses (b) and (c) of sub-section (1) of Section 17 applies to:

"any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding".

12. In our opinion the exception mentioned in Section 17(2)(vi) means that if a suit is filed by the plaintiff in respect of property A, then a decree in that suit in respect of immovable property B (which was not the subject-matter of the suit at all) will require registration. This is the view taken by this Court in K. Raghunandan & Ors. v. Ali Hussain Sabir & Ors. 2008 (9) Scale 215.

13. However, a different view was taken by this Court in Bhoop Singh v. Ram Singh Major 1995 (5) SCC 709 in which it is stated that: "...We would think that the exception

engrafted is meant to cover that decree or order of a court, including a decree or order expressed to be made on a compromise, which declares the pre-existing right and does not by itself create new right, title or interest in praesenti in immovable property of the value of Rs. 100 or upwards....."

14. In our opinion there seems to be inconsistency between the decisions of this Court in Bhoop Singh's case (supra) and K. Raghunandan's case (supra) in so far as the Registration Act is concerned. Prima facie it seems to us that the decision in Bhoop Singh's case (supra) does not lay down the correct law since Section 17(2)(vi) on its plain reading has nothing to do with any pre-existing right. All that seems to have been stated therein is that if a decree is passed regarding some immovable property which is not a subject-matter of the suit then it will require registration. As already explained above, if a suit is filed in respect of property A but the decree is in respect of immovable property B, then the decree so far as it relates to immovable property B will require registration. This seems to be the plain meaning of clause (vi) of Section 17(2) of the Registration Act.

15. It is a well settled principle of interpretation that the Court cannot add words to the statute or change its language, particularly when on a plain reading the meaning seems to be clear. Since there is no mention of any pre-existing right in the exception in clause (vi) we have found it difficult to accept the views in Bhoop Singh's case (supra).

16. It seems that there is inconsistency in the decisions of this Court in Bhoop Singh's case (supra) and K. Raghunandan's case (supra) and since we are finding it difficult to agree with the decision of this Court in Bhoop Singh's case (supra), the matter should be considered by a larger Bench of this Court." [3]

20. The appeal was then placed before a Bench of three learned judges of this Court and by an order dated 24th July, 2014 it was held, in the following words, that there was no inconsistency between the two decisions: "The learned counsels have submitted that there is no inconsistency in the judgments referred to in the order dated 31st March, 2009. Upon hearing the learned counsel we also do not find any inconsistency between the judgments delivered in the cases of (i) Bhoop Singh v. Ram Singh Major & Ors. [(1995) 5 SCC 709] and (ii) Raghunandan & Ors v. Ali Hussain Sabir & Ors. [(2008) 13 SCC 102].

In view of the afore-stated circumstances, we refer the matter back to the concerned Court so that the appeal can be decided on merits."

21. The appeal was then sent back to a Bench of two judges for a decision on the appeal on merits. It is under these circumstances that it has come up for final disposal.

22. On these broad facts, learned counsel for the appellants Phool Patti and Phool Devi contended that the decree dated 24th November, 1980 was a collusive decree. In fact, a false case of a family settlement had been made out by Ram Singh. In reality, Bhagwana had gifted the disputed property to Ram Singh and that required compulsory registration under Section 17(1)(a) of the Registration Act, 1908. Bhagwana had not only avoided payment of registration charges but also stamp duty and had played a fraud upon the Trial Court in the first instance.

23. It was submitted that the disputed property was not the self-acquired property of Bhagwana and being ancestral property, Phool Patti and Phool Devi had an interest in the disputed property and would have inherited it on the death of Bhagwana.

24. It was further submitted by learned counsel that if it is assumed that the decree dated 24th November, 1980 was not a collusive decree and that no gift had been made by Bhagwana in favour of Ram Singh, then a right in the disputed property was created for the first time in favour of Ram Singh and this required compulsory registration.

25. The sum and substance of the submissions of learned counsel for the appellants is that if the decree dated 24th November, 1980 is a collusive decree, then Bhagwana had, in reality, gifted the disputed property to Ram Singh and the gift was required to be compulsorily registered; but if the decree is not a collusive decree then an interest had been created in the disputed property in favour of Ram Singh for the first time by a decree of a court and therefore the transfer of the disputed property was required to be compulsorily registered. Either way, according to learned counsel, the transfer of the disputed property by Bhagwana to Ram Singh required compulsory registration.

26. The basic premise on which the case of the appellants rests is that the consent decree dated 24th November, 1980 was a collusive decree. However, in the order dated 21st March, 2009 it was specifically held by this court that "Since the consent decree dated 24.11.1980 had been held by the First Appellate Court to be not collusive, the High Court in our opinion rightly refused to interfere with that finding of fact." This conclusion cannot now be challenged by the appellants and we too are bound by this conclusion. The only doubt that this court had was with regard to what appeared to be an inconsistency between two decisions of this court. A Bench of three judges of this court has now held that there is no inconsistency between the two decisions. That issue is also no longer open for discussion.

27. In the welter of conflicting and sometimes contradictory facts, the only statement that can be relied upon is that of Bhagwana himself who stated in the witness box on 27th January, 1983 (in the second suit) that the entire disputed property was not ancestral but that 20 kanals were purchased by him while 32 kanals were ancestral property.

28. If that be so, then Bhagwana was entitled to gift 20 kanals of land to Ram Singh which he did. As regards the remaining 32 kanals, Bhagwana accepted the existence of a family settlement, and the Trial Court (in the first suit) did accept that there was a family settlement. It is in this family settlement that 32 kanals of land, being the ancestral property of Bhagwana came to the share of Ram Singh. It is true that in the second suit it was held that there was no family settlement but that was on the basis that the decree dated 24th November, 1980 was a collusive decree. But if it is held, as indeed it has been held in the order dated 21st March, 2009 that the consent decree was not a collusive decree, then it must follow that the finding that there was no family settlement (arrived at in the second suit) must be held incorrect, and we do so, particularly in the absence of any contrary finding on this issue by the First Appellate Court or the High Court. Consequently, in terms of the family settlement, 32 kanals of land originally belonging to Bhagwana came to the share of Ram Singh in the family settlement. This explains the statement of Bhagwana that he "gave" the disputed property to Ram Singh under his free will treating him as his son, that is, 20 kanals of his self acquired

property and 32 kanals of his ancestral property that then came to the share of Ram Singh through the family settlement.

29. What follows from this is that 20 kanals of land was gifted by Bhagwana to Ram Singh. This gift clearly requires compulsory registration under Section 17(1)(a) of the Registration Act, 1908 (the Act). Ram Singh's claim over 32 kanals of land was acknowledged in the consent decree dated 24th November, 1980. This did not require compulsory registration in view of Section 17(2) (vi) of the Act.

30. Learned counsel for the appellants cited three decisions to support his contention that the consent decree was collusive and therefore of no effect. He referred to Nagubai Ammal v. B. Shama Rao,<sup>[4]</sup> Rup Chand Gupta v. Raghuvanshi Pvt. Ltd.<sup>[5]</sup> and Ramchandra G. Shinde v. State of Maharashtra.<sup>[6]</sup> However, in view of the conclusion arrived at by this court in its order dated 21st March, 2009 we are not inclined to reopen the issue, as indeed we cannot. Nor do we disagree with the finding so as to refer the issue to a larger Bench.

31. It was contended that Phool Patti and Phool Devi, the daughters of Bhagwana had the necessary locus standii to challenge the gift made by Bhagwana to Ram Singh. While this may or may not be so (we are not commenting on the issue) the question of a challenge to the gift of 20 kanals of land does not arise on the facts of this case. There was no pleading to this effect, no issue was framed in this regard in the suit filed by Phool Patti and Phool Devi, nor was any evidence led to challenge the validity of the gift. It is too late in the day for them to question the validity of the gift in favour of Ram Singh for the first time in this court without any foundation, factual or otherwise, having been laid for a decision on this issue.

32. The terms of the family settlement are not on record. As mentioned above, the family settlement could relate to the ancestral as well as self- acquired property of Bhagwana or only the ancestral property. It appears that it related only to the ancestral property and not the self-acquired property (hence the reference to a hibba). The decree relating to 32 kanals of land did not require compulsory registration, as mentioned above. However, the self acquired property of Bhagwana that is 20 kanals, therefore, in view of the law laid down in Bhoop Singh the gift of 20 kanals of land by Bhagwana in favour of Ram Singh, notwithstanding the decree in the first suit, requires compulsory registration since it created, for the first time, right, title or interest in immovable property of a value greater than Rs.100/- in favour of Ram Singh.

33. In view of the above discussion, the appeal is partly allowed and disposed of in the manner indicated above. No costs.

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***Aspire Investments Private Ltd. V. Nexgen Edusolutions Private Ltd.***

CS(OS) 192/2009

Decided on November 20, 2009

**RAJIV SHAKDHER, J. – 1.** This is an application preferred by the defendant under Section 8 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act') seeking a reference of the 'matter' raised in the suit to an arbitrator. The defendant's prayer is pivoted on an arbitration agreement contained in an unregistered lease deed dated 27.03.2008 (hereinafter referred to in short as the 'parent contract'). There is no dispute between the plaintiff and the defendant that the parent contract is in existence and duly executed between them. They are at issue only on the aspect as to whether, such an arbitration agreement, can be relied upon by the defendant in order to maintain its application under Section 8 of the Arbitration Act. According to me, much would depend on the answer to the question: whether agreement to arbitrate, arrived at between the plaintiff and defendant, which is part of a parent contract, which is both unregistered and unstamped; can trigger an arbitration.

**2.** The facts which are necessary for disposing of the present application under Section 8 of the Arbitration & Conciliation Act fall in a narrow compass:—

2.1 The defendant/applicant is in the field of rendering educational services, having branches all over India. The defendant/applicant entered into a lease agreement dated 27.03.2008 with the plaintiff/respondent (hereinafter referred to as the 'parent contract') with respect of Flats bearing numbers F-601 to 608 and F-610 to 619, 6th Floor, Aditya Tower Building/Plot, No. 5, Laxmi Nagar, District Centre, Delhi-110092 (hereinafter referred to in short as the 'demised premises'). The undisputed fact is that the demised premises were let out for a period often years w.e.f 15.06.2008 till 14.06.2018 Furthermore, the rent of the demised premises was fixed at Rs. 1,50,000/- per month. There are also averments in the application with respect to various breaches purportedly committed by the plaintiff/respondent which could have been attended to but were not attended to by the plaintiff/respondent. However, these aspects are not within the scope and ambit of the issue with which I am concerned in the present application.

2.2 Coming back to the narrative, on 13.11.2008 a notice was issued by the defendant/applicant seeking to appoint its nominee as an Arbitrator in terms of Clause 8 of the parent contract. The receipt of the arbitration notice is not disputed. As a matter of fact, the plaintiff/respondent replied to it vide its reply dated 29.01.2009 The written statement was filed by the applicant/defendant on 15.04.2009 while the present application under Section 8 of the Arbitration Act was filed on 18.04.2009 The plaintiff/respondent has opposed the application.

**3.** The learned counsel for the plaintiff has opposed the application of the defendant. The gravamen of his submission is that, the parent contract being unregistered and unstamped it cannot be relied upon by the defendant for reference of the issues raised in the suit to an Arbitrator. In this regard it was submitted that in view of the fact that the arbitration clause is contained in a parent contract which is a document of the nature described in Section 17(1)(d) of the Registration Act, *i.e.*, a lease agreement for the period of over one year, the bar of Section 49 of the Registration Act will come into play. Similarly, Section 35 of the Indian

Stamp Act, 1899 was relied upon to contend that the parent contract could not be relied upon by the defendant, which expressly prohibited the receipt of an unstamped document in evidence for “any purpose”. In support of his submissions the learned counsel placed reliance on the following judgments: *Atma Ram Properties (P) Ltd. v. Golden Phoenix Travels Pvt. Ltd.*; Arb. P. No. 58/2008 decided on 14.05.2008; *Chemical Sales Agencies v. Smt. Naraini Newar*; 114 (2004) DLT 272: 2004 (53) DRJ 224; *Bimla Rani Gupta v. S.R Sachdeva*; 2000 (1) Arb. LR 437 : 2000 (53) DRJ 388; *Om Prakash Chawla v. Union of India*, Punjab Law Reporter Vol. LXXIV-1972 at Page 53 and *Avinash Kumar Chauhan v. Vijay Krishna Mishra*; (2009) 2 SCC 532.

4. In the context of the background facts let us examine the legal provisions Section 17(1)(d) of the Registration Act, 1908 (hereinafter referred to as the ‘Registration Act’) mandates that any lease for a period exceeding one year would require to be registered mandatorily. Section 49 of the Registration Act provides as follows:—

“**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 unless it has been registered:

[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), or as evidence of any collateral transaction not required to be effected by registered instrument.]”

4.1 Therefore, in terms of Section 49 of the Registration Act, a lease agreement, which is what the parent contract in the present case is, can neither affect the immovable property comprised therein nor be received as evidence of any transaction affecting such property or conferring such power unless it is registered. The exception to this bar is where an unregistered lease agreement is sought to be relied upon as evidence of “any collateral transaction not required to be effected by registered document”.

5. To wit, is an arbitration agreement a ‘collateral transaction’? I don't think it could be disputed that a stand alone arbitration agreement would not require registration under the provisions of the Arbitration Act. The reason for this is short. Section 2(a) of the Arbitration Act defines that an arbitration agreement is one which is referred to in Section 7 of the Arbitration Act. It, therefore, becomes necessary to refer to Section 7 of the Arbitration Act, which reads as follows:

“**7. Arbitration agreement** — (1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

- (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- (3) An arbitration agreement shall be in writing.
- (4) An arbitration agreement is in writing if it is contained in—
- (a) a document signed by the parties;
  - (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
- (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

5.1 Sub-Section (2) of Section 7 of the Arbitration Act contemplates one such situation with which one is bedeviled in the present case û that is, where an arbitration agreement forms part of a parent contract. Sub-Section (3) of Section 7 requires that it can only be evidenced by writing. And what would constitute writing is provided in the illustrations given in sub-section (4) clause (a) to (c) of Section 7. Sub-section (5) of Section 7 goes a step further: where in the parent contract there is only a reference to another document containing an arbitration clause; as long as the reference is such that it makes the arbitration clause part of the main clause it would constitute a valid arbitration agreement.

5.2 Thus, a bare reading of Section 7 of the Arbitration Act would show that a valid arbitration agreement is one whereby parties agree to submit their disputes to arbitration whether arising out of a contract or otherwise, and this agreement is reflected in a ‘writing’. Instances of ‘writing’ which the Arbitration Act recognizes as valid are given in sub-section 4(a) to (b) and sub-Section (5) of Section 7. There is no requirement of registration or stamping. Therefore, the position vis-vis a stand alone arbitration agreement is clear that it does not require registration.

**6.** Therefore, would the position be any different if the arbitration agreement is part of a parent contract which affects an immovable property. For this purpose, let us examine the provisions of the Registration Act. Section 17 of the Registration Act is in two parts. Sub-section (1) clauses (a) to (e) refers to all such documents which require compulsory registration. Sub-section (2) clauses (i) to (xii) of Section 17 refers to those documents which do not require compulsory registration. Interestingly, there is no reference to an arbitration agreement in either sub-section (1) or sub-section (2) of Section 17 of the Registration Act.

6.1 Since the parent contract deals with an immovable property, to escape the rigours of Section 17 of the Registration Act, recourse would have to be had to the escape clause, which is, the proviso to Section 49 of the Registration Act.

6.2 Section 49 of the Registration Act provides that any document which requires registration in Section 17 shall not be received as evidence of any transaction affecting a property which is part of such an unregistered document save and except where it is placed as evidence of any ‘collateral’ transaction which is not required to be effected by a registered

instrument. The word 'collateral' by itself would mean something which is not inconsistent with or directly connected with the principal obligation or issue in dispute (See *Prem's Law Dictionary*, Vol. 1 at Page 350). Thus, it is related to; is complimentary; accompanying as a co-ordinate (See *Black's Law Dictionary*, 6th Edition at Page 261). The word 'transaction' in the present context would mean any act or agreement between or among parties whereby a cause of action or alteration of legal rights occur (See *Black's Law Dictionary*, 6th Edition at Page 1496). There is no doubt that the transaction in issue is an agreement to arbitrate between the plaintiff and the defendant. The arbitration agreement is not inconsistent with but on the other hand, is both complimentary and related to the present contract. If that be so, then surely, it would fall within the expression 'collateral' transaction.

6.3 I am fortified, in my view, by the discussion in the case of *Damodar Valley v. K.K Kar*, (1974) 1 SCC 141 : AIR 1974 SC 158, in paragraphs 10 and 11 at pages 162-163 of the report. The Supreme Court while adverting to its own judgment in the case of *Union of India v. Kishorilal Gupta & Bros.*, AIR 1959 SC 1362 has observed that an arbitration clause is a collateral term of a contract as distinguished from its substantive terms. An arbitration clause perishes only if the parent contract is void ab initio. The cases which fall between two extreme situations, that is, where the parent contract is void or is substituted by a new contract there may be a situation where disputes may arise in respect of parent contracts which are repudiated or there are issues of breach or frustration. In these circumstances, even though the performance of an agreement may come to an end but the contract is in existence for the purposes of reference of disputes to an arbitration.

6.4 There is no requirement either under Section 17 of the Registration Act or under the provisions of Section 7 of the Arbitration Act that an Arbitration Agreement should be effected by a registered instrument. Therefore, just because it forms part of a parent contract it does not stand to reason that it cannot be relied upon because the parent contract is not registered. It is no one's case; as it cannot be, that the parent contract is void or non est in law for want of registration or stamping. Therefore, assuming that such a submission were to be accepted, it would still not help the cause of the plaintiff as such an Arbitration Agreement would fall within the ambit of the proviso to Section 49 of the Registration Act. This in sum and substance is the view taken by a single Judge of this Court in *Gaajara International v. Food Corporation of India*, 96 (2002) DLT 581 : 2002 (62) DRJ 217.

#### **Analysis of the judgments cited by the plaintiff/respondent.**

7. In so far as the first judgment i.e, *Atma Ram Properties* (supra) is concerned, what was not brought to the notice of the Court was perhaps the proviso to Section 49. Therefore, there was no occasion to discuss as to whether an arbitration agreement would fall within the ambit and scope of the expression 'collateral transaction'. The second judgment, i.e, *Chemical Agencies* (supra), in my view, turned on peculiar facts, that is, the pre-requisites of Section 7 of the Arbitration Act were not fulfilled. In that case the Court observed that for a valid arbitration agreement to subsist there should be in place a "defined legal relationship". In view of the fact that the tenant had taken a defence in the written statement that there did exist a landlord-tenant relationship; the Court concluded that there was no defined legal relationship between the parties and hence, no valid arbitration agreement subsisted between the parties. This is evident from the observations made at Page 278 in Paragraph 12 of the



judgment. The discussion in Paragraphs 14 and 15 at Page 279 only fortifies this aspect of the matter where the Court while distinguishing the judgment of *Gaajara International* (supra) and *Trans World Finance & Real Estate Co. Pvt. Ltd. v. Union of India*, 97 (2002) DLT 767 : 2002 (63) DRJ 655 has distinguished the aforesaid judgments on the following grounds: *Gaajara International* (supra), according to the learned Judge, dealt with the definition of Arbitration Agreement as it obtained in Section 2(a) of the Arbitration Act, 1940 which was entirely different from the definition of arbitration agreement as provided in Section 7 of the Arbitration Act. Similarly, even though *Trans World Finance Real Estate* (supra) dealt with the Arbitration Act there was no discussion specifically with respect to Section 7 of the Arbitration Act. In my view, as observed above, the aforesaid judgments were sought to be distinguished essentially on the ground of absence of defined legal relationship in *Chemical Agencies* (supra). This is clear on a reading of the observations made in Paragraph 17 of the judgment at Page 280. The said judgment, according to me, is clearly distinguishable. In so far as the third judgment is concerned, i.e., *Bimla Rani Gupta* (supra), in my view, that is also distinguishable. A reading of the judgment would show that there is no discussion with respect to the provisions of Section 49 of the Registration Act. In my view, the case dealt with an application made under Section 34 of the Arbitration Act, 1940. In my view, the said judgment has no applicability. Similarly, *Om Prakash Chawla* (supra) dealt with the provisions of Section 34 of the Arbitration Act, 1940. As regards the other case i.e., *Avinash Kumar Chauhan* (supra), the same is, in my view, also distinguishable as it dealt with the issue as to whether an unregistered document dealing with sale of an immovable property could be received in evidence. The matter did not pertain to the issue with which I am concerned with in the present case. It is well settled that a judgment can be relied upon as a precedent only in respect of what it decides and not what logically follows from it. [See *Bhavnagar University v. Palitan Sugar Mill (P)Ltd.*, (2003) 2 SCC 111].

7.1 Fortuitously, my task has become easier - a further research has revealed, that a Division Bench of this Court in *N.I.I.T v. West Star Construction Pvt. Ltd.*, Arb. P. No. 244/2008 dated 27.04.2009 has accepted the view expressed in *Gaajara International* (supra) and *Travel Finance Pvt. Ltd.* (supra). The decision in *Chemical Sales Agencies* (supra) has been distinguished. The Division Bench has come to the conclusion, after noticing Section 7 and Section 16(1)(b) of the Arbitration Act and Section 107 of the Transfer of Property Act, 1882, that an arbitration clause contained in a lease deed is a collateral term which would survive whether or not it is registered or properly stamped.

7.2 Stamping like registration would effect the admissibility of the document, its absence cannot exclude the reliance on the parent contract for the purposes of triggering an arbitration. The Arbitration Act, which undoubtedly, is a special statute dealing with an arbitration should in my view take precedence over the provisions of both the Registration Act and the Indian Stamp Act, 1899. Respectfully following the Division Bench of this Court, I am of the view that even though the parent contract is neither registered nor stamped, the arbitration clause contained in the parent contract would survive. The arbitration agreement, in my view, is a collateral transaction which would fall within the proviso to Section 49 of the Registration Act, 1908.

8. There is another issue which arose during the course of oral submissions made by the counsel, to which I must advert to. The issue being: whether the defendant/applicant was entitled to maintain an application under the provisions of Section 8 of the Arbitration Act, in as much as, the defence with regard to the maintainability of the suit was taken in the first instance in the written statement in the form of a preliminary submission and that, it was only thereafter a formal application under Section 8 of the Arbitration Act was filed. In other words, did the defendant take a 'step in proceedings' and thereby waive its right under Section 8 of the Arbitration Act? In my view, the requirement of Section 8 of the Arbitration Act is that; before a defence on the substance of the dispute, that is, on merits, is preferred by the party seeking to adhere to the arbitration agreement arrived at between itself and the other party, it ought to convey in no uncertain terms its willingness to subscribe to the arbitration agreement. The legislature by enacting sub-Section (1) of Section 8 statutorily recognized a situation, which may arise; where a party to an action in Court instituted by the other party chooses by its conduct to waive its right to invoke an arbitration agreement subsisting between itself and the other party. The fact that in the instant case the applicant/defendant indicated its intent to exercise its right to invoke the arbitration agreement in the preliminary submissions made in the written statement would not, in my view, result in rejection of the prayer of the applicant/defendant that parties be referred to an arbitration. As long as the intention to arbitrate is indicated the judicial authority before whom the action is placed is duty bound to refer the parties to arbitration; with a caveat that it complies with the other provisions of the Arbitration Act including sub-section (2) of Section 8 of the Arbitration Act. Therefore, in my view, any objection in this regard is completely untenable and hence, rejected.

9. Accordingly, in view of the discussion above, the plaint is rejected. The suit is, accordingly, disposed of.

**CS(OS) No. 192/2009**

In view of the orders passed in IA No. 5332/2009, the suit is disposed of as the defendant's application under Section 8 of the Arbitration & Conciliation Act, 1996 referring the parties to arbitration has been allowed.

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**THE INDIAN STAMP ACT, 1899**

***Saiyed Shaban Ali v. Sheikh Mohammad Ishaq***

AIR 1939 All. 724

**BAJPAI J.** – This is a reference under S. 61, Stamp Act, and the question that we have got to decide is whether paper No. 7C is a lease as well as an agreement or only an agreement. The learned Judge of the Small Cause Court was of the opinion that the document was an agreement only, whereas the Inspector of Stamps held the view that it was a lease as well as an agreement. We have pursued the document and we have come to the conclusion that it is a lease as well as an agreement. It is executed not by the lessor but by the lessee, and the latter covenants that he would take certain premises from the lessor, make certain alterations in the premises at his own cost, pay Rs. 9 a month as rent and the period of occupation was fixed as five years. It was also stipulated that the executant will not leave the premises for five years and if he did vacate the premises within five years he would be liable for the rent of five years. The document was executed on 11th December 1927 on a general stamp of 8 annas. As we said before, the terms of the document leave no room for doubt that it is a lease as well as an agreement. ‘Lease’ under the Stamp Act “includes a kabuliyat or other undertaking in writing... to occupy or pay or deliver rent for immovable property”. Under S. 6, Stamp Act, if an instrument is so framed as to come within two or more of the descriptions in Sch. I and if the duties chargeable thereunder are different the instrument will be chargeable only with the highest of such duties. The document is a lease as well as an agreement, and as the duty for a lease is higher, it will be chargeable only as a lease. The annual rent reserved is Rs.108, that is to say, it exceeds Rs. 100 and does not exceed Rs. 200. As a conveyance a duty of Rs. 2 is chargeable. In case of a lease, where the lease purports to be for a term in excess of three years, as it is in the present case, the duty is the same as on a conveyance for a consideration equal to the amount or value of the average annual rent reserved. We therefore declare that the document is chargeable as a lease, and we determine the amount of duty thereon as Rs. 2 Annas 8 having already been paid, the deficiency is Re. 1-8-0. Under S. 35 of the Act a penalty is also leviable and such a penalty shall be ten times the amount of the deficiency, that is Rs. 15. We make the above declaration and we direct that a copy of our judgment will be sent to the Collector.

***Member, Board of Revenue v. Arthur Paul Benthall***

(1955) 2 SCR 842 : AIR 1956 SC 35

**T.L. VENKATARAMA AYYAR, J.** - This appeal raises a question under Section 5 of the Indian Stamp Act II of 1899. The respondent was, at the material time, the Managing Director of Messrs Bird and Co. Ltd., and of Messrs F. W. Heilgers and Co. Ltd., which were acting as Managing Agents of several Companies registered under the Indian Companies Act. He was also a Director of a number of other Companies, and had on occasions acted as liquidator of some Companies, as executor or administrator of estates of deceased persons and as trustees of various estates. On 4-7-1949 he applied to the Collector of Calcutta under Section 31 of the Stamp Act for adjudication of duty payable on a power of attorney, marked as Exhibit A in the proceedings, which he proposed to execute. By that power, he empowered Messrs Douglas Chisholm Fairbairn and John James Brims Sutherland jointly and severally to act for him in his individual capacity and also as executor, administrator, trustee, managing agent, liquidator and all other capacities. The Collector referred the matter under Section 56(2) of the Act to the decision of the Chief Controlling Revenue Authority, who eventually referred it under Section 57 to the High Court of Calcutta stating his own opinion that the stamp duty was payable on the power "for as many respective capacities as the principal executes the power". The reference was heard by a Bench consisting of the Chief Justice, Das, J. and S. R. Das Gupta, J., who differed in their opinion. The learned Chief Justice with whom Das, J. agreed, held that the different capacities of the executant did not constitute distinct matters for purposes of Section 5 of the Act, and that the proper duty payable on the instrument was Rs 10 under Article 48(d) of Schedule 1-A of the Stamp Act as amended by Section 13 of Bengal Act III of 1922. S. R. Das Gupta, J. was of the opinion that the different capacities of the executant were distinct matters for the purposes of Section 5, and that the instrument was chargeable with the aggregate amount of duty payable if separate instruments were executed in respect of each of those capacities. In the result, the question was answered in accordance with the opinion of the majority in favour of the respondent. Against that decision, the Board of Revenue, West Bengal has preferred this appeal by special leave, and contends that the instrument in question comprises distinct matters, and must be stamped in accordance with Section 5.

2. The statutory provisions bearing on the question are Sections 3 to 6 of the Act. Section 3 is the charging section, and it enacts that subject to certain exemptions, every instrument mentioned in the Schedule to the Act shall be chargeable with the duty of the amount indicated therein as the proper duty therefor. Section 4 lays down that when in the case of any sale, mortgage or settlement several instruments are employed for completing the transaction, only one of them called the principal instrument is chargeable with the duty mentioned in Schedule I, and that the other instruments are chargeable each with a duty of one rupee. Section 5 enacts that any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under the Act. Section 6, so far as is material, runs as follows:

"Subject to the provisions of the last preceding section, an instrument so framed as to come within two or more of the descriptions in Schedule I, shall, where the

duties chargeable thereunder are different, be chargeable only with the highest of such duties.”

3. The point for decision in this appeal is as to the meaning to be given to the words “distinct matters” in Section 5. The contention of the respondent which found favour with the majority of the learned Judges in the court below is that the word “matters” in Section 5 is synonymous with the word “description” occurring in Section 6, and that they both refer to the several categories of instruments which are set out in the Schedule. The argument in support of this contention is this: Section 5 lays down that the duty payable when the instrument comprises or relates to distinct matters is the aggregate of what would be payable on separate instruments relating to each of these matters. An instrument would be chargeable under Section 3 only if it fell within one of the categories mentioned in the Schedule. Therefore, what is contemplated by Section 5 is a combination in one document of different categories of instruments such as sale and mortgage, sale and lease or mortgage and lease and the like. But when the category is one and the same, then Section 5 has no application, and as, in the present case, the instrument in question is a power of attorney, it would fall under Article 48(a) in whatever capacity it was executed, and there being only one category, there are no distinct matters within Section 5.

4. We are unable to accept the contention that the word “matter” in Section 5 was intended to convey the same meaning as the word “description” in Section 6. In its popular sense, the expression “distinct matters” would connote something different from distinct “categories”. Two transactions might be of the same description, but all the same, they might be distinct. If A sells Black-acre to X and mortgages White-acre to Y, the transactions fall under different categories, and they are also distinct matters. But if A mortgages Black-acre to X and mortgages White-acre to Y, the two transactions fall under the same category, but they would certainly be distinct matters. If the intention of the legislature was that the expression ‘distinct matters’ in Section 5 should be understood not in its popular sense but narrowly as meaning different categories in the Schedule, nothing would have been easier than to say so. When two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sense, and the conclusion must follow that the expression “distinct matters” in Section 5 and “descriptions” in Section 6 have different connotations.

5. It is urged against this conclusion that if the word “matters” in section is construed as meaning anything other than “categories” or in the phraseology of Section 6, “descriptions” mentioned in the Schedule, then there could be no conflict between the two Sections, and the clause in Section 6 that it is “subject to the provision of the last preceding Section” would be meaningless and useless. We see no force in this contention. Though the topics covered by Sections 5 and 6 are different, it is not difficult to conceive of instruments which might raise questions falling to be determined under both the sections. Thus, if a partnership carried on by members of a family is wound up and the deed of dissolution effects also a partition of the family properties as in **Secretary, Board of Revenue v. Alagappa Chettiar** [ILR 1937 Mad 553], the instrument can be viewed both as a deed of dissolution and a deed of partition, and under Section 6, the duty payable will be the higher duty as on an instrument of partition. But supposing by that very deed one of the members creates a charge or mortgage over the

properties allotted to his share in favour of another member for moneys borrowed by him for his own purposes, that would be a distinct matter which would attract Section 5. Now, but for the saving clause, a contention might be advanced that Sections 5 and 6 are mutually exclusive, and as the instrument falls within Section 6, the only duty payable thereon is as on an instrument of partition and no more. The purpose of the clause in Section 6 is to repel any such contention.

6. Considerable stress was laid by Mr Chaudhury on the scheme of the Act as embodied in Sections 3 to 6 as strongly supporting the view that “matters” in Section 5 meant the same thing as “description” in Section 6. He argued that under Section 3 the duty was laid not on all instruments but on those which were of the descriptions mentioned in the Schedule, that Section 4 enacted a special provision with reference to three of the categories mentioned in the Schedule, sale (conveyance), mortgage and settlement, that if they were completed in more than one instrument, not all of them were liable for the duty specified in the Schedule, but only one of them called the principal document, and that Section 6 provided that when the instrument fell under two or more of the categories in the Schedule, the duty payable was the highest payable on any one of them, that thus the categories in the schedule were the pivot on which the entire scheme revolved, and that in construing the section in the light of that scheme, the expression “distinct matter” must in the setting be construed as distinct categories. To construe “distinct matters” as something different from “distinct categories” would be, it was argued, to introduce a concept foreign to the scheme of the enactment.

7. The error in this argument lies in thinking that the object and scope of Sections 4 to 6 are the same, which in fact they are not. Section 4 deals with a single transaction completed in several instruments, and Section 6 with a single transaction which might be viewed as falling under more than one category, whereas Section 5 applies only when the instrument comprises more than one transaction, and it is immaterial for this purpose whether those transactions are of the same category or of different categories. The topics dealt with in the three sections being thus different, no useful purpose will be served by referring to Section 4 or Section 6 for determining the scope of Section 5 or for construing its terms. It is not without significance that the legislature has used three different words in relation to the three sections, “transaction” in Section 4, “matter” in Section 5, and “description” in Section 6.

8. In support of his contention that ‘distinct matters’ in Section 5 meant only different categories, learned counsel for the respondent relied on certain observations in **Ansell v. Inland Revenue Commissioners** [(1929) 1 KB 608]. There, the instrument under consideration was a deed of settlement which comprised certain Government securities as also other investments, and under the Stamp Act 1891, it was chargeable with a single duty ad valorem on the value of all the properties settled. By Section 74, sub-section (1) of the Finance Act, 1910, voluntary dispositions were chargeable with a higher stamp duty as on a conveyance; but Government securities were exempted from the operation of the section. The question that arose for decision was whether a separate duty was payable in respect of Government stocks under the provisions of the Stamp Act, 1891 over and above what was paid under Section 74, sub-Section (1) of the Finance Act, 1910 on account of other investments. Answering it in the affirmative, Rowlatt, J. observed:

“If two different classes of property are being transferred by the same words of assignment in the same document, and those two different classes of property in the same document are different from the point of view of the Stamp Act and taxation, it seems to me in common sense that they must be distinct matters.”

The respondent wants to read these observations as meaning that where the matters are not dealt with separately for purposes of stamp duty, then they are not distinct matters. This, however, does not follow. The case before the court was one in which the instrument dealt with properties which fell under two categories, and the decision was that they were distinct matters. There is nothing either in the decision or the observations quoted above to support the contention of the respondent that if the instrument comprises matters falling within the same description, it is not to be construed as comprising distinct matters. Reliance was also placed on the observations in **Reversionary Interest Society v. Commissioners of Inland Revenue** [22 ILR 740], in which it was held that a statutory declaration for the purpose of carrying through a transaction was liable for a single stamp duty. There, the declaration was made by husband and wife, and in view of the purpose for which it had to be used, it was construed as one declaration. This is a decision on the facts, and is not of much assistance.

9. In the view, then, that Section 5 would apply even when the instrument comprises matters of the same description, the point for decision is whether the instrument proposed to be executed by the respondent is a single power of attorney or a combination of several of them. The contention of Mr Chaudhury is that when the executant of one instrument confers on the attorney a general authority to act for him in whatever matters he could act, then there is, in fact, only a single delegation, and that therefore the instrument must be construed as a single power of attorney liable for a single duty under Article 48 (d) of the Schedule. The contention of the appellant, on the other hand, is that though the instrument is executed by one person, if he fills several capacities and the authority conferred is general, there would be distinct delegations in respect of each of those capacities, and that the instrument should bear the aggregate of stamp duty payable in respect of each of such capacities. The question is which of these two contentions is correct.

10. We are unable to agree with the respondent that when a person executes a power of attorney in respect of all the matters in which he could act, it should be held, as a matter of law and without regard to the contents of the instrument, to comprise a single matter. Whether it relates to a single matter or to distinct matters will, in our opinion, depend on a number of factors such as who are parties thereto, which is the subject-matter on which it operates and so forth. Thus, if A executes one power authorising X to manage one estate and Y to manage another estate, there would really be two distinct matters, though there is only one instrument executed by one person. But if both X and Y are constituted attorneys to act jointly and severally in respect of both the estates, then there is only one delegation and one matter, and that is specifically provided for in Article 48(d). Conversely, if a number of persons join in executing one instrument, and there is community of interest between them in the subject-matter comprised therein, it will be chargeable with a single duty. This was held in **Davis v. Williams** [104 E.R. 358], **Bowen v. Ashley** [127 E.R. 467, 469], **Goodson v. Forbes** [128 E.R. 999 at 1000-1001] and other cases. But if the interests of the executants are separate, the instrument must be construed as comprising distinct matters. Applying the same principle to

powers of attorney, it was held in **Alien v. Morrison** [108 ER 1152, 1153] that when members of a mutual insurance club executed a single power, it related to one matter, Lord Tenterdon, C.J. observing that “there was certainly a community of purpose actuating all the members of this club”. In **Reference under Stamp Act, s. 46** [ILR 9 Mad. 358], a power of attorney executed by thirty-six persons in relation to a fund in which they were jointly interested was held to comprise a single matter. A similar decision was given in **Reference under Stamp Act, s. 46** [ILR 15 Mad 386] where a power of attorney was executed by ten mirasdars empowering the collection of communal income appurtenant to their mirasi rights. On the other hand, where several donors having separate interests execute a single power of attorney with reference to their respective properties as, for example, when A constitutes X as attorney for management of his estate Black-acre and B constitutes the same person as attorney for the management of his estate White-acre, then the instrument must be held to comprise distinct matters. It was so decided in **Reference under Stamp Act, s. 46** [2 MLJ 178]. Thus, the question whether a power of attorney relates to distinct matters is one that will have to be decided on a consideration of the terms of the instrument and the nature and the extent of the authority conferred thereby.

11. It may be mentioned that questions of this character cannot now arise in England in view of the special provision contained in the Finance Act, 1927 (17 & 18, Geo. 5, Ch. 10), Section 56 which runs as follows:

“No instrument chargeable with stamp duty under the heading Letter or Power of Attorney and Commission, Factory, Mandate, or other instrument in the nature thereof in the First Schedule to the Stamp Act, 1891, shall be charged with duty more than once by reason only that more persons than one are named in the instrument as donors or donees (whether jointly or severally or otherwise), of the powers thereby conferred or that those powers relate to more than one matter.”

12. There is no provision in the statute law of this country similar to the above, and it is significant that it assumes that a power of attorney might consist of distinct matters by reason of the fact that there are several donors or donees mentioned in it, or that it relates to more than one matter.

13. Now, considering Exhibit A in the light of the above discussion, the point for determination is whether it can be said to comprise distinct matters by reason of the fact that the respondent has executed it in different capacities. In this form, the question is bereft of authority, and falls to be decided on well-recognised principles applicable to the matter. It is, as has been stated above, settled law that when two persons join in executing a power of attorney, whether it comprises distinct matters or not will depend on whether the interests of the executants in the subject-matter of the power are separate or joint. Conversely, if one person holding properties in two different capacities, each unconnected with the other, executes a power in respect of both of them, the instrument should logically be held to comprise distinct matters. That will be in consonance with the generally accepted notion of what are distinct matters, and that certainly was the view which the respondent himself took of the matter when he expressly recited in the power that he executed it both in his individual capacity and in his other capacities. But it is contended by Mr Chaudhury that the fact that the respondent filled several capacities would not affect the character of the instrument as relating



to a single matter, as the delegation thereunder extended to whatever the respondent could do, and that it would be immaterial that he held some properties in his individual capacity and some others as trustee or executor, as the legal title to all of them would vest in him equally in the latter as well as in the former capacity. We are concerned, he argued, not with the source from which the title flowed but with the reservoir in which it is now contained.

14. This is to attach more importance to the form of the matter than to its substance. When a person is appointed trustee, the legal title to the estate does, under the English law, undoubtedly vest in him; but then he holds it for the benefit of the cestui que trust in whom the equitable estate vests. Under the Indian law, it is well established that there can be trusts and fiduciary relations in the nature of trust even without there being a vesting of the legal estate in the trustee as in the case of mutts and temples. In such cases, the legal title is vested in the institution, the mahant or shebait being the manager thereof, and any delegation of authority by him can only be on behalf of the institution which he represents. When a person possesses both a personal capacity and a representative capacity, such as trustee, and there is a delegation of power by him in both those capacities, the position in law is exactly the same as if different persons join in executing a power in respect of matters which are unrelated. There being no community of interest between the personal estate belonging to the executant and the trust estate vested in him, they must be held to be distinct matters for purposes of Section 5. The position is the same when a person is executor or administrator, because in that capacity he represents the estate of the deceased, whose persona is deemed to continue in him for purposes of administration.

15. It was finally contended by Mr Chaudhury that if every capacity of the donor is to be considered as a distinct matter, we should have to hold that there are distinct matters not only with reference to the capacity of the executant as trustee, executor and so forth, but in respect of every transaction entered into by him in his personal capacity. Thus, it is argued, if he confers on his attorney authority to sell one property, to mortgage another and to lease a third, he would have acted in three different capacities as vendor, mortgagor and lessor, and the instrument will have to be stamped as relating to three distinct matters. This, he contended, would destroy the very basis of a general power of attorney. The fallacy in this argument is in mixing up the capacity which a person possesses with acts exercisable by virtue of that capacity. When an executor, for example, sells one property for discharging the debts of the testator and mortgages another for raising funds for carrying on his business, he no doubt acts in two different transactions; but in respect of both of them, he functions only in his capacity as executor. In our opinion, there is no substance in this contention.

16. In the result, we are of the opinion, differing from the majority of the learned Judges of the court below, that the instrument, Exhibit A, comprises distinct matters in respect of the several capacities of the respondent mentioned therein, and that the view taken by the revenue authorities and supported by S. R. Das Gupta, J. is correct. This appeal will accordingly be allowed. The respondent will pay the costs of the appellant here and in the court below.

**BHAGWATI, J.**- I regret I am unable to agree with the conclusion reached in the Judgment just delivered.

18. While agreeing in the main with the construction put upon Sections 4, 5 and 6 of the Act and the connotation of the words “distinct matters” used in Section 5, I am of the view

that the question still survives whether the instrument in question is a single power of attorney or a combination of several of them. The argument which has impressed my Brother Judges forming the majority of the Bench is that though the instrument is executed by one individual, if he fills several capacities and the authority conferred is general, there would be distinct delegations in respect of each of those capacities and the instrument should bear the aggregate of stamp duty payable in respect of each of such capacities. With the greatest respect I am unable to accede to that argument. I agree that the question whether a power of attorney relates to distinct matters is one that will have to be decided on the consideration of the terms of the instrument and the nature and the extent of the authority conferred thereby. The fact, however, that the donor of the power of attorney executes it in different capacities is not sufficient in my opinion to constitute the instrument, one comprising distinct matters and thus requiring to be stamped with the aggregate amount of the duties with which separate instruments each comprising or relating to one of such matters would be chargeable under the Act, within the meaning of Section 5. The transaction is a single transaction whereby the donor constitutes the donees jointly and severally his attorneys for him and in his name and on his behalf to act for him in his individual capacity and also in his capacity as managing director, director, managing agent, agent, secretary or liquidator of any company in which he is or may at any time thereafter be interested in any such capacity as aforesaid and also as executor, administrator, trustee or in any capacity whatsoever as occasion shall require. No doubt, different capacities enjoyed by the donor are combined herein but that does not constitute him different individuals thus bringing this instrument within the mischief of Section 5. The executants of the instrument are not several individuals but is only one individual, the donor himself, though he enjoys different capacities. These different capacities have a bearing on the nature and extent of the powers which he could exercise as such. In his own individual capacity he could exercise all the powers as the full owner qua whatever right, title and interest he enjoys in the property, whether it be an absolute interest or a limited one; he may be the absolute owner of the property or may have a life interest therein, he may have a mortgagee's interest or a lessee's interest therein, he may be a dominant owner of a tenement or may be a mere licensee; but whatever interest he enjoys in that property will be the subject-matter of the power which he executes in favour of the donee. He may, apart from this individual interest which he enjoys therein, be a trustee of certain property and he may also enjoy the several interests described above in his capacity as such trustee. It may be that in his turn he may be accountable to the beneficiaries for the due administration of the affairs of the trust but that does not mean that he, as trustee, is not entitled to exercise all these powers, the trust property having vested in him, and he being therefore in a position to exercise all these powers in relation thereto.

The same would be the position if he were an executor or an administrator of an estate, in possession of the estate of the deceased as such. The property of the deceased would vest in him though his powers of dealing with the same would be circumscribed either by the provisions of the testamentary instrument or the limitations imposed upon the same by law. All these circumstances would certainly impose limitations on his powers of dealing with the properties but that does not detract from the position that he is entitled to deal with those properties and exercise all the powers in relation thereto though with the limitations imposed upon them by reason of the capacities which he enjoys. It follows, therefore, that, though

enjoying different capacities, he is the same individual who functions though in different capacities and conducts his affairs in the various capacities which he enjoys but as a single individual. He is not one individual when he is acting in his own individual capacity; he is not another individual when he is acting as a trustee of a particular estate and he is not a third individual when he is acting as an executor or administrator of a deceased person. In whatever capacity he is acting he is the same individual dealing with various affairs with which he is concerned though with the limitations imposed upon his powers of dealing with the properties by reason of the properties having vested in him in different capacities.

19. I am therefore of the opinion that the instrument in question does not comprise distinct matters but comprises one matter only and that matter is the execution of a general power of attorney by the donor in favour of the donees constituting the donees his attorneys to act for him in all the capacities which he enjoys. The instrument in question cannot be split up into separate instruments each comprising or relating to a distinct matter in so far as the different capacities of the donor are concerned. A general power of attorney comprises all acts which can be done by the donor himself whatever be the capacity or capacities which he enjoys and cannot be split up into individual acts which the donor is capable of performing and which he appoints his attorney to do for him and in his name and on his behalf. It is within the very nature of the general power of attorney that all the distinct acts which the donor is capable of performing are comprised in the one instrument which is executed by him, and if that is the position, it is but logical that whatever acts the donor is capable of performing whether in his individual capacity or in his representative capacity as trustee or as executor or administrator are also comprised within the instrument and are not distinct matters to be dealt with as such so as to attract the operation of Section 5.

20. I am therefore of the opinion that the conclusion reached by the majority Judges in the High Court of Judicature at Calcutta was correct and would accordingly dismiss this Appeal with costs.

**BY THE COURT** - In accordance with the opinion of the majority the Appeal is allowed with costs here and in the Court below.

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***Govt. of U.P. v. Raja Mohd. Amir Ahmad Khan***

(1962) 1 SCR 97 : AIR 1961 SC 787

**J.L. KAPUR, J.** - This is an appeal against the judgment and order of the High Court of Allahabad on a certificate granted by that Court. The respondent filed a petition under Article 226 of the Constitution praying that the imposition of stamp duty by the Collector of Sitapur, of Rs 85,595/7/ and a penalty of Rs 5 was against law and could not be realised against him and prayed that the order be quashed. On 12-9-1948, the respondent executed a wakf by oral recitation of Sigha and then it was written on a stamped paper which was signed by the respondent and attested by witnesses. On 15-9-1948, it was presented to the Collector for his opinion under Section 31 as to the duty chargeable. As the Collector himself was in doubt, he referred the matter to the Board of Revenue which, after a fairly long time, held that the document was liable to duty in accordance with Article 58 of the Stamp Act. On 29-10-1951, the Collector held that Rs 85,598/7/- were payable as stamp duty and ordered that it be deposited within fifteen days. Notice to this effect was served on the respondent on 10-11-1951. Thereupon the respondent filed a petition in the High Court under Article 226 which was dismissed on 3-11-1952, on the ground that it was premature. On 2-2-1954, a further notice was served upon the respondent to deposit the amount of the stamp duty plus the penalty of Rs 5 within a month otherwise proceedings would be taken against him under Section 48 of the Stamp Act. Thereafter on 1-3-1944, the respondent filed a petition under Article 226 of the Constitution in the Allahabad High Court challenging the legality of the imposition of the stamp duty and the penalty and prayed for a writ of certiorari. A Full Bench of the High Court quashed the order of the Collector and the State of U.P. has come in appeal to this Court.

2. The decision of this appeal depends upon the interpretation of Sections 31, 32 & 33 of the Stamp Act. It is admitted that the document in dispute was submitted to the Collector for his opinion under Section 31 and the opinion of the Collector was sought as to what the duty should be. Under Section 32 of the Act when such an instrument is brought to the Collector under Section 31 and he determines that it was already fully stamped or he determines the duty which is payable on such a document and that duty is paid, the Collector shall certify by endorsement on the instrument presented that full duty with which it is chargeable has been paid and upon such endorsement being made, the instrument shall be deemed to be fully stamped or not chargeable to duty as the case may be. Under the proviso to Section 32, the Collector is not authorised to make the endorsement if an instrument is brought to him a month after the date of its execution.

3. The decision of this appeal depends upon the interpretation to be put upon the words "before whom any instrument chargeable...is produced or comes in the performance of his functions". Dealing with these words the High Court held:

"With all respect, therefore, we agree that the learned Judges deciding Chuni Lal Burman case took a correct view of the words 'is produced or comes in the performance of his functions' used in Section 33 of the Act to mean 'the production of the instrument concerned in evidence or for the purpose of placing reliance upon it by one party or the other'."

The High Court was also of the opinion that the object of paying the whole stamp duty was to get the instrument admitted into evidence or its being acted upon or registered or authenticated as provided in Sections 32(3), 35,38(1) and 48(1) of the Stamp Act.

4. Counsel for the State referred to the various sections of the Act; first to the definition section; Section 2(11) which defines what is “duly stamped”; Section 2(14) which defines “instrument” and Section 2(12) which defines “executed”. He then referred to Section 3 which lays down what “chargeable” means and then to Section 17 which provides that all instruments chargeable with duty and executed by any person in British India shall be stamped before or at the time of the execution. Certain other sections i.e. Sections 35 & 38(1) were also referred to and so also Sections 40(1)(a), 41, 42 and 48 but in our opinion it is not necessary to refer to these sections. What has to be seen is what is the consequence of a person applying to a Collector for his determination as to the proper duty on an instrument. The submission on behalf of the State (appellant) was that if an instrument whether stamped or not is submitted for the opinion of the Collector before it is executed, i.e., it is signed, then the Collector is required to give his determination of the duty chargeable and return the document to the person seeking his opinion but if the document is scribed on a stamped paper or unstamped paper and is executed then different consequences follow. In the latter case it was submitted that under Section 33 the Collector is required to impound the document if he finds that it is not duly stamped. On the other hand it was submitted on behalf of the respondent that on his giving his opinion the Collector becomes *functus officio* and can take no action under Section 33. It is these two rival contentions of the parties that require to be decided in this case.

5. After an inordinately long delay, the Collector determined the amount of duty payable and impounded the document. Power to impound is given in Section 33 of the Act. Under that section any person who is a Judge of is in-charge of a public office before whom an instrument chargeable with duty is produced or comes in the performance of his functions is required to impound the instrument if it appears to him not to be duly stamped. The question is does this power of impounding arise in the present case? The instrument in dispute was not produced as a piece of evidence nor for its being acted upon e.g. registration, nor for endorsement as under Section 32 of the Stamp Act but was merely brought before the Collector for seeking his advise as to what the proper duty would be. The words “every person...before whom any instrument...is produced or comes in the performance of his functions” refer firstly to production before judicial or other officers performing judicial functions as evidence of any fact to be proved and secondly refer to other officers who have to perform any function in regard to those instruments when they come before them e.g. registration. They do not extend to the determination of the question as to what the duty payable is. They do not cover the acts which fall within the scope of Section 31, because that section is complete by itself and it ends by saying that the Collector shall determine the duty with which, in his judgment, the instrument is chargeable, if it is chargeable at all. Section 31 does not postulate anything further to be done by the Collector. It was conceded that if the instrument is unexecuted i.e. not signed and the opinion of the Collector is sought, he has to give his opinion and return it with his opinion to the person seeking his opinion. The language in regard to executed and unstamped documents is no different and the powers and duties of

the Collector in regard to those instruments are the same, that is, when he is asked to give his opinion, he has to determine the duty with which, in his judgment, the instrument is chargeable and there his duties and powers in regard to that matter end. Then follows Section 32. Under that section the Collector has to certify by endorsement on the instrument brought to him under Section 31 that full duty has been paid, if the instrument is duly stamped, or it is unstamped and the duty is made up, or it is not chargeable to duty. Under that section the endorsement can be made only if the instrument is presented within a month of its execution. But what happens when the instrument has been executed more than a month before its being brought before the Collector? Section 31 places no limitation in regard to the time and there is no reason why any time limit should be imposed in regard to seeking of opinion as to the duty payable.

6. Chapter IV of the Act which deals with instruments not duly stamped and which contains Sections 33 to 48, provides for impounding of documents, how the impounded documents are to be dealt with, Collector's powers to stamp instruments impounded and how the duties and penalties are to be recovered. It would be an extraordinary position if a person seeking the advice of the Collector and not wanting to rely upon an instrument as evidence of any fact to be proved nor wanting to do any further act in regard to the instrument so as to effectuate its operation should also be liable to the penalties which unstamped instruments used as above might involve. The scheme of the Act shows that where a person is simply seeking the opinion of the Collector as to the proper duty in regard to an instrument, he approaches him under Section 31. If it is properly stamped and the person executing the document wants to proceed with effectuating the document or using it for the purposes of evidence, he is to make up the duty and under Section 32 the Collector will then make an endorsement and the instrument will be treated as if it was duly stamped from the very beginning. But if he does not want to proceed any further than seeking the determination of the duty payable then no consequence will follow and an executed document is in the same position as an instrument which is unexecuted and unstamped and after the determination of the duty the Collector becomes *functus officio* and the provisions of Section 33 have no application. The provisions of that section are a subsequent stage when something more than mere asking of the opinion of the Collector is to be done.

7. Our attention was drawn to the observations of Rankin C.J. in **Re Cooke and Kelly** [ILR 59 Cal 1171] but those observations are *obiter* as the High Court held that the reference under Section 57 of the Stamp Act was incompetent. The doctrine of *functus officio* was applied in several cases: **Collector, Ahmednagar v. Rambhau Tukaram Nirhali** [AIR 1930 Bom 392]. In that case a certificate of sale had been signed but the certificate was not duly stamped which was pointed out when it was sent to the Sub-Registrar for registration. The Sub-Registrar informed the Judge about it and the Judge got back the certificate from the purchaser and thinking that he had power to impound the document and to impose a penalty asked for the opinion of the High Court and it was held that after he had signed it he was *functus officio* and could not act any further and could not impound it. The same principle was laid down in **Paiku Kashinath v. Gaya** [ILR 48 Nag 950] and in **Chunduri Panakala Rao v. Penugonda Kumaraswami** [AIR 1937 Mad 763] and in our opinion as soon as the

Collector determined the duty he became functus officio and he could not impound the instrument under Section 33 and consequential proceedings could not, therefore, be taken.

8. The appeal is therefore dismissed.

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***Javer Chand v. Pukhraj Surana***

(1962) 2 SCR 333 : AIR 1961 SC 1655

**B.P. SINHA, C.J.** - The substantial question for determination in this appeal is whether or not the two hundis sued upon were admissible in evidence. The learned trial Judge held that they were, and in that view of the matter decreed the suit in full with costs and future interest, by his judgment and decree dated 26-9-1952. On appeal, the High Court of Rajasthan at Jodhpur, by its judgment and decree dated 8-10-1956 allowed the appeal and dismissed the plaintiffs' suit. Each party was directed to bear its own costs throughout. The High Court granted the necessary certificate under Article 133(1)(a) of the Constitution. That is how the appeal is before us.

2. It is only necessary to state the following facts in order to appreciate the question of law that has to be determined in this appeal. The defendant-respondent is said to have owed money to the plaintiffs, the appellants in this case, during the course of their business as commission agents for the defendant, at Bombay. Towards the payment of those dues, the defendant drew two mudatti hundis in favour of the plaintiffs, for the sum of 35 thousand rupees, one for 20 thousand rupees payable 61 days after date, and the other for 15 thousand rupees payable 121 days after date. The plaintiffs endorsed the two hundis to G. Raghunathmal Bank and asked the Bank to credit their account with the amount on realisation. On the date of their maturity, the Bank presented those hundis to the defendant, who dishonoured them. Thereupon the Bank returned the hundis to the plaintiffs. As the defendant did not pay the amount due under those documents on repeated demands by the plaintiffs, they instituted a suit for realisation of Rs 39,615, principal with interest. On those allegations, the suit was instituted in the Court of District Judge, Jodhpur, on 4-1-1949.

3. It is not necessary to set out the defendant's written statement in detail. It is enough to state that the defendant admitted the execution of the hundis but alleged that they had been drawn for purchasing gold in future and since the plaintiff did not send the gold, the hundis were not honoured or accepted. It was denied that the defendant owed any amount to the plaintiffs or that the hundis were drawn in payment of any such debt. It was thus contended that the hundis were without consideration. The most important plea raised by the defendant in bar of the suit was that the hundis were inadmissible in evidence because they had not been stamped according to the stamp law.

4. On those pleadings, a number of issues were joined between the parties, but the only relevant issue was Issue 2 in these terms:

“Whether the two hundis, the basis of the suit, being unstamped, were inadmissible in evidence? (OD\*)”

(\*which perhaps are meant to indicate that the onus was on the defendant in respect of this issue).

It appears that the defendant led evidence first, in view of the fact that the onus lay on him. He was examined as DW 5, and in his examination-in-chief he stated, “I did not receive any gold towards these hundis. I asked them to return the hundis, but they did not return them. I had drawn the two hundis marked Ext. P-1 and Ext. P-2. They are written in Roopchand's hand. I did not receive any notice to honour



these hundis.” His other witnesses, DWs 1, 2 and 4 were examined and cross-examined with reference to the terms of the hundis and as to who the author of the hundis was. All along during the course of the recording of the evidence on behalf of the parties, these hundis have been referred to as Ext. P-1 and Ext. P-2. The conclusion of the learned trial Judge on Issue 2 was in these terms:

“Therefore, in this case the plaintiff having paid the penalty, the two documents in suit having been exhibited and numbered under the signatures of the presiding officer of court and the same having thus been introduced in evidence and also referred to and read in evidence by the defendant’s learned counsel, the provisions of Section 36 of the Stamp Act, which are mandatory, at once come into play and the disputed documents cannot be rejected and excluded from evidence and they shall accordingly properly form part of evidence on record. Issue 2 is thus decided against the defendant.”

The suit was accordingly decreed with costs, as stated above. On appeal by the defendant to the High Court, the High Court also found that the hundis were marked as Exts. P-1 and P-2, with the endorsement “Admitted in evidence” and signed by the Judge. The High Court also noticed the fact that when the hundis were executed in December 1946, the Marwar Stamp Act of 1914 was in force and Sections 9 and 11 of the Marwar Stamp Act, 1914 authorised the Court to realise the full stamp duty and penalty in case of unstamped instruments produced in evidence. Section 9 further provided that on the payment of proper stamp duty, and the required penalty, if any, the document shall be admissible in evidence. It was also noticed that when the suit was filed in January 1949, stamp duty and penalty were paid in respect of the hundis, acting upon the law, namely, the Marwar Stamp Act, 1914. The High Court also pointed out that the documents appear to have been admitted in evidence because the trial court lost sight of the fact that in 1947 a new Stamp Act had come into force in the former State of Marwar, amending the Marwar Stamp Act of 1914. The new law was, in terms, similar to the Indian Stamp Act. The High Court further pointed out that after the coming into effect of the Marwar Stamp Act, 1947 the hundis in this case could not be admitted in evidence, in view of the provisions of Section 35, proviso (a) of the Act, even on payment of duty and penalty. With reference to the provisions of Section 36 of the Stamp Act, the High Court held that the plaintiffs could not take advantage of the provisions of that section because, in its opinion, the admission of the two hundis “was a pure mistake”. Relying upon a previous decision of the Rajasthan High Court [ ] reported in ILR (1953) Rajasthan 833, the High Court held that as the admission of the documents was pure mistake, the High Court, on appeal, could go behind the orders of the trial court and correct the mistake made by that court. In our opinion, the High Court misdirected itself, in its view of the provisions of That section is categorical in its terms that when a document has once been admitted in evidence, such admission cannot be called in question at any stage of the suit or the proceeding on the ground that the instrument had not been duly stamped. The only exception recognised by the section is the class of cases contemplated by Section 61, which is not material to the present controversy. Section 36 does not admit of other exceptions. Where a question as to the admissibility of a document is raised on the ground that it has not been stamped, or has not been properly stamped, it has to be decided then and there when the

document is tendered in evidence. Once the court, rightly or wrongly, decides to admit the document in evidence, so far as the parties are concerned, the matter is closed. Section 35 is in the nature of a penal provision and has far-reaching effects. Parties to a litigation, where such a controversy is raised, have to be circumspect and the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the court. The court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. The record in this case discloses the fact that the hundis were marked as Exts. P-1 and P-2 and bore the endorsement "admitted in evidence" under the signature of the court. It is not, therefore, one of those cases where a document has been inadvertently admitted, without the court applying its mind to the question of its admissibility. Once a document has been marked as an exhibit in the case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, Section 36 of the Stamp Act comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the trial court itself or to a court of appeal or revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same court or a court of superior jurisdiction.

5. In our opinion, the High Court has erred in law in refusing to act upon those two hundis which had been properly proved - if they required any proof, their execution having been admitted by the executant himself. As on the findings no other question arises, nor was any other question raised before us by the parties, we accordingly allow the appeal, set aside the judgment and decree passed by the High Court and restore those of the trial court.

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## ***Board of Revenue v. Rai Saheb Sidhnath Mehrotra***

(1965) 2 SCR 269 : AIR 1965 SC 1092

**S.M. SIKRI, J.** - This is an appeal by special leave against the judgment of the High Court of Allahabad in a reference under Section 57 of the Indian Stamp Act, 1899. The Board of Revenue referred the following questions to the High Court:

(1) Whether the document is a sale deed for a consideration of Rs 1,00,000 as contended by the executants.

(2) Whether in view of the provisions of Section 24 of the Stamp Act, the sale consideration shall be deemed to be Rs 5,55,000 and duty liable to be paid thereon as held by the Board.

(3) Whether the consideration of the sale will be deemed to be Rs Ten Lakhs i.e. the entire amount due to the mortgagee Bank, and duty is payable thereon.

(4) On what amount is the additional stamp duty under Section 107 of the Kanpur Development Act, 1945, leviable.

The High Court gave the following answer to the first three questions:

“The document in question is a sale deed for a consideration of Rs 1,00,000 only and that the Stamp duty payable in respect of it was to be calculated on the amount and not on any higher amount.”

2. The appellant, the Board of Revenue, challenges the answer given by the High Court to the said three questions. We may mention that the answer to the fourth question is not the subject-matter of appeal before us.

3. The relevant facts are as follows. The respondent is one of the executants of the deed dated December 15, 1952. The executants, hereinafter referred to as the vendors, were lessees of two plots of land and on these plots they had constructed an oil mill, known as Sri Govind Oil Mills, an Ice and Cold Storage Factory, and buildings in which the factories stood. The Ice and Cold Storage factory was being run by the vendors in partnership with Shyam Sunder Gupta and Satya Prakash Gupta. The vendors had equitably mortgaged these properties with the Chartered Bank of India, and a sum of Rs 10,00,000 was due to the Bank. In order to pay off the debt, the vendors entered into a contract with Messrs Oil Corporation of India Ltd., hereinafter referred to as the vendees, for the sale of the lands, buildings, plants, machinery and stores and goodwill of the Govind Oil Mills & Ice & Cold Storage Factory for a sum of Rs 5,55,000, made up as follows; Rs 1,12,000 for the plant and machinery and goodwill of the Ice and Cold Storage Factory, Rs 3,00,000 for the machinery of Sri Govind Oil Mills, Rs 25,000 for stores, Rs 18,000 for goodwill, and Rs 1,00,000 for the buildings and the lessee rights in the plots. Out of this Rs 66,000 was payable to Messrs Shyam Sunder Gupta and Satya Prakash Gupta in respect of their share in the Kanpur Ice and Cold Storage Factory, and the remainder to the vendors.

4. The Chartered Bank agreed to release from its charge the properties to be conveyed to the vendees provided a sum of Rs 5,00,000 was paid to it. The vendees agreed to pay the said Bank a sum of Rs 4,89,000, while the vendors agreed to pay Rs 11,000 to the Bank to make up the balance.

5. In pursuance of this agreement, the vendors handed over the possession of plant and machinery of the two factories to the vendees, who paid before December 15, 1952, Rs 3,89,000 to the said Bank. On December 15, 1952, the sale deed in respect of the buildings and the lessee rights was executed. Clause 2 of the deed provided that 'the vendees hereby declare that the properties hereby conveyed are free from all encumbrances except the charge in favour of the Chartered Bank of India, Australia and China, The Mall, Kanpur, which would be paid off so far as the properties hereby conveyed are concerned in the manner set forth above.'

6. On these facts, Mr C.B. Aggarwala, the learned counsel for the appellant, contends that on a true interpretation of Section 24 of the Indian Stamp Act, 1899, the consideration for the purpose of calculating, ad valorem duty is either Rs 10,00,000, or Rs 5,55,000 or at least Rs 1,11,000.

8. The first question which we may pose is: What is the underlying object of the section 24 ? Illustration 2 to the section reads:

"A sells a property to B for Rs 500 which is subject to a mortgage to C for Rs 1000 and unpaid interest Rs 200. Stamp-duty is payable on Rs 1700."

In this illustration the consideration set forth in the conveyance is Rs 500, and under Article 23, the amount on which the Stamp Duty is leviable would be Rs 500 only. There is no doubt that this is not the real value of the property for if the property was not the subject-matter of mortgage, A would not sell the property for Rs 500 and B would pay more than Rs 500. The legislature, therefore, adopted a simple test for valuing the property taken by the vendees, and the test adopted was that any unpaid mortgage money or money charge, together with interest (if any) due on the sum shall be deemed to be part of the consideration for the sale. Therefore, in the illustration the sum of Rs 1000 and Rs 200 are added to Rs 500 and the sum on which the stamp duty is payable is determined at Rs 1700. The Lord President explained the underlying reason in the case of **Commissioners of Inland Revenue v. Liquidators of City of Glasgow Bank** as follows:

"If any other rule was adopted, it is quite plain that the fair incidence of this tax would be altogether frustrated and defeated. A proprietor has an estate worth £ 20,000. There is a bond upon it for £ 10,000. He sells that estate, and the purchaser pays to him the difference between the amount of the bond and the value of the estate, so that the bond being for £ 10,000 he pays £ 10,000. The day after he obtains infetment he pays off the bond. Well, the practical result of that is that he has paid £ 20,000 as the purchase money of this estate, and he has obtained a conveyance with an ad valorem stamp of the value of £ 10,000. That is a simple defeating of the purpose and intention of the legislature as expressed in this clause, and therefore. I think, upon the plain meaning of this section, that there was no intention whatever to go back upon the enactment of the 16 and 17 Vict., and to restore the enactment of the 55 Geo. III, which is what the liquidators are contending for. On the contrary, it seems to me that the 73rd section plainly intended to continue the provision of the statute 16 and 17 Vict."

9. The next point that needs determination is: What does the phrase “sale of property subject to a mortgage” mean? Does this phrase mean that whenever mortgaged property is sold the explanation applies or does it imply that if mortgaged property is sold subject to the mortgage then and then only the explanation applies? In our view, the correct meaning is the latter meaning. Let us see what would be the position if A, instead of selling property as in illustration 2, adopts the following mode of selling. A sells property to B for Rs 1700, which is subject to mortgage to C for Rs 1000 and unpaid interest Rs 200. A agrees that Rs 1200 be paid to C and Rs 500 to him. If the first meaning is adopted, the consideration on which the stamp duty would be leviable would be Rs 1700, which is the consideration expressed in terms of Article 23, and Rs 1200 deemed to be consideration within Section 24, the total amounting to Rs 2900. In our opinion this result could never have been intended. We agree with the decision of the Calcutta High Court in **U.K. Janardhan Rao v. Secretary of State** and of the Bombay High Court in **Waman Martand Bhalerao v. Commissioner Central Division** that the phrase “subject to a mortgage or other encumbrance” in the explanation to Section 24 qualifies the word “sale” and not the word “property”. We need hardly say that the Stamp Act is a taxing statute and must be construed strictly, and if two meanings are equally possible, the meaning in favour of the subject must be given effect to.

10. Before we consider the facts of this case, we may mention that it is plain from the explanation that it is only the unpaid mortgage money that is deemed to be part of the consideration. If the mortgage money has been paid off by the date of the conveyance the explanation does not require it to be added to the consideration. If the mortgage money has been paid off by the vendee before the date of the sale, as part of the consideration, it would be included in the amount leviable with stamp duty under Article 23, but not under the explanation. The conveyance deed would, in the above eventuality, recite the fact that so much money has been paid to the mortgagee and it would be the consideration expressed in the deed.

11. Let us now apply the law as explained above to the facts of this case. On December 15, 1952, the date when the deed was executed, Rs 3,89,000 had already been paid by the vendees to the Bank. Mr Aggarwal contends that this amount should be included because it was consideration moving from the vendees. He says that stamp duty cannot be avoided by the simple device of paying money before a conveyance is executed. He is right in this but he must show that Rs 3,89,000 was an advance payment for the immovable property conveyed by the deed dated December 15, 1952. It is quite clear from the terms of the deed that Rs 4,55,000 was to be paid for items other than the immoveable property conveyed by the said deed and the sum of Rs 3,89,000 had nothing to do with the immoveable property. The payment of Rs 3,89,000 to the Bank left outstanding Rs 1,11,000 as mortgage money. Rs 1,00,000 is expressed to be the consideration for the conveyance of the immovable property, and therefore, falls within Article 23. This leaves Rs 11,000, and the question arises whether this sum should be taken into consideration for the purpose of levying stamp duty.

It has already been noticed that this sum of Rs 11,000 forms part of the price for items other than the immoveable property. Mr Aggarwala has not seriously controverted the finding of the High Court on this point. Accordingly, we hold that this sum of Rs 11,000 cannot be included for the purpose of levying stamp duty.

12. In the result, we agree with the High Court that the stamp duty is to be calculated only on the sum of Rs 1,00,000. The appeal is accordingly dismissed.

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## ***Hindustan Steel Ltd. v. Dilip Construction Co.***

(1969) 1 SCC 597 : AIR 1969 SC 1238

**J.C. SHAH, J.** - The respondents entered into a contract with Hindustan Steel Ltd. for “raising, stacking carting and loading into wagons limestone at Nandini mines”. Dispute which arose between the parties was referred to arbitration, pursuant to Clause 61 of the agreement. The arbitrators differed, and the dispute was referred to an umpire who made and published his award on April 19, 1967. The umpire filed the award in the Court of the District Judge, Rajnandgaon in the State of Madhya Pradesh and gave notice of the filing of the award to the parties to the dispute, on July 14, 1967, the appellant filed an application for setting aside the award under Sections 30 and 33 of the Indian Arbitration Act, 1940. One of the contentions raised by the appellants was that, the award was unstamped and on that account “invalid and illegal and liable to be set aside”. The respondents then applied to the District Court that the award be impounded and validated by levy of stamp duty and penalty. By order, dated September 29, 1967, the District Judge directed that the award be impounded. He then called upon the respondents to pay the appropriate stamp duty on the award and penalty and directed that an authenticated copy of the instrument be sent to the Collector, Durg, together with a certificate in writing stating the receipt of the amount of duty and penalty. Against that order the appellant moved the High Court of Madhya Pradesh in exercise of its revisional jurisdiction. The High Court rejected the petition and the appellant appeals to this Court with special leave.

2. It is urged by Counsel for the appellant that an instrument which is not stamped as required by the Indian Stamp Act, may, on payment of stamp duty and penalty, be admitted in evidence, but cannot be acted upon for, “the instrument has no existence in the eye of law”. Therefore, counsel urged, in proceeding to entertain the application for filing the award, the District Judge, Rajnandgaon, acted without jurisdiction.

3. The relevant provisions of the Stamp Act may be summarised. “Instrument” is defined in Section 2(14) as including “every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded”. An instrument is said to be “duly stamped” within the meaning of the Stamp Act when the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in India: Section 2(11). Item 12 of Schedule I prescribes the stamp duty payable in respect of an award. Section 38 deals with the impounding of the instruments. By Section 39 the Collector is authorised to adjudge proper penalty and to refund any portion of the penalty which has been paid in respect of the instrument sent to him. Section 40 prescribes the procedure to be followed by the Collector in respect of an instrument impounded by him or sent to him under Section 38. If the Collector is of the opinion that the instrument is chargeable with duty and is not duly stamped, he shall require the payment of proper duty or the amount required to make up the same together with a penalty of five rupees; or, if he thinks fit, an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof.

4. The award, which is an “instrument” within the meaning of the Stamp Act was required to be stamped. Being unstamped, the award could not be received in evidence by the Court,

nor could it be acted upon. But the Court was competent to impound it and to send it to the Collector with a certificate in writing stating the amount of duty and penalty levied thereon. On the instrument so received the Collector may adjudge whether it is duly stamped and he may require penalty to be paid thereon, if in his view it has not been duly stamped. If the duty and penalty are paid, the Collector will certify by endorsement on the instrument that the proper duty and penalty have been paid.

5. An instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence, and it cannot be acted upon by that person or by any public officer. Section 35 provides that the admissibility of an instrument once admitted in evidence shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

6. Relying upon the difference in the phraseology between Sections 35 and 36 it was urged that an instrument which is not duly stamped may be admitted in evidence on payment of duty and penalty, but it cannot be acted upon because Section 35 operates as a bar to the admission in evidence of the instrument not duly stamped as well as to its being acted upon, and the Legislature has by Section 36 in the conditions set out therein removed the bar only against admission in evidence of the instrument. The argument ignores the true import of Section 36. By that section an instrument once admitted in evidence shall not be called in question at any stage of the same suit or proceeding on the ground that it has not been duly stamped. Section 36 does not prohibit a challenge against an instrument that it shall not be acted upon because it is not duly stamped, but on that account there is no bar against an instrument not duly stamped being acted upon after payment of the stamp duty and penalty according to the procedure prescribed by the Act. The doubt, if any, is removed by the terms of Section 42(2) which enact, in terms unmistakable, that every instrument endorsed by the Collector under Section 42(1) shall be admissible in evidence and may be acted upon as if it has been duly stamped.

7. The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments: It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light the scheme is clear. Section 35 of the Stamp Act operates as a bar to an unstamped instrument being admitted in evidence or being acted upon; Section 40 provides the procedure for instruments being impounded, sub-section (1) of Section 42 provides for certifying that an instrument is duly stamped, and sub-section (2) of Section 42 enacts the consequences resulting from such certification.

8. Our attention was invited to the statement of law by M. C. Desai, J., in **Mst. Bittan Bibi v. Kuntu Lal** [ILR (1952) 2 All 984]:

“A court is prohibited from admitting an instrument in evidence and a Court and a public officer both are prohibited from acting upon it. Thus a Court is prohibited from both admitting it in evidence and acting upon it. It follows that the acting upon is not included in the admission and that a document can be admitted in evidence but not be acted upon. Of course it cannot be acted upon without its being admitted,



but it can be admitted and yet be not acted upon. If every document, upon admission, became automatically liable to be acted upon, the provision in Section 35 that an instrument chargeable with duty but not duly stamped, shall not be acted upon by the Court, would be rendered redundant by the provision that it shall not be admitted in evidence for any purpose. To act upon an instrument is to give effect to it or to enforce it.”

In our judgment, the learned Judge attributed to Section 36 a meaning which the legislature did not intend. Attention of the learned Judge was apparently not invited to Section 42(2) of the Act which expressly renders an instrument, when certified by endorsement that proper duty and penalty have been levied in respect thereof, capable of being acted upon as if it had been duly stamped. The appeal fails and is dismissed.

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***The Madras Refineries Ltd. v.  
The Chief Controlling Revenue Authority, Board of Revenue***

(1977) 2 SCC 308 : AIR 1977 SC 500

**P.N. SHINGHAL, J.** - This appeal by special leave arises out of the decision of the Madras High Court dated October 9, 1974, on a reference by the Chief Controlling Revenue Authority under Section 57 of the Indian Stamp Act, 1899, hereinafter referred to as the Act. The Board of Revenue, Madras, which was the Chief Controlling Revenue Authority, initially stated the case raising the following questions for decision:

(a) Whether the decision of the Board of Revenue that the instrument relating to the Deed of Trust and Mortgage would attract the levy of a Stamp Duty as laid down in Article 40(b) of Schedule I of the Indian Stamp Act and that the debentures would be exempted from the levy of stamp duty is correct or not; and

(b) Whether the claim of the respondent herein that the stamp duty is payable on the debenture under Article 27(a) and on the Deed of Trust and Mortgage under Article 40(c) is tenable or not?

The High Court directed the Board of Revenue to refer three additional questions, but ultimately took the view that the additional questions did not really arise in the case. It answered the first question in favour of the Revenue and the second question against the Madras Refineries Limited, hereinafter referred to as the Company. The company feels aggrieved and has come up in appeal to this Court. It will be enough to state those facts which bear on the controversy before us.

2. The company was incorporated under the Indian Companies Act, 1956, as a public limited company. An agreement known as the Loan and Note Purchase Agreement was executed between the company and the First National City Bank and six others on December 20, 1966, by which the company agreed to authorise the creation and issuance of \$ 14,880,000 (U.S.) principal amount of its 5% secured notes Series 'A', and \$ 7,440,300 (U.S.) principal amount of its 5½% secured notes Series 'B', and the sale of, or the borrowing to be evidenced by such notes in accordance with the terms and provisions of the agreement. The notes were to be issued under and secured by a Deed of Trust and Mortgage between the company and the First National City Bank. It was also agreed that the notes shall be secured and shall have the other terms and provisions provided in the agreement and shall be guaranteed by the President of India pursuant to the terms of a "Guarantee Agreement", in the prescribed form. We shall have occasion to refer to the relevant clauses of the Loan and Note Purchase Agreement, the Deed of Trust and Mortgage and Guarantee Agreement as and when necessary. The Deed of Trust and Mortgage and the Guarantee Agreement were executed between the President and the First National City Bank (as Trustee) on June 15, 1967. In the meantime the company made an application to the Collector under Section 31 of the Act for opinion as to the stamp duty with which the Deed of Trust and Mortgage was chargeable, and the Collector referred the matter to the Board of Revenue. The Board decided on June 28, 1967 that the duty was chargeable on the Trust and Mortgage Deed under Article 40 (b) of Schedule I to the Act. The company paid Rs 39,66,500 as stamp duty under protest, stating that it would move the Board for a reference of the controversy to the High Court. The Trust

and Mortgage Deed was registered on June 30, 1967, and the 'A' series debentures were issued the same day. The company applied to the Board of Revenue to state the case to the High Court. 'B' series debentures were issued on June 28, 1968. The case was stated on March 28, 1969 and was decided by the impugned decision of the High Court dated October 9, 1974.

3. It has been argued by Mr Ram Reddy for the appellant company that the Guarantee Agreement was the principal and primary security, and the Deed of Trust and Mortgage was a collateral or auxiliary security and that the stamp duty on the Deed of Trust and Mortgage was payable in accordance with Article 40(c). It has been urged that the Guarantee Agreement was exempt from duty under Section 3 of the Stamp Act and the debentures were exempt under Article 27.

4. The controversy centres round the question whether the Guarantee Agreement could be said to be the principal or primary security? Mr Ram Reddy has invited our attention to the following passage in **Sergeant on Stamp Duties and Companies Capital Duty**, sixth edition, page 6:

**Leading and principal object.** - With reference to the stamp duty upon instruments generally, it is a well settled rule of law that an instrument must be stamped for its leading and principal object, and the stamp covers everything accessory to that object.

5. In **Limmer Asphalt Paving Co. v. I. R. C** (1872) LR 7 Exch. 211, it was stated:

In order to determine whether any, and if any, what stamp duty is chargeable upon an instrument the legal mie is that the real and true meaning of the instrument is to be ascertained; that the description of it given in the instrument itself by the parties is immaterial, even although they may have believed that its effect and operation was to create a security mentioned in the Stamp Act, and they so declared.

This appears to be a correct statement of the law. We have therefore to determine the real and true meaning of the Guarantee Agreement and to decide whether it could be said to be the principal and primary security.

6. The Loan and Note Purchase Agreement was executed on December 20, 1966, between the company and the First National City Bank and others. Under that agreement, the company was to authorise the creation and issuance of secured notes, series A and B, referred to above, and the notes were to be "issued under and secured by the Deed of Trust and Mortgage between the company and the First National City Bank". It was then stated in the Loan and Note Purchase Agreement as follows:

The Notes shall be dated, shall mature, shall bear interest, shall be payable, shall be secured and shall have such other terms and provisions as provided in the Mortgage and shall be guaranteed by the President of India pursuant to the terms of a Guarantee Agreement (the "Guarantee Agreement") in the form attached hereto as Exhibit 3.

It would thus appear that it was the Deed of Trust and Mortgage which was the security for the loan, although the loan was also guaranteed by the President in terms of the Guarantee Agreement.

7. As has been stated, the Guarantee Agreement was made between the President of India and the First National City Bank. It was clearly stated in that agreement that the First National City Bank executed it “as Trustee under y Deed of Trust and Mortgage dated as -of June 15, 1967”. The Trust and Mortgage Deed was thus executed before the execution of the Guarantee Agreement, even though both of them were executed on the same day, namely, June 15, 1967.

8. It is true that it has been stated in the Guarantee Agreement that the President of India, as the guarantor, unconditionally guaranteed “as primary obliger and not as surety merely, the due and punctual payment from time to time” of the principal as well as the interest etc. stated in the agreement. And it was for that purpose that the guarantor agreed to “endorse upon each of the notes at or before the issue and delivery thereof by the company its guaranty of the prompt payment of the principal, interest and premium thereof and of the other indebtedness”. It is also true that as stated in paragraph 10 of the Guarantee Agreement, the obligations of the guarantor were “absolute and unconditional under any and all circumstances, and shall not be to any extent or in any way discharged, impaired or otherwise affected, except by performance thereof in accordance with the terms thereof. We have also noticed the further stipulation that “each and every remedy of the Trustee shall, to the extent permitted by law, be cumulative and shall be in addition to any other remedy given hereunder or under the Mortgage or any of the other collateral or now or hereafter existing at law or in equity or by statute”.

9. Mr Ram Reddy has relied heavily on these averments in the Guarantee Agreement, but they cannot detract from the basic fact that the Deed of Trust and Mortgage was executed first in point of time and was the principal or primary security for the loan according to the terms and conditions of the agreement between the parties. It was that document which constituted the First National City Bank as the trustee, and enabled it to enter into the Guarantee Agreement with the President, and the President guaranteed the due performance of the obligations undertaken by the company thereunder.

10. The Deed of Trust and Mortgage, which was executed between the company and the First National City Bank as a national banking association incorporated and existing under the laws of United States of America, stated that as the company was in the process of constructing a refinery for the refining of crude oil and deemed it necessary to borrow money from time to time to finance such construction and to issue its notes therefor and to “mortgage and charge its properties hereinafter described to secure the payment of such notes” it executed the Deed of Trust and Mortgage as security in accordance with the terms and conditions of Article 2 of the Deed of Trust and Mortgage to secure the due payment of the principal of and the premium, if any, and the interest on the notes and of all other moneys for the time being and from time to time owing on the security of that indenture and on the notes and the performance by the company of all of its obligations thereunder. The Deed of Trust and Mortgage was therefore clearly the principal or the primary security and could not be said to be a “collateral agreement”. The parties in fact clearly stated in Article 1, Section 1.01 of the Deed of Trust and Mortgage as follows:

**Collateral Agreements:** The term ‘Collateral Agreements’ shall mean the Guarantee Agreement and the undertaking, hereinafter defined.

It was therefore specifically agreed between the parties that the Deed of Trust and Mortgage was not a collateral agreement.

11. In all these facts and circumstances it is futile to contend that the Deed of Trust and Mortgage was not the principal or primary security. As was stated in Article 9 of that document, that security became enforceable in case of any or more “events of default”, and it cannot be said that merely because the Guarantee Agreement contained the stipulation that the President, as the guarantor, unconditionally guaranteed the due and punctual payment of principal and interest etc. “as primary obligator and not as surety merely” that agreement became the principal on the primary security. It is the real and true meaning of the Deed of Trust and Mortgage and the Guarantee Agreement which has to be ascertained, and this leaves no room for doubt that the view taken by the High Court in this respect is correct and does not call for interference. Mr Ram Reddy relied on some decisions to support his argument that the Guarantee Agreement was the security for the loan and was the principal or the primary document, but these cases were decided on different facts and have no real bearing on the controversy before us.

12. The Guarantee Agreement was executed for and on behalf of the President by his authorised representative and no stamp duty was chargeable for it by virtue of the proviso to Section 3 of the Act. That in fact appears to be the reason why counsel for the appellant strenuously argued that we should hold it to be the principal instrument, for he has next argued that the case falls within the purview of Section 4(1) of the Act and the “principal instrument” only would be chargeable with the duty prescribed in Schedule I, and deed of any trust and mortgage would be chargeable with a duty of Rs4-50 p. instead of the duty prescribed for it in that schedule. We find however that there is no merit in this argument also. Sub-section (1) of Section 4 of the Act reads as follows:

**4. Several instruments used in single transaction of sale mortgage or settlement.** - (1) Where, in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule I, for the conveyance, mortgage or settlement, and each of the other instruments shall be chargeable with a duty of four rupees fifty naye paise instead of the duty (if any) prescribed for it in that Schedule.

It is nobody’s case that the Guarantee Agreement was an instrument of sale, for it did not transfer the ownership of anything in exchange for a price paid or promised or part-paid and part-promised. It was also not an instrument of mortgage because it is nobody’s case that there was any transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan or an existing or a future debt or the performance of an engagement which could give rise to a pecuniary liability. The expression “settlement” has been defined in clause (24) of Section 2 of the Act as follows:

“Settlement” means any non-testamentary disposition, in writing, of movable or immovable property made -

(a) in consideration of marriage,

(b) for the purpose of distributing property of the settlor among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or

(c) for any religious or charitable purpose;

and includes an agreement in writing to make such a disposition (and, where any such disposition has not been made in writing, any instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition),

The term “disposition” has been defined in Stroud’s Judicial Dictionary as a devise “intended to comprehend a mode by which property can pass, whether by act of parties or by an act of the law” and “includes transfer and charge of property”. As the Guarantee Agreement did not have any such effect, it did not constitute a “settlement” also. That document was not therefore an instrument of sale, mortgage or settlement, and did not fall within the purview of sub-section (1) of Section 4 of the Act

13. It was the Deed of Trust and Mortgage which was a “mortgage deed” within the meaning of clause (17) of Section 2 of the Act, and it was therefore clearly chargeable with stamp duty at the rate prescribed in Article 40 (b) of Schedule I to the Act.

14. We have examined the other argument of Mr Ram Reddy that even if the Guarantee Agreement was not the principal instrument within the meaning of sub-section (1) of Section 4 of the Act, we should hold that the debentures which were issued by the company were the principal and primary security, and that the Deed of Trust and Mortgage was the “other instrument” within the meaning of that sub-section and was chargeable with a duty of Rs4-50 p. instead of the duty prescribed for it in the schedule. This argument is also futile for we find that the secured notes (Series A and B) were issued under and were secured by the Deed of Trust and Mortgage. As such, -the notes were issued in consequence and on the security of the Deed of Trust and mortgage and there is no justification for the contention that the debentures were the principal instruments, and not the Deed of Trust and Mortgage.

15. As the High Court has rightly answered both the questions, we find no force in this appeal and it is dismissed with costs.

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***Trideshwar Dayal v. Maheshwar Dayal***

(1990) 1 SCC 357

**L.M. SHARMA, J.** - 2. A dispute between the appellants and respondent 1, who are members of a family, was referred to an arbitrator, who made an award on October 9, 1973, and filed the same within a few days before the civil court for making it a rule of the court. On objection by the present appellants, the prayer was rejected on March 18, 1976 and the order was confirmed by the High Court on July 8, 1981 in a regular first appeal. An application for special leave was dismissed by this Court on April 18, 1983 and a prayer for review was also rejected. It is stated on behalf of the appellants that in the meantime respondent 1 applied before the Collector for summoning the award and realising the duty and penalty. A copy of the award was annexed to the application. The respondent's prayer was opposed by the appellants but was allowed by the Collector on July 15, 1983; and, on a request made to the civil court for sending the award, the civil court asked the office to do so. The appellants moved the Chief Controlling Revenue Authority under Section 56 of the Indian Stamp Act (hereinafter referred to as 'the Act') against the Collector's order dated July 15, 1983. The Authority in exercise of its revisional power set aside the impugned order of the Collector, inter alia, on the ground of lack of jurisdiction. The respondent challenged this judgment before the High Court in a writ case which was allowed by the impugned judgment dated February 27, 1989. The matter was remanded to the Collector to decide the case afresh in the light of the observations. The High Court also doubted the power of the Chief Controlling Revenue Authority to entertain the appellants' application order Section 56 of the Act. This judgment is the subject matter of the present appeal.

3. Mr Satish Chandra, the learned counsel for the appellants, contended that there cannot be any doubt about the power of the Chief Controlling Authority to correct an erroneous order of the Collector. Emphasis was laid on the language of Section 56 suggesting its wide application. The learned counsel was also right in arguing that the Authority is not only vested with jurisdiction but has the duty to quash an order passed by the Collector purporting to be under Chapters IV and V of the Act by exercising power beyond his jurisdiction. To hold otherwise will lead to an absurd situation where a subordinate authority makes an order beyond its jurisdiction, which will have to be suffered on account of its unassailability before a higher authority. This Court in **Janardan Reddy v. State of Hyderabad** [AIR 1951 SC 217], after referring to a number of decisions, observed that it is well settled that if a court acts without jurisdiction, its decision can be challenged in the same way as it would have been challenged if it had acted with jurisdiction, i.e., an appeal would lie to the court to which it would lie if its order was with jurisdiction. We, therefore, agree with the appellants that the Chief Controlling Revenue Authority had full power to interfere with the Collector's order, provided it was found to be erroneous. Their difficulty, however, is that we do not find any defect in the Collector directing to take steps for the realisation of the stamp duty.

4. It was contended on behalf of the appellants that respondent 1 had no locus standi to move the Collector for impounding the award and sub-section (1) of Section 33 of the Act had no application. The learned counsel proceeded to say that in the circumstances it has to be assumed that the Collector acted suo motu under sub-section (4) of the said section and since the proviso to sub-section (5) directs that no action under sub-section (4) shall be taken after a

period of four years from the date of execution of the instrument, the Collector had no authority to pass the impugned order after about a decade. In reply, Mr G.L. Sanghi urged that the order for impounding the award was passed by the civil court itself on March 18, 1976, and the further orders of the Collector dated July 22, 1983 and of the civil court dated August 27, 1983 were passed merely by way of implementing the same. The learned counsel is right in relying upon the concluding portion of the order of the civil court dated March 18, 1976 directing the impounding of the award and sending it to the Collector for necessary action. It is true that further steps in pursuance of this judgment were not taken promptly and it was respondent 1 who drew the attention to this aspect, but it cannot be legitimately suggested that as the reminder for implementing the order came from the respondent, who was motivated by a desire to salvage the situation to his advantage, further steps could not be taken. There is no question of limitation arising in this situation and it cannot be said that what had to be done promptly in 1976 could not be done later. The orders of the Collector dated July 15, 1983 and July 22, 1983 must, therefore, in the circumstances, be held to have been passed as the follow-up steps in pursuance of the civil court's direction dated March 18, 1976, and no valid objection can be taken against them. The Collector, therefore, shall have to proceed further for realisation of the escaped duty.

6. Lastly Mr Satish Chandra argued that respondent 1 is taking keen interest in the present proceeding in an attempt to illegally reopen the question of making the award a rule of the court, which stood concluded by the impugned judgment of the High Court and the orders of this Court dismissing the special leave petition therefrom and he cannot be allowed to do so. The reply of Mr Sanghi has been that this aspect is not relevant in the present proceeding for realisation of the duty and need not be decided at this stage. His stand is that an award which is not made rule of the court is not a useless piece of paper and can be of some use, say by way of defence in a suit. He said that this question will have to be considered if and when the occasion arises. Having regard to the limited scope of the present proceeding, we agree with Mr. Sanghi that we may not go into this aspect in the present case, but we would clarify the position that on the strength of the present judgment it will not be open to the respondent to urge that the effect of the High Court decision dated July 8, 1981 and the orders of this Court dismissing the special leave petition therefrom and later the review application has disappeared or has got modified. The appeal is disposed of in the above terms.

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**Addl. District Sub-Registrar Siliguri V. Pawan Kumar Verma & Others**

J. (G.S. SINGHVI) and J. (KURIAN JOSEPH)

2013 (7) SCC 537

**KURIAN, J.** – Leave granted.

2. While registering an instrument of partition, whether the registering authority under the Registration Act, 1908 is bound by the assessment of stamp duty made by the court as per suit valuation, is the question arising for consideration in this case.

3. Petitioner is aggrieved by the order dated 02.09.2010 of the High Court of Calcutta passed on a petition filed by the petitioner challenging the order passed by the Civil Judge (Senior Division) at Siliguri on 22.08.2007. Respondents are parties to a partition suit filed by the 1st Respondent herein before the Civil Judge (Senior Division) at Siliguri in T.S. (Partition) No. 70 of 1999. The Trial Court had directed the petitioner, who was not a party before the court, to complete the registration on the basis of the stamp duty as per the suit valuation. The suit was valued at Rs.50 lakhs for the purpose of suit valuation. During the pendency of the suit, dispute was compromised and, accordingly, Annexure P3 - Order dated 30.03.2001 was passed ordering: "that the suit be and the same is decreed in final form on compromise in terms of the joint compromise petition dated 15.11.2000 which do form part of the decree. The parties do bear their respective costs. Parties are directed to file Stamp Papers as would be assessed by the Sheristadar for engrossing the Final Decree and for registration of the same. Sheristadar is directed to assess the amount of Stamp Paper over the valuation of the suit property at once...." (Emphasis supplied)

4. Subsequently, some clerical corrections were carried out in the order, on 12.02.2007. When the decree was presented for registration, the same was objected to by the petitioner observing that there is no proper valuation for the purpose of registration. Aggrieved, the plaintiff took up the matter before the Civil Judge (Senior Division) at Siliguri leading to Annexure P6-Order. The learned Civil Judge (Senior Division) took the view that once the value has been fixed by the court, Registrar cannot make an attempt to reassess the same. Aggrieved, the Additional District Sub-Registrar, Siliguri, approached the High Court. Placing reliance on its earlier decision on Nitya Hari Kundu and others vs. State of W.B. and others[1], the High Court dismissed the petition and, hence, the Special Leave Petition.

5. In order to analyse disputes in proper perspective, it is necessary to refer to the statutory provisions governing the issue. Indian Stamp Act, 1899, as amended by the West Bengal, has defined 'market value' at Section 2 (16B), which reads as follows: "(16B)"market value" means, in relation to any property which is the subject-matter of an instrument, the price which such property would have fetched or would fetch if sold in open market on the date of execution of such instrument as determined in such manner and by such authority as may be prescribed by rules made under this Act or the consideration stated in the instrument, whichever is higher;" (Emphasis supplied)

6. Section 2(12) of Indian Stamp Act, 1899, as amended by the West Bengal, has also defined 'execution' with reference to an instrument to mean "signed" and "signature".

7. Section 47A of Indian Stamp Act, 1899, as amended by the West Bengal, provided for the procedure for dealing with undervaluation. To the extent relevant, the provision reads as follows: - "47A. Instruments of conveyance, etc., under-valued, how to be dealt with.-

(1) Where the registering officer appointed under the Registration Act, 1908 (16 of 1908), has, while registering any instrument of-

(a) agreement or memorandum of any agreement relating to a sale or lease-cum-sale of immovable property,

(b) conveyance,

(c) exchange of property,

(d) gift,

(e) partition,

(f) power-of-attorney-

(i) when given for consideration to sell any immovable property, or

(ii) in such other cases referred to in article 48 of Schedule IA, where proper stamp duty is payable on the basis of market value,

(g) settlement,

(h) transfer of lease by way of assignment, reason to believe that the market value of the property which is the subject-matter of any such instrument has not been truly set forth in the instrument presented for registration, he may, after receiving such instrument, ascertain the market value of the property which is the subject-matter of such instrument in the manner prescribed and compute the proper stamp duty chargeable on the market value so ascertained and thereafter he shall, notwithstanding anything to the contrary contained in the Registration Act, 1908, in so far as it relates to registration, keep registration of such instrument in abeyance till the condition referred to in sub-section (2) or sub-section (7), as the case may be, is fulfilled by the concerned person.

(2) Where the market value of the property which is the subject-matter of an instrument has been ascertained and the proper duty chargeable thereon has been computed under sub-section (1), the registering officer shall, in the manner prescribed, send to the concerned person a notice calling upon him to make payment of the deficit amount of stamp duty within such time as may be prescribed, and if such person makes payment of such deficit amount of stamp duty in the prescribed manner, the registering officer shall register the instrument.

(3) Where the concerned person does not make payment of the stamp duty as required under sub-section (2) within the time specified in the notice issued under that sub-section, the registering authority shall refer the matter to such authority and in such manner as may be prescribed for determination of the market value of the property which is the subject-matter of such instrument and the proper stamp duty payable thereon:

(4) to (7) xxx xxx xxx xxx xxx xxx xxx

(8)

(a) The authority referred to in sub-section (3) may, on receipt of any information or otherwise, suo motu within five years from the date of registration of any instrument, where

such instrument was registered on the basis of the market value which was set forth in the instrument or which was ascertained by the registering officer referred to in sub-section (1), call for and examine any such instrument and any other document relating thereto for the purpose of satisfying himself as to the correctness of the market value of the property which is the subject-matter of such instrument and which was set forth in the instrument or which was ascertained under sub-section (2) and the stamp duty payable thereon.

(b) If, after such examination, the authority referred to in clause (a) has reasons to believe that the market value of the property which is the subject-matter of such instrument has not been truly set forth in the instrument or correctly ascertained under sub-section (2), he may, after giving the parties concerned in the instrument a reasonable opportunity of being heard, determine the market value of the property which is the subject-matter of such instrument and the amount of stamp duty chargeable thereon in the manner referred to in sub-section (5), and the difference in the amount of stamp duty, if any, between the stamp duty so determined by him and the stamp duty already paid by the concerned person shall be required to be paid by him in the prescribed manner :"

(Emphasis supplied)

8. Rule 3 of The West Bengal Stamp (Prevention of Undervaluation of Instruments) Rules, 2001 has provided for the procedure to be adopted when there is undervaluation. To the extent relevant, the procedure reads as follows:

3. Manner of determination of market value and furnishing of particulars relating to any property.-

(1) The market value within the meaning of clause [16(B)] of section 2 in relation to any land or any land with building shall, after taking into consideration the particulars referred to in sub-rule (2), be determined on the basis of the highest price for which sale of any land or any land with building, of similar nature and area and in the same locality or in a comparable locality, has been negotiated and settled during the five consecutive years immediately preceding the date of execution of any instrument setting forth such market value, or on the basis of any court decision after hearing the State Government, or on the basis of information, report or record that may be available from any court or any officer or authority of the Central Government or the State Government or any local authority or local body, or on the basis of consideration stated in such instrument for such land or land with building, whichever is greater."

(Emphasis supplied)

9. The scheme for valuation for the purpose of registration would show that an instrument has to be valued in terms of the market value at the time of execution of the document. In the instant case, it appears that there was no such valuation in the Civil Court. The learned Civil Judge, as per annexure P3 - Order dated 30.03.2001, directed the Sheristadar to assess the amount of stamp paper for the valuation of the suit property. The suit was instituted in the year 1999. The same was compromised in the year 2001. The plaintiff filed stamp papers as per valuation of the Sheristadar in the suit on 03.08.2004 and the decree was presented for registration before the Additional Registrar on 23.05.2007. In view of the objection raised

with regard to the assessment of market value for the purpose of registration, the plaintiff sought for clarification leading to annexure P6-Order.

10. The High Court has placed reliance on a single bench decision in Nitya Hari Kundu's case (supra). It was a case where the court permitted an item of a trust property to be sold after fixing the market value. When the Registrar refused to accept the valuation made by the court, a writ petition was filed in the High Court where it was conceded by the Registrar that:

"14. it is correct to say that a Court decision permitting a trust estate to sell a trust property for a particular consideration, must necessarily be accepted as a determination of the market value of the property in the stamp rules."

11. However, the High Court also considered the matter on merits and finally held in paragraph 13, which reads as follows: -

"13. Therefore, in interpreting the statutes if I make harmonious construction of S. 47A read with the Rules made thereunder, it will be read that valuation made by the Court cannot be said to be done not truly set forth and there is any reason to disbelieve, otherwise. If any authority does so it will tantamount to exceeding the jurisdiction made under the law. The authority concerned cannot sit on appeal over a Court decision unless appeal is preferred from such order which is absent herein."

12. It appears that the learned Civil Judge and the High Court only referred to the headnote in Nitya Hari Kundu's case (supra), which reads as follows: "Stamp Act (2 of 1899), S.47-A- Valuation of duty under S.47-A- Valuation made by Court and sale deed sent for Registration S.47A is not applicable- After determination of value by Court, it cannot be said that there is reason for Registrar to believe that valuation is not correctly made - Registrar is bound by that valuation and has to act upon it."

13. The court had, in fact, fixed the market value of the property in that case for permitting the Trust estate to put it to sale. However, without reference to the court, it appears that the Collector made an independent assessment and that was what was struck down by the court. Once the court had made the exercise to fix the market value of a property, the same can be reopened or altered only in a process known to law. That is not the situation in the instant case where a partition suit was filed in the year 1999, compromised in the year 2001, stamp value assessed on the basis of suit valuation and the decree presented for registration in the year 2007.

14. Market value for the purpose of Indian Stamp Act, 1899 is not the same as suit valuation for the purpose of jurisdiction and court fee. The procedures are different for assessment of the stamp duty and for registration of an instrument. The reference to the expression 'on the basis of any court decision after hearing the State Government' appearing in Rule 3 of The West Bengal Stamp (Prevention of Undervaluation of Instruments) Rules, 2001, would clearly show that the suit valuation cannot be automatically followed for the purpose of registration. The learned Civil Judge has, thus, clearly erred in directing the registration to be done on the basis of suit valuation. The Sheristadar made a mechanical assessment of stamp duty on 1/4th share of the suit property as per the compromise and fixed the stamp duty accordingly for Rs.12,50,000/-. That does not meet the requirement under law.

15. The Suits Valuation Act, 1887 and The Indian Stamp Act, 1899 operate in different fields. However, going by the scheme of the Act and Rules as amended by West Bengal, we are of the view that it will only be appropriate that in such situations where the registering authority has any difference of opinion as to assessment on the stamp duty of the instrument presented for registration on the orders of the court, it will only be appropriate that Registrar makes a back reference to the court concerned and the court undertakes a fresh exercise after affording an opportunity of hearing to the registering authority with regard to the proper value of the instrument for registration. The registering authority cannot be compelled to follow invariably the value fixed by the court for the purpose of suit valuation.

16. Accordingly, we set aside the impugned order dated 02.09.2010 of the High Court of Calcutta and order dated 30.03.2001 of the learned Civil Judge, Siliguri and order dated 27.08.2007 of Civil Judge (Senior Division), Siliguri. The court of the learned Civil Judge (Senior Division), Siliguri shall consider afresh the matter after affording an opportunity for hearing to the petitioner and pass appropriate orders with regard to the stamp duty for the purpose of registration of the partition deed. This exercise should be completed within a period of three months from the date of receipt of this order. Appeal is allowed.

17. There is no order as to costs.

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## **THE COURT FEES ACT, 1870**

### **Nemi Chand v. Edward Mills Co. Ltd.**

1953 SCR 197 : AIR 1953 SC 28

**M.C. MAHAJAN, J.** - This is an appeal by special leave granted by the Privy Council and limited to the question of court-fee viz. whether the memorandum of appeal presented to the High Court court-fee was payable under Section 7(iv)(c) or Article 17 of Schedule II of the Court-Fees Act.

2. The question whether the memorandum of appeal was properly stamped arose in the following circumstances: Edward Mills Co. Ltd. is a joint stock company situate in Beawar, Ajmer-Merwara. In accordance with the provisions of the articles of the Company one Seth Gadh Mal Lodha and Rai Sahib Moti Lal (Respondent 2) were its Chairman and Managing Director respectively since 1916. Seth Gadh Mal Lodha represented his family firm of Kanwal Nain Hamir Singh, while Rai Sahib Moti Lal represented the joint family firm of Champa Lal Ram Swaroop. On 1st July, 1938, Rai Sahib Moti Lal and his firm were adjudged insolvents by the Bombay High Court. The result was that Respondent 2 had to vacate the office of Managing Director and the members of his firm also became ineligible for it. By a resolution of the Board of Directors passed on 18th July, 1938, Gadh Mal Lodha was appointed to take the place of Rai Sahib Moti Lal as Managing Director. Gadh Mal Lodha died on 11th January, 1942, and the Board of Directors then appointed Seth Sobhagmal Lodha to act as Chairman as well as Managing Director till the appointment was made by the Company. An extraordinary meeting of the Company was called for the 8th February, 1945, for the election of the Chairman. At this meeting conflict arose between the two groups represented by Sobhagmal Lodha and Moti Lal. The Chairman therefore dissolved the meeting but the supporters of Moti Lal continued to hold it and passed a resolution appointing him as the sole agent and Chairman for a period of twenty years a remuneration equal to ten per cent of the profits of the Company. It is this resolution of the 8th February, 1942, which has led to the present dispute.

3. Seth Sobhagmal in the situation that arose approached the District Judge of Ajmer with the prayer that a general meeting of the Company may be held under the supervision of the court. This request was allowed on 11th February, 1942, and the court ordered that the meeting be held on 12th February, 1942, under the Chairmanship of Seth Sobhagmal. Respondent 2 being aggrieved by this order, filed an application in revision in the Court of the Judicial Commissioner impugning the order. The learned Judicial Commissioner allowed the revision and directed that the resolution of 8th February, 1942, should be acted upon.

4. Having failed to get redress in the summary proceedings, the appellant then filed the suit out of which this appeal arises for quashing the resolution of 8th February, 1942. In the plaint he asked for the following reliefs:

1. That it be declared that the appointment of Defendant 2 is illegal, invalid and ultra vires and that he has no right to act as Chairman, Managing Director etc. of Defendant 1;

2. That a receiver be appointed to take charge of the management of the Company, until a properly qualified Chairman, Managing Director etc. are duly appointed as required by the memorandum and articles of the Company.

The plaint bore a court-fee stamp of Rs 10 only, but the objection of the respondents that court-fee was payable on Relief No. 2 the appellants paid ad valorem fee Rs 51,000 which was the valuation of the suit for purposes of jurisdiction.

5. The Additional District Judge dismissed the suit on the preliminary ground that it was not maintainable as it related to the internal management of the Company and that the appellants had no right to bring it without impleading the Directors who were necessary parties to it.

6. Aggrieved by this decision of the trial Judge, the appellants preferred an appeal to the Court of the Judicial Commissioner, Ajmer-Merwara, at Ajmer. The memorandum of appeal was stamped with a court-fee stamp of Rs 10 and it was expressly stated therein that Relief No. 2 of the plaint was given up. An objection was raised regarding the amount of court-fee paid on the memorandum of appeal. The Judicial Commissioner ordered that proper court-fees be paid thereon in a month. In this order no reasons were given for this decision. The additional fee demanded was not paid, and the Judicial Commissioner dismissed the appeal with costs on 22nd March, 1945. An application was made for leave to appeal to the Privy Council against this order but it was refused. In the order refusing leave it was said as follows:

“On appeal to this Court, the memorandum was again stamped with a ten rupee stamp only and the respondents therefore objected. It having been conceded by plaintiffs earlier that the relief for the receivership was consequential to the relief for the declaration, the appellants were directed to pay the same stamp as had been paid in the trial court. They objected stating that they had expunged from their memorandum of appeal the request that the court should appoint a Receiver and that they were not, therefore, liable to pay the same amount. On this a notice was issued and counsel were heard.

It being clearly set out in Section 42 of the Specific Relief Act that no court shall grant a declaration only where the plaintiff being able to seek further relief than a mere declaration of title omits to do so, the appellants were directed to pay as earlier ordered the same amount as had ultimately been paid on the plaint. They had earlier sought a consequential relief and the court was, therefore, entirely unable to hold that the plaintiffs were unable to seek a further relief, they having sought the relief in the lower court and it having been refused to them. The amount of the stamp was not paid and the appeal was therefore dismissed with costs

The reasons for demanding additional court-fee, though not mentioned in the original order, are stated in this order.

7. The question for determination in this appeal is whether the order of the Judicial Commissioner demanding additional court-fee can be sustained in law. A memorandum of appeal, as provided in Article 1 of Schedule I of the Court-Fees Act, has to be stamped according to the value of the subject-matter in dispute in appeal; in other words, the relief claimed in the memorandum of appeal determines the value of the appeal for purposes of court-fee. The only relief claimed in the memorandum of appeal was the first one mentioned in the plaint. This relief being purely of a declaratory character, the memorandum of appeal was properly stamped under Article 17 of the Second Schedule.

8. It is always open to the appellant in appeal to give up a portion of his claim and to restrict it. It is further open to him, unless the relief is of such a nature that it cannot be split up, to relinquish a part of the claim and to bring it within the amount of court-fee already paid. The plaintiffs in express terms relinquished the second relief they had claimed in the plaint, in their memorandum of appeal. For the purpose of deciding whether the memorandum of appeal was properly stamped according to the subject-matter of the appeal, it was not open to the Judicial Commissioner to canvass the question whether the suit with the second prayer eliminated from it fell within the mischief of the proviso to Section 42 of the Specific Relief Act. That was a question which related to the merits of the appeal and did not concern its proper institution. On this ground, therefore, the Judicial Commissioner had no jurisdiction to demand additional fee from the plaintiffs and the appeal could not be dismissed for failure to meet it. We are thus of the opinion that the order demanding additional court-fee on the memorandum of appeal as it stood, that is, minus the second prayer, was erroneous and we hold that the memorandum of appeal was properly stamped, as the subject-matter of the appeal was purely of a declaratory character.

9. Mr Setalvad for the respondents contended that the first relief claimed in the plaint, and which was the subject-matter of the appeal included within it consequential relief and was not purely declaratory in nature and therefore the Judicial Commissioner was right in demanding additional court-fee on the value of the consequential relief. It was said that the words that Respondent 2 “had no right to act as Chairman and Managing Director” amounted to a claim for consequential relief. We are unable to agree. The claim contained in the first relief of the plaint is to the effect that it be declared that Defendant 2 has no right to act as Chairman and Managing Director because of his appointment being illegal, invalid, and ultra vires. The declaration claimed is in negative form that Defendant 2 has no right to act as Chairman and Managing Director. No claim for a consequential relief can be read within this prayer. The words “that Defendant 2 has no right to act as Chairman ...” are mere repetition and reiteration of what is contained in the opening sentence of the para. This contention of Mr Setalvad, therefore, cannot be sustained.

10. It was next contended that in view of the provisions of Section 12 of the Court-Fees Act it should be held that the decision of the Judicial Commissioner was final, and could not be challenged in appeal. The provisions of this section have to be read and construed keeping in view the provisions of the Code of Civil Procedure. Order 7 Rule 11 of the Civil Procedure Code, provides as follows:

“The plaint shall be rejected-



(b) where the relief claimed is undervalued and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;....

(d) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the court, fails to do so.”

An order rejecting a plaint is a decree as defined in Section 2 sub-section (ii) and is appealable as such. There is an apparent conflict between the provisions of the Code of Civil Procedure and the provisions of Section 12 which make the order relating to valuation final and efforts to reconcile the provisions of the Court-Fees Act and the Code have resulted in some divergence of judicial opinion on the construction of the section. In a number of decisions the Calcutta High Court took the view that the finality declared by Section 12 of the Court-Fees Act had been taken away by the relevant provisions of the Code, as the order rejecting a plaint was appealable as a decree, no matter whether the dispute related to the category under which the same falls for purposes of court-fee or only to valuation pure and simple under a particular category. This extreme view has not been maintained in later decisions and it has been held that the finality declared by Section 12 is limited only to the question of valuation pure and simple and does not relate to the category under which a certain suit falls.

11. The difference in the phraseology employed in Sections 5 and 12 of the Court-Fees Act indicates that the scope of Section 12 is narrower than that of Section 5. Section 5 which declares decisions on questions of court-fee whenever they arise in the chartered High Courts as final makes a decision as to the necessity of paying a fee or the amount thereof final. Whereas Section 12 makes a decision on every question relating to valuation for the purpose of determining the amount of any fee payable under Chapter 3 on a plaint or memorandum of appeal final. Had Section 12 been drafted somewhat as follows:

“If any dispute arises as to the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal, it shall be decided by the court in which such plaint or memorandum is filed and such decision shall be final as between the parties.”

then the construction contended for by Mr Setalvad might have been upheld. When the two sections in the same Act relating to the same subject-matter have been drafted in different language, it is not unreasonable to infer that they were enacted with a different intention and that in one case the intention was to give finality to all decisions of the taxing officer or the taxing Judge, as the case may be, while in the other case it was only intended to give finality to questions of fact that are decided by a court but not to questions of law. Whether a case falls under one particular section of the Act or another is a pure question of law and does not directly determine the valuation of the suit for purposes of court-fee. The question of determination of valuation or appraisal only arises after it is settled in what class or category it falls.

12. It has been argued in some decisions that it is absolutely necessary to decide the category in which a case falls before assessing its value and therefore the determination of the question of category is necessarily involved in the determination of the valuation of the suit for purposes of court-fee. This argument, though plausible, does not seem sound. The actual assessment of the value depends either on arithmetical calculations or upon a valuation by an expert and the evidence led in the case, while the decision of the question of category is one of law and may well be said to be an independent question antecedent but not relating to valuation. The expression "valuation" interpreted in its ordinary meaning of "appraisal", cannot be said to necessarily include within its ambit the question of category which is a matter of law. The construction placed on this section by a long course of decisions is one which reconciles the provisions of the Court-Fees Act with that of the Code of Civil Procedure and does not make those provisions nugatory and is therefore more acceptable than the other constructions which would make the provisions of either one or the other of these statutes nugatory. Perhaps it may be possible to reconcile the provisions of the two statutes by holding that the finality declared by Section 12 of the Court-Fees Act means that the parties cannot impugn such a decision by preferring an appeal but that it does not confer on such decisions a complete immunity from examination in a higher court. In other words, Section 12 when it says that such a decision shall be final between the parties only makes the decision of the court on a question of court-fee non-appealable and places it on the same footing as other interlocutory non-appealable orders under the Code and it does no more than that. If a decision under Section 12 is reached by assuming jurisdiction which the court does not possess or without observing the formalities which are prescribed for reaching such a decision, the order obviously would be revisable by the High Court in the exercise of revisional powers. Similarly, when a party thinking that a decision under Section 12 is palpably wrong takes the risk of his plaint being rejected or suit dismissed and then appeals from the order rejecting the plaint or from the decree dismissing the suit but not from the decision on the question of court-fee, then it is open to him to challenge the interlocutory order even on the question of court-fee made in the suit or appeal. The word "finality" construed in the limited sense in which it is often used in statutes means that no appeal lies from an order of this character as such and it means no more than that.

13. Conceding for the sake of argument but not admitting that Mr Setalvad is right in his contention that Section 12 is comprehensive enough to include within its ambit all questions relating to court-fee whether they involve a decision as to question of category or as to valuation simpliciter, in the present case the Judicial Commissioner decided none of these questions and his decision cannot be said to be one falling within the ambit of Section 12. All that the Judicial Commissioner decided was that as the suit could not be maintained without asking for Relief No. 2, the same fee was payable the memorandum of appeal as the plaint. In substance the court decided an issue regarding the maintainability of the appeal without first deciding whether the appeal had been properly instituted in that court. No finality can attach to such a decision by the provisions of Section 12, as in reality it decides no question within the ambit of Section 12 of the Court-Fees Act.

14. For the reasons given above the second objection raised by Mr Setalvad that no appeal lies from the order of the Judicial Commissioner by special leave is without force and is overruled.

15. The result is that the appeal is allowed, the decision of the Judicial Commissioner dismissing the appeal is set aside and the case remanded to him for decision in accordance with law on the basis that the memorandum of appeal presented to him was properly stamped.

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## *Sathappa Chettiar v. Ramanathan Chettiar*

1958 SCR 1024 : AIR 1958 SC 245

**P.B. GAJENDRAGADKAR, J.** - This is a plaintiff's appeal by special leave against the order passed by a Division Bench of the Madras High Court on 25-1-1955, calling upon him to pay court fees on the valuation of Rs 15,00,000 both on his plaint and on his memorandum of appeal and it raises some interesting questions of law under the provisions of the Court Fees Act (which will be described hereafter as "the Act").

2. The appellant had filed Civil Suit No. 311 of 1951 on the Original Side of the Madras High Court. In this suit he had claimed partition of the joint family properties and an account in respect of the joint family assets managed by the respondent. The appellant is the son of Subbiah Chettiar. His case was that Subbiah had been adopted by Lakshmi Achi in 1922. Lakshmi Achi was the widow of the undivided paternal uncle of the respondent. As a result of his adoption Subbiah became a coparcener in his adoptive family and, as Subbiah's son, the appellant claimed to have a share in the joint family properties and in the assets of the joint family and that was the basis on which a claim for partition and accounts was made by the appellant in his suit. In the plaint it has been alleged that Subbiah had filed a suit for partition of his share and had obtained a decree in the trial court. The respondent had taken an appeal against the said decree in the High Court. Pending the appeal the dispute was settled amicably between the parties and in consideration of payment of a specified sum and delivery of possession of certain sites Subbiah agreed to release all his claims and those of his son, the present appellant, in respect of the properties then in suit. According to the appellant, this compromise transaction did not bind the appellant and so he claimed to recover his share ignoring the said transaction between his father and the respondent. The plaint filed by the appellant valued the claim for accounts at Rs 1000 under Section 7(iv)(f) of the Act and a court fee of Rs 112-7-0 was paid on the said amount on an ad valorem basis. In regard to the relief for partition the fixed court fee of Rs 100 was paid by the appellant under Article 17-B (Madras) of Schedule II of the Act. For the purposes of jurisdiction, however, the appellant gave Rs 15,00,000 as the value of his share.

3. It appears that the Registry, on examining the plaint, was inclined to take the view that the plaint should have borne court fee under Section 7(v) in respect of the claim for partition. Since the appellant did not accept this view the matter was referred to the Master of the Court who was the Taxing Officer under the Madras High Court Fees Rules, 1933. The Master felt that the issue raised by the Registry was of some importance and so, in his turn, he referred the dispute to the Judge sitting on the Original Side under Section 5 of the Act. This reference was decided by the Chamber Judge Krishnaswamy Naidu, J., on October 18, 1951. The learned Judge held that the appellant was not bound to set aside the prior compromise decree between his father and the respondent and that the plaint was governed by Article 17-B of Schedule II. Accordingly the court fee paid by the appellant in respect of his claim for partition was held to be in order.

4. In due course the respondent was served and he filed a written statement raising several contentions against the appellant's claim for partition and accounts. One of the points raised by the respondent was that the compromise and the release deed executed by the appellant's father and the decree that was subsequently passed between the parties were fair and bona fide transactions and, since they amounted to a settlement of the disputed claim by the appellant's father, the plaintiff was bound by them.

5. Ramaswamy Gounder, J., who heard the suit tried the respondent's contention about the binding character of the compromise decree as a preliminary issue. The learned judge held that there was a fair and bona fide settlement of the dispute by the appellant's father acting as the manager of his branch and so the appellant was bound by the compromise decree. In the result, the appellant's suit was dismissed on 22-9-1953.

6. Against this decree the appellant presented his memorandum of appeal on 1-12-1953. This memorandum bore the same court fees as the plaint. On examining the memorandum of appeal the Registry again raised the question about the sufficiency of fees paid by the appellant. The Registry took the view that the appellant should have paid court fees under Section 7(v) of the Act in respect of his claim for partition as the appellant's claim in substance was a claim for recovery of possession based on title within the meaning of Section 7(v). The matter was then referred to the Master; but, in his turn, the Master again made a reference to the Taxation Judge under Section 12(2) of the Act. Thereupon the learned Chief Justice constituted a Bench of two Judges to deal with this reference.

7. The learned Judges who heard the reference did not think it necessary to consider whether Section 12 of the Act was applicable to the present appeal. They dealt with the reference as made under Section 5 of the Act. The appellant urged before the Division Bench that the order passed by Krishnaswami Naidu, J., was final since it was an order passed under Section 5 of the Act. The learned Judges did not accept this contention. They held that the record did not show that Krishnaswamy Naidu, J., had been nominated by the Chief Justice to hear the reference under Section 5 either by a general or a special order and so no finality could be claimed for the said order under Section 5 of the Act. On the merits the learned Judges agreed with the view taken by Krishnaswamy Naidu, J., and held that Section 7(v) of the Act was not applicable to the appellant's claim for partition. According to the learned Judges, neither was Article 17-B of Schedule II applicable. They held that the provisions of Section 7(iv)(b) of the Act applied. That is why the appellant was directed to mention his value for the relief of partition under the said section. It may be mentioned at this stage that this order became necessary because in the plaint the plaintiff had not specifically mentioned the value for the relief of partition claimed by him. He had merely stated that for the relief of partition claimed by him he was paying a court fee of Rs 100 in accordance with Schedule II, Article 17-B. All that he had done in the plaint was to value his total claim for jurisdiction at Rs 15,00,000.

8. In compliance with this order the appellant valued his relief to enforce his right to share in the joint family properties in suit at Rs 50,000, paid the deficit court fee Rs 1662-7-0 and re-presented his memorandum of appeal in court on 7-5-1954.

9. That, however, was not the end of the present dispute in respect of court fees. The Registry raised another objection this time. According to the Registry, since the appellant had valued his relief in the suit for purposes of jurisdiction at Rs 15,00,000, it was not open to him to value his relief on the memorandum of appeal under Section 7(iv)(b) without an amendment of the valuation made in the plaint. Since the appellant did not accept this view of the Registry, the matter was again placed before the court for orders. The appellant then offered to file an application for formal amendment of his plaint by substituting Rs 50,000, in place of Rs 15,00,000, for the jurisdictional value of his relief. Accordingly the appellant made an application on 18-10-1954. This application was opposed both by the respondent and the Assistant Government Pleader on behalf of the State. The learned Judges who heard this application took the view that if the appellant had given the value in the first instance for purposes of jurisdiction he was precluded from giving a different value at a later stage. Accordingly it was held that Rs 15,00,000, which had been mentioned in the plaint as the value of the appellant's claim for jurisdictional purposes should be treated as the value given by the appellant also for the purposes of court fees under Section 7(iv)(b) of the Act. The result was that the application made by the appellant for a formal amendment of the valuation made in the plaint was rejected. The learned Judges also purported to exercise their jurisdiction under Section 12(2) of the Act and directed that the appellant should pay deficit court fees on the basis of Rs 15,00,000, not only on his memorandum of appeal but also on his plaint. It is this order which has given rise to the present appeal.

10. The first point which Shri Krishnaswamy Ayyangar has raised before us on behalf of the appellant is that the order passed by the learned Chamber Judge on 18-10-1951, is final under Section 5 of the Act. By this order the learned Chamber Judge had held that the plaint filed in the present suit did not attract the provisions of Section 7(v) of the Act and that the proper court fee to be paid was determined by Article 17-B of Schedule II of the Act. Since the appellant had paid the fixed court fee of Rs 100, under this latter provision, no objection could be taken on the ground that sufficient court fee had not been paid. If this order had really been passed under Section 5 of the Act it would undoubtedly be final. Section 5 of the Act provides for procedure in case of difference as to necessity of court fee. In cases where a difference arises between an officer whose duty it is to see that any fee is paid under Chapter III and a suitor as to the necessity of paying the fee or the amount thereof, it has to be referred to the Taxing Officer whose decision thereon shall be final.

This section further provides that if the Taxing Officer, to whom such difference is referred by the office, is of opinion that the point raised is one of general importance, he can refer the said point to the final decision of the Chief Justice of the High Court or such judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf; and it is clear that if the Chief Justice or any other judge appointed in that behalf by the Chief Justice decides the matter in question, his decision shall be final. Unfortunately, however, in

the present case it has been found by the Division Bench that dealt with this matter subsequently that a search of the record did not show any general or special order which would have justified the exercise of jurisdiction under Section 5 by Krishnaswamy Naidu, J. No doubt Shri Krishnaswamy Ayyangar stated before us that the practice in the Madras High Court always was to refer disputes as to proper court fees arising between suitors on the Original Side and the Registry to the Chamber Judge and it was always assumed, says Shri Ayyangar, that the Chamber Judge on the Original Side was appointed generally to deal with such disputes. It is difficult for us to make any such assumption in dealing with the present suit. Unless we are satisfied from the record that Krishnaswamy Naidu, J., had, at the material time, been appointed either generally or specially to act under Section 5, it would be difficult to accede to the argument that the order passed by him in the present proceedings is final. It is frankly conceded that the record does not show any general or special order as contemplated by Section 5. That is why we must hold that the learned Judges of the Division Bench were right in refusing to attach finality to the order passed by Krishnaswamy Naidu, J.

11. It is then urged by Shri Krishnaswamy Ayyangar that the learned Judges were in error in purporting to exercise their jurisdiction under Section 12(2) of the Act when they directed the appellant to pay additional court fees on the plaint on the basis of the valuation of Rs 15,00,000. His contention is that Section 12 does not apply to the appeals arising from judgments and decrees passed in suits on the Original Side of the Madras High Court. It is perfectly true that the question about the levy of fees in High Courts on their Original Sides is governed by Section 3 of the Act and, if the matter had to be decided solely by reference to the Act, it would not be possible to apply any of the provisions contained in Chapter III of the Act either to the suits filed on the Original Side of the Madras High Court or to the appeals arising from judgments and decrees in such suits. But it is common ground that, on the plaints filed on the Original Side of the Madras High Court, court fees are leviable under the relevant provisions contained in Chapter III of the Act and the levy of these fees is authorised by Order 2 Rule 1 of the High Court Fees Rules, 1933. It is, therefore, necessary to inquire what provisions of the Act have been extended to the suits filed on the Original Side. The authority and jurisdiction of the Madras High Court in enacting Rule 1 of Order 2 are not in dispute. What is in dispute before us is the effect of the said rule. The appellant's case is that the said rule merely contemplates the levy of certain specified court fees as indicated in the provisions of the Act which are expressly made applicable to the Original Side. No other provision of the Act, according to the appellant, can be said to have been extended and so the learned Judges were in error in purporting to exercise their jurisdiction under Section 12(2). We are not satisfied that this argument is well-founded. Order II Rule 1 reads thus:

**“Order 2 Rule 1 of Madras High Court Fees Rules, 1933:**

**ORDER 2**

1. The fees and commissions set out in Appendix II hereto shall be charged by the Registrar, Sheriff, Reserve Bank of India and Imperial Bank of India, as the case may be, upon the several documents, matters and transactions therein specified

as chargeable. The commission chargeable to Government shall be charged by Reserve Bank of India and credited to Government. (To other documents including Memoranda of appeals the Registrar shall apply so far as may be the law for the time being in force relating to court fees, as regards the scale of such fees, the manner of levy of such fees, the refund of such fees and in every other respect, in the manner and to the extent that it is applicable to similar documents filed in original proceedings in a District Court and in appeals from decrees and orders of a District Court.)

\*Added by ROC No. 2219 of 1949.”

It cannot be disputed that as a result of this rule, Sections 7(iv) (a), (b), (c), (d), (e) and (f) of the Act along with the proviso as well as Article 17-B of Schedule II of the Act applied to suits filed on the Original Side of the High Court. The latter portion of the order which has been added in 1949 obviously makes applicable to the suits and appeals on the Original Side of the High Court provisions of the Act as regards the scale of fees, the manner of their levy and the refund of fees. It also makes the relevant provisions of the Act applicable in “every other respect”. The words “in every other respect” in the context clearly indicate that Section 12 which confers upon the Appellate Court Authority or jurisdiction to examine the question about the sufficiency or otherwise of the court fees paid not only on the memorandum of appeal but also on the plaint in the suit which comes before the court of appeal is obviously intended to apply. It would indeed be illogical to apply the relevant provisions of the Act for the levy of court fees on plaints and memoranda of appeal and not to confer jurisdiction on the appropriate court to examine the sufficiency or otherwise of the court fees paid in that behalf. The power to entertain claims for refund of court fees has been specifically mentioned. A claim for refund can be validly made, for instance in a case where excess court fee has been paid. That is why the provisions of Sections 13, 14 and 15 had to be applied in terms. If a litigant is entitled to make a claim for refund of court fees in cases governed by the relevant provisions of the Act, there appears to be no reason why it should not be open to the court to entertain the question about inadequate payment of court fees. Logically, if excess court fees paid should and can be refunded in these proceedings, inadequate or insufficient court fees paid can and should be dealt with on that footing and orders passed to pay the deficit court fees in such cases. It is matters of this kind that are clearly covered by the expression “in every other respect” to which we have just referred. We, therefore, hold that the learned Judges below were justified in assuming jurisdiction under sub-sections (1) and (2) of Section 12. Section 12 consists of two parts. Sub-section (1) provides that the question about the proper payment of court fees on the plaint or memorandum of appeal shall be decided by the court in which such plaint or memorandum of appeal is filed. It also lays down that such decision is final between the parties to the suit. Sub-section (2) confers upon the court of appeal, reference, or revision, jurisdiction to deal with the question of adequacy of court fee paid on the plaint whenever the suit in which such plaint has been filed comes before it and if the court is satisfied that proper court fees have not been paid then it can pass an order requiring the party to pay so much additional fee as would have been payable if the question had been rightly decided in the first instance. Since the decision of Krishnaswamy Naidu, J., cannot attract the finality mentioned in Section 5 of the Act, it was open to the Division



Bench to consider the correctness of the view taken by the learned Chamber Judge; and as they were satisfied that the plaint did not fall under Article 17-B of Schedule II, they were entitled to pass appropriate orders under Section 12(1) and (2).

12. The appellant, however, contends that the learned Judges were in error in directing him to pay court fees on the basis of the value of Rs 15,00,000 both on his plaint and on his memorandum of appeal because he argues that this decision is inconsistent with the earlier order that the proper court fees to be paid on the memorandum of appeal had to be determined under Section 7(iv)(b) of the Act. This order has been passed by the Division Bench under Section 5 of the Act and it is final between the parties. This order gives the appellant leave to value his claim for the relief of partition and he exercised his option by valuing it at Rs 50,000. The valuation thus made by the appellant in respect of the value of his relief of partition for the payment of court fees should and must be taken to be the valuation even for the purposes of jurisdiction and it is on this valuation alone that the appellant can be justly called upon to pay court fees both on the plaint and on the memorandum of appeal. The learned Judges were, therefore, in error in not allowing the appellant leave to make amendment in the plaint so as to bring the plaint in conformity with the provisions of Section 7, sub-section (iv) of the Act. That in brief is the appellant's case.

13. On the other hand, on behalf of the Intervener- Advocate-General of Madras as well as on behalf of the respondent, it was sought to be urged before us that both the plaint and the memorandum of appeal ought to be valued for the purposes of payment of court fees under Section 7(v) of the Act. It is conceded that the question of court fees must be considered in the light of the allegations made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on the merits. The argument, however, is that if all the material allegations contained in the plaint are fairly construed and taken as a whole it would appear that the plaintiff has been ousted from the enjoyment of the properties in suit and his claim for partition in substance is a claim for possession of the suit properties and as such falls within the provisions of Section 7, sub-section (v) of the Act. The question about proper court fees leviable on plaints in which Hindu plaintiff's make claims for partition under varying circumstances has given rise to several conflicting decisions in the High Courts of India. We are, however, not called upon to consider the point as to whether Section 7(v) would apply to the present suit or whether the present suit would fall under Section 7(iv)(b). In our opinion, the decision of the Division Bench of the Madras High Court that the memorandum of appeal should be taxed for the purposes of court fee under Section 7(iv)(b) of the Act is final under the provisions of Section 5 of the Act and it cannot be reopened at this stage. It may be that when the Division Bench of the Madras High Court considered this matter under reference made by the Master under Section 5, the respondent was not heard. Normally the dispute between the litigant and the Registry in respect of court fees arises at the initial stage of the presentation of the plaint or the appeal and the defendant or the respondent is usually not interested in such a dispute unless the question of payment of court fees involves also the question of jurisdiction of the court either to try the suit or to entertain the appeal. There is no doubt that the question about

the adequacy of the court fees leviable on the appellant's memorandum of appeal was properly referred by the Master to the learned Chief Justice of the Madras High Court and has been decided by the Division Bench of the said High Court in pursuance of the requisite order made by the Chief Justice in that behalf. In such a case, the decision reached by the Division Bench must be held to be final under Section 5 of the Act. That is why we have not allowed the merits of this order to be questioned in the present appeal. We must, therefore, deal with the appellant's contention on the basis that the court fees on his memorandum of appeal must be levied under Section 7(iv)(b) of the Act.

14. The question which still remains to be considered is whether the Division Bench was justified in directing the appellant to pay court fees both on the plaint and on the memorandum of appeal on the basis of the valuation for Rs 15,00,000. In our opinion, the appellant is justified in contending that this order is erroneous in law. Section 7, sub-section (iv)(b) deals with suits to enforce the right to share in any property on the ground that it is joint family property and the amount of fees payable on plaints in such suits is "according to the amount at which the relief sought is valued in the plaint or memorandum of appeal." Section 7 further provides that in all suits falling under Section 7(iv) the plaintiff shall state the amount at which the value of the relief is sought. If the scheme laid down for the computation of fees payable in suits covered by the several sub-sections of Section 7 is considered, it would be clear that, in respect of suits falling under sub-section (iv), a departure has been made and liberty has been given to the plaintiff to value his claim for the purposes of court fees. The theoretical basis of this provision appears to be that in cases in which the plaintiff is given the option to value his claim, it is really difficult to value the claim with any precision or definiteness. Take for instance the claim for partition where the plaintiff seeks to enforce his right to share in any property on the ground that it is joint family property. The basis of the claim is that the property in respect of which a share is claimed is joint family property. In other words, it is property in which the plaintiff has an undivided share. What the plaintiff purports to do by making a claim for partition is to ask the court to give him certain specified properties separately and absolutely on his own account for his share in lieu of his undivided share in the whole property. Now it would be clear that the conversion of the plaintiff's alleged undivided share in the joint family property into his separate share cannot be easily valued in terms of rupees with any precision or definiteness. That is why legislature has left it to the option of the plaintiff to value his claim for the payment of court fees. It really means that in suits falling under Section 7(iv)(b) the amount stated by the plaintiff as the value of his claim for partition has ordinarily to be accepted by the court in computing the court fees payable in respect of the said relief. In the circumstances of this case it is unnecessary to consider whether, under the provisions of this section, the plaintiff has been given an absolute right or option to place any valuation whatever on his relief.

15. What would be the value for the purpose of jurisdiction in such suits is another question which often arises for decision. This question has to be decided by reading Section 7(iv) of the Act along with Section 8 of the Suits Valuation Act. This latter section provides that, where in any suits other than those referred to in Court Fees Act Section 7, paras 5, 6 and

9 and para 10 clause (d), court fees are payable ad valorem under the Act, the value determinable for the computation of court fees and the value for the purposes of jurisdiction shall be the same. In other words, so far as suits falling under Section 7, sub-section (iv) of the Act are concerned, Section 8 of the Suits Valuation Act provides that the value as determinable for the computation of court fees and the value for the purposes of jurisdiction shall be the same. There can be little doubt that the effect of the provisions of Section 8 is to make the value for the purpose of jurisdiction dependent upon the value as determinable for computation of court fees and that is natural enough. The computation of court fees in suits falling under Section 7(iv) of the Act depends upon the valuation that the plaintiff makes in respect of his claim. Once the plaintiff exercises his option and values his claim for the purpose of court fees, that determines the value for jurisdiction. The value for court fees and the value for jurisdiction must no doubt be the same in such cases; but it is the value for court fees stated by the plaintiff that is of primary importance. It is from this value that the value for jurisdiction must be determined. The result is that it is the amount at which the plaintiff has valued the relief sought for the purposes of court fees that determines the value for jurisdiction in the suit and not vice versa. Incidentally we may point out that according to the appellant it was really not necessary in the present case to mention Rs 15,00,000 as the valuation for the purposes of jurisdiction since on plaints filed on the Original Side of the Madras High Court prior to 1953 there was no need to make any jurisdictional valuation.

16. The plaintiff's failure to state the amount at which he values the relief sought is often due to the fact that in suits for partition the plaintiff attempts to obtain the benefit of Article 17-B of Schedule II in the matter of payment of court fees. Where the plaintiff seeks to pay the fixed court fee as required by the said article, he and his advisers are apt to take the view that it is unnecessary to state the amount for which relief is sought to be claimed for the purposes of court fees and the valuation for jurisdiction purposes alone is, therefore, mentioned. Often enough, it turns out that the plaint does not strictly attract the provisions of Article 17-B of Schedule II and that the court fee has to be paid either under Section 7(iv) (b) or under Section 7(v) of the Act. If the court comes to the conclusion that the case falls under Section 7(iv)(b) or 7 (iv)(c) ordinarily liberty should be given to the plaintiff to amend his plaint and set out specifically the amount at which he seeks to value his claim for the payment of court fees. It would not be reasonable or proper in such a case to hold the plaintiff bound by the valuation made by him for the purposes of jurisdiction and to infer that the said valuation should be also taken as the valuation for the payment of court fees. In this connection we may point out that this is the view taken by the Full Bench decision of the Lahore High Court in **Karam Ilahi v. Muhammad Bashir** [AIR 1949 Lah. 116]. As we have already indicated Section 8 of the Suits Valuation Act postulates that the plaintiff should first value his claim for the purpose of court fee and it provides for the determination of the value for jurisdiction on the basis of such claim. In our opinion, therefore, the learned Judges of the Madras High Court were in error in holding that the valuation for jurisdiction shown in the plaint should be taken to be the valuation for the payment of court fees on the plaint as well as the memorandum of appeal. In view of their prior decision that the present case fell under

Section 7(iv)(b), they should have allowed the appellant to amend his valuation for the payment of court fees not only on the memorandum of appeal but also on the plaint.

17. We must accordingly set aside the order under appeal and direct that the plaintiff should be allowed to state the amount of Rs 50,000 at which he values the relief sought by him for the purpose of Section 7(iv)(b) of the Act. Shri Krishnaswamy Ayyangar has orally requested us to give him liberty to make the appropriate amendment in his plaint and we have granted his request.

18. In the result the appeal would be allowed and the appellant directed to pay additional court fees on his plaint on the basis of the valuation of Rs 50,000 within two months from today. Since the appellant has already paid adequate court fees on his memorandum of appeal, no further order need be passed in that behalf.

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## ***Shamsher Singh v. Rajinder Prashad***

(1973) 2 SCC 524 : AIR 1973 SC 2384

**A. ALAGIRISWAMI, J.** - This appeal raises the question of the court fee payable in the suit filed by the first respondent and his minor brother the second respondent against their father the third respondent and the alienee from him the appellant.

2. On July 13, 1962, the father executed a mortgage deed in favour of the appellant of a property of which he claimed to be the sole owner for a sum of Rs 15,000. The mortgagee, the appellant filed a suit on the foot of this mortgage and obtained a decree. When he tried to take out execution proceedings for the sale of the mortgaged property, Respondents 1 and 2 tiled a suit for a declaration that the mortgage executed by their father in favour of the appellant is null and void and ineffectual as against them as the property was a joint Hindu family property, and the mortgage had been effected without consideration and family necessity. On this plaint the plaintiffs paid a fixed court-fee of Rs 19-50 and the value of the suit for purposes of jurisdiction was given as Rs 16,000. A preliminary objection having been raised by the appellant that the suit was not properly valued for purposes of court fees and jurisdiction, the Subordinate Judge tried it as a preliminary issue. He held that although the case is covered by Section 7 (iv)(c) of the Court Fees Act, the proviso to that section applied and directed the plaintiffs to pay court-fee on the value of Rs 16,000 which was the amount at which the plaintiffs valued the suit for the purposes of jurisdiction. The court-fee not having been paid the plaint was rejected. the plaintiffs thereupon carried the matter up on appeal before the High Court of Punjab and Haryana. Before that court the plaintiffs did not seriously contest the position that the consequential relief of setting aside the decree within the meaning of Section 7(iv)(c) of the Court Fees Act was inherent in the declaration which was claimed with regard to the decree. But taking the view that the plaintiffs were not at all bound by the mortgage in dispute or the decree, the High Court held that there was no consequential relief involved since neither the decree nor the alienation binds the plaintiffs in any manner. The first defendant in the suit has, therefore, filed this appeal.

3. Before us a preliminary objection was raised based on the observations of this Court in **Rathnavarmaraja v. Smt Vimla** [AIR 1961 SC 1299] that the present appeal is not competent. In that case this Court observed that whether proper court-fee is paid on a plaint is primarily a question between the plaintiff and the State and that the defendant who may believe and even honestly that proper court-fee has not been paid by the plaintiff has still no right to move the superior courts by appeal or in revision against the order adjudging payment of court-fee payable on the plaint. But the observations must be understood in the background of the facts of that case. This Court was there dealing with an application for revision filed before the High Court under Section 115 of the Code of Civil Procedure and pointed out that the jurisdiction in revision exercised by the High Court is strictly conditioned by clauses (a) to (c) thereof and may be invoked on the ground of refusal to exercise jurisdiction vested in the Subordinate Court or assumption of jurisdiction which the court does not possess or on the ground that the court has acted illegally or with material irregularity in the exercise of its jurisdiction, and the provisions of Sections 12 and 19 of the Madras Court Fees Act do not

arm the defendant with a weapon of technicality to obstruct the progress of the suit by approaching the High Court in revision against an order determining the court-fee payable. The ratio of that decision was that no revision on a question of court-fee lay where no question of jurisdiction was involved. This decision was correctly interpreted by the Kerala High Court in **Vasu v. Chakki Mani** [AIR 1962 Ker 84], where it was pointed out that no revision will lie against the decision on the question of adequacy of court-fee at the instance of the defendant..... unless the question of court-fee involves also the question of jurisdiction of the court. In the present case the plaint was rejected under Order 7, Rule 11 of the CPC. Such an order amounts to a decree under Section 2(2) and there is a right of appeal open to the plaintiff. Furthermore, in a case in which this Court has granted special leave the question whether an appeal lies or not does not arise. Even otherwise a second appeal would lie under Section 100 of the CPC on the ground that the decision of the first Appellate Court on the interpretation of Section 7(iv)(c) is a question of law. There is thus no merit in the preliminary objection.

4. As regards the main question that arises for decision it appears to us that while the court-fee payable on a plaint is certainly to be decided on the basis of the allegations and the prayer in the plaint and the question whether the plaintiff's suit will have to fail for failure to ask- for consequential relief is of no concern to the court at that stage, the court in deciding the question of court-fee should look into the allegations in the plaint to see what is the substantive relief that is asked for. Mere astuteness in drafting the plaint will not be allowed to stand in the way of the court looking at the substance of the relief asked for. In this case the relief asked for is on the basis that the property in dispute is a Joint Hindu family property and there was no legal necessity to execute the mortgage. It is now well settled that under Hindu Law if the manager of a joint family is the father and the other members are the sons the father may by incurring a debt so long as it is not for an immoral purpose lay the joint family estate open to be taken in execution proceedings upon a decree for the payment of the debt not only where it is an unsecured debt and a simple money decree for the debt but also to a mortgage debt which the father is personally liable to pay and to a decree for the recovery of the mortgage debt by the sale of the property even where the mortgage is not for legal necessity or for payment of antecedent debt. Consequently when the plaintiffs sued for a declaration that the decree obtained by the appellant against their father was not binding on them they were really asking either for setting aside the decree or for the consequential relief of injunction restraining the decree holder from executing the decree against the mortgaged property as he was entitled to do. This aspect brought out in a decision of the Full Bench of the Lahore High Court in **Zeb-ul-Nisa v. Din Mohammad** [AIR 1941 Lab 97], where it was held that:

“The mere fact that the relief as stated in the prayer clause is expressed in a declaratory form does not necessarily show that the suit is for a mere declaration and no more. If the relief so disclosed is a declaration pure and simple and involves no other relief, the suit would fall under Article 17(iii).”

In that case the plaintiff had sued for a twofold declaration: (i) that the property described in the plaint was a waqf, and (ii) that certain alienations thereof by the mutwali and his brother

were null and void and were ineffectual against the waqf property. It was held that the second part of the declaration was tantamount to the setting aside or cancellation of the alienations and therefore the relief claimed could not be treated as a purely declaratory one and inasmuch as it could not be said to follow directly from the declaration sought for in the first part of the relief, the relief claimed in the case could be treated as a declaration with a “ consequential relief”.... It was substantive one in the shape of setting aside of alienations requiring ad valorem court-fee on the value of the subject-matter of the sale, and even if the relief sought for fell within the purview of Section 7(iv)(c) the plaintiffs in view of Sections 8 and 9, Suits Valuation Act, having already fixed the value of the relief in the plaint for purposes of jurisdiction were bound to fix the same value for purposes of court-fee. It was also pointed out that in deciding whether a suit is a purely declaratory, the substance and not merely the language or the form of the relief claimed should be considered. The court also observed:

“It seems to me that neither the answer to the question whether the plaintiff is or is not a party to the decree or the deed sought to be declared as null and void, nor to the question whether the declaration sought does or does not fall within the purview of Section 42, Specific Relief Act, furnishes a satisfactory or conclusive test for determining the court-fee payable in the suit of this description. When the plaintiff is a party to the decree or deed, the declaratory relief, if granted, necessarily relieves the plaintiff of his obligations under the decree. or the deed and, hence it seems to have been held in such cases, that the declaration involves a consequential relief. In cases where the plaintiff is not a party to the decree or the deed, the declaratory relief does not ordinarily include any such consequential relief. But there are exceptional cases in which the plaintiff though not a party to the deed or the decree is nevertheless bound thereby. For instance, when a sale or mortgage of joint family property is effected by a manager of a joint Hindu family, the alienation is binding on the other members of the family (even if they are not parties to it) until and unless it is set aside. Similarly, a decree passed against the manager will be binding on the other members of the family. If therefore a coparcener sues for a declaration that such an alienation or decree is null and void, the declaration must I think be held to include consequential relief in the same way as in those cases in which the plaintiff is himself a party to the alienation or the decree, which is sought to be declared null and void. The case dealt with in AIR 1936 Lah 166 seems to have been of this description. The case of an alienation by a mutwalli of waqf property would also appear to stand on a similar footing;. In the case of waqf property, it is only the trustee or the mutwalli who can alienate the property. If he makes an alienation it is binding on all concerned, until and unless it is set aside. therefore a person sues to get such an alienation declared null and void, he can only do so by getting the deed invalidated. The relief claimed in such cases also may therefore be found to include a consequential relief”.

5. We should now refer to certain decisions relied upon by the respondents. We do not consider that the decision of the learned Single Judge of the Madras High Court in **Venkata Ramani v. Narayanaswami** [AIR 1925 Mad 713] lays down the correct law. It proceeds on

the basis that the plaintiffs not being parties to the document they were not bound to get rid of it by having it actually cancelled, but it ignores the effect of Hindu Law in respect of a mortgage decree obtained against the father. As pointed out by the Lahore High Court, in such cases in suing for declaration that the decree is not binding on him the son is really asking for a cancellation of the decree. This aspect does not seem to have been taken into consideration by the learned Single Judge. The decision of a learned single Judge of the Nagpur High Court in **Pandwang Mongol v. Bhojalu Usanna** [AIR 1949 Nag 37], suffers from the same error. Though it refers to the decision of the Full Bench of the Lahore High Court as well as the same High Court's decision in **Prithsi Raj v. D.C. Ralli**, it does not seek to distinguish them for holding otherwise. The learned Judge gives no reason whether and if so why he dissents from the view taken in the latter case. This decision also suffers from the learned Judge's misapprehension that there is a difference between a simple money decree and a mortgage decree obtained against a Hindu father when it is questioned by the son and its view that in execution of a simple money decree the entire joint family property, inclusive of the interest of the sons, is liable to be sold in execution of the decree, but that in the case of a mortgage decree it is not necessary for a son to allege or prove that the debt was incurred for an illegal or an immoral purpose and he can succeed if it is proved that the mortgage was not for legal necessity or for the payment of antecedent debt. We have already referred to the decision of this Court on this point. We must also hold in view of the reasons already set forth that the decision of the Allahabad High Court in **Ishwar Dayal v. Amba Prasad** [AIR 1935 All 667] is not a good law. As regards the decision of the Full Bench of the Allahabad High Court in **Bishan Sarup v. Musa Mal** [AIR 1935 All 817], there is nothing to show whether the alienation was made by the manager of a joint Hindu family and therefore the decision is not in point.

6. We, therefore, hold that the decision of the High Court was not correct and allow this appeal with costs. The plaintiffs would be given a month's time for paying the necessary court-fee.

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**Ashok v. Narasingh Rao**

AIR 1975 MP 39

**SHIV DAYAL, J.** – The plaintiff is aggrieved by an order of the trial Court whereby it has been held that the plaintiff must pay proper ad valorem court-fees.

2. Earlier a suit for ejection and arrears of rent was instituted by Narasingh Rao (now defendant No.1) against the plaintiff and defendants Nos.2 to 8. That was Civil Suit No.150-A/1968 in the Court of Civil Judge Class II, Gwalior. In that suit, the plaintiff was described as a minor and Kishan defendant No.3 was appointed as guardian ad litem. Eventually, in that suit a compromise decree was passed. That decree is being challenged in the present suit on the ground that the plaintiff (there defendant) had attained the age of majority and further it was misrepresented in the compromise that he was under the guardianship of his mother Smt. Ramabai (defendant No.5). It is alleged in the plaint that fraud was practised upon the court by his mother, defendant No.5. who arrogated to herself the position of a guardian. The decree is challenged as null and void and as fraudulently obtained.

3. In the relief clause, there is no proper prayer for setting aside the decree, but merely declaration has been sought that the decree is ineffective and void as against the plaintiff.

4. The trial Court has held that the suit for mere declaration is not maintainable. It was necessary for the plaintiff to claim consequential relief of setting aside the decree and further that the plaintiff had to pay ad valorem courtfees.

5. In this revision it is contended for the plaintiff that the decree is not binding on him and, therefore, it is not necessary for him to pray for setting it aside.

6. The learned Counsel for the petitioner in his long address endeavoured to show:-

(1) That in the earlier suit since Kishan was appointed under Order 32, Rule 3, Civil Procedure Code as a guardian ad litem, Smt. Ramabai could not act as a guardian though she be his mother and natural guardian.

(2) The signature of Kishan on the compromise petition was in his individual capacity as defendant and not as guardian of the minor defendant (now plaintiff).

(3) That there was specific application by Smt. Ramabai for permission of the court to compromise on behalf of the minor in which she described herself as guardian of the minor, and Shri K.L. Batham, Advocate, who signed the compromise petition was also counsel for Smt. Ramabai by virtue of a separate Vakalatnama. He was also counsel for the guardian ad litem under a separate Vakalatnama, dated March 28, 1970, in which he signed as guardian of the minor.

(4) The other Vakalatnama in favour of Shri Kishanlal Batham is on behalf of Smt. Rama Bai, Kailash Chandra, Kishan and Suresh Chandra, defendants.

(5) The decision of the Supreme Court in Kaushlya Devi v. Baijanath, AIR 1961 SC 790 does not apply here because it was not as if the compromise was entered into by the guardian ad litem although without leave of the court. Here in fact the compromise was entered into not by the guardian ad litem but by another defendant

on behalf of the minor, that defendant arrogating to herself the capacity of a guardian.

(6) Since the impugned decree was not passed on adjudication by the court, but on a compromise, which in the eye of law is a contract, the decree is not binding on the defendant after his attaining majority. For this he relies on **Sanyasi v. Lanka Yerran Naidu** [AIR 1928 Mad 294].

(7) In my opinion, whatever may be the force in these contentions, the question today is whether the plaintiff is within the dictum of their Lordships' decision in **Shamsher Singh v. Rajinder Prasad** [AIR 1973 SC 2384] where it has been held that-

“(1) The court in deciding the question of court-fees should look into the allegations in the plaint to see what is the substantive relief that is asked for. Mere astuteness in drafting the plaint will not be allowed to stand in the way of the court looking at the substance of the relief asked for.

(2) Where a decree is otherwise binding on the plaintiff, a suit though couched in a declaratory form, is in substance a suit either for setting aside the decree or for a declaration with a consequential relief of injunction restraining the decree holder from executing the decree against the judgment-debtor and the plaintiff is liable to pay ad valorem court-fee under Section 7 (iv) (c) of the Court Fees Act.”

8. In the present case, the plaintiff was a defendant in the earlier suit and the impugned decree was passed against him. That decree is per se binding on him and it can be executed against him. Even if he has grounds to show that the decree is liable to be set aside, unless and until he establishes those grounds and the decree is in fact set aside by another decree of a competent court, the existing decree subsists as binding on him. The suit is, therefore, within the above dictum of the Supreme Court. In the relief clause the prayer for setting aside the decree is implicit.

9. The revision is dismissed.

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**Tara Devi v. Sri Thakur Radha Krishna Maharaj**

(1987) 4 SCC 69

**B.C. RAY, J.** - This is a petition on special leave against the judgment and order dated January 11, 1987 of the High Court of Judicature of Patna passed in C.R. No. 1385 of 1985.

2. The plaintiff-respondent filed a suit for declaration that pattas dated December 15, 1948, July 1, 1950, April 24, 1951 and November 26, 1952 executed by Nagendra Prasad Bhagat in the name of defendant 1 were illegal, ineffective and not binding on the plaintiff. There was also a prayer for recovery of possession with mesne profits. The suit was valued on the basis of the rent-payable for the land. The defendant filed a written statement and thereafter raised a preliminary objection that the plaintiff has undervalued the suit and also challenged the jurisdiction of the court to entertain the suit. The trial court has held that the suit is governed by Section 7(iv)(c) of the Court Fees Act, 1870 and the plaintiff has rightly valued the leasehold interest created by the lessee. The plaintiff is entitled to put his own valuation of the reliefs claimed. The valuation, it has been held, was not arbitrary and unreasonable and as such it was held that the plaintiff has rightly valued the suit and proper court fee has been paid thereon.

3. Against this judgment and order a revision petition being Civil Revision No. 1385 of 1985 was filed in the High Court, Patna. The said revision petition was admitted and thereafter it was referred to the Full Bench for decision of the question whether in a suit for declaration with consequential relief falling under clause (iv)(c) of Section 7 of the Court Fees Act, 1870, the court has jurisdiction to examine the correctness of the valuation given by the plaintiff and whether the plaintiff has an absolute right or option to place any valuation whatever on the relief claimed in such a suit. It has been held by the High Court considering several decisions including the decisions of this Court in **Sathappa Chettiar v. Ramanathan Chettiar** [AIR 1958 SC 245] as well as **Meenakshisundaram Chettiar v. Venkatachalam Chettiar** [AIR 1979 SC 989] that the plaintiff has the right to value the relief claimed according to his own estimation and such valuation has to be ordinarily accepted. The plaintiff however, has not been given the absolute right or option to place any valuation whatever on such relief and where the plaintiff manifestly and deliberately underestimates the relief the court is entitled to examine the correctness of the valuation given by the plaintiff and to revise the same if it is patently arbitrary or unreasonable. The High Court held that the Munsif came to a clear finding that the valuation given by the plaintiff was not at all arbitrary or unreasonable and as such there was no scope for interference with the said order under revision. The revision application was so dismissed.

4. The instant special leave petition has been filed against the said order. We have heard the learned counsel and in our considered opinion we do not find any merit in the arguments made on behalf of the petitioner. It is now well settled by the decisions of this Court in **Sathappa Chettiar v. Ramanathan Chettiar** and **Meenakshisundaram Chettiar v. Venkatachalam Chettiar** that in a suit for declaration with consequential relief falling under Section 7 (iv)(c) of the Court Fees Act, 1870, the plaintiff is free to make his own estimation

of the reliefs sought in the plaint and such valuation both for the purposes of court fee and jurisdiction has to be ordinarily accepted. It is only in cases where it appears to the court on a consideration of the facts and circumstances of the case that the valuation is arbitrary, unreasonable and the plaint has been demonstratively undervalued, the court can examine the valuation and can revise the same. The plaintiff has valued the leasehold interest on the basis of the rent. Such a valuation, as has been rightly held by the courts below, is reasonable and the same is not demonstratively arbitrary nor there has been any deliberate underestimation of the reliefs. We, therefore, do not find any reason to grant special leave to appeal asked for in the petition as the order passed in the said revision is unexceptionable. The special leave petition is therefore dismissed. There will however be no order as to costs.

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**Abdul Hamid Shamsi v. Abdul Majid**

(1988) 2 SCC 575 : AIR 1988 SC 1150

**L.M. SHARMA, J.** - The jurisdiction of the City Civil Court, Calcutta to entertain a suit being T.S. No. 520 of 1983 filed by Respondent 1 is under challenge in the present appeal, on the ground that the correct value of the suit is beyond the pecuniary jurisdiction of the court. The plaintiff-respondent 1 has alleged that he is a partner of a partnership business along with his brothers Defendants 1 and 2. Originally it was a proprietary business belonging to Abdul Samad, father of the plaintiff and Defendants 1 and 2, and was later converted into a partnership firm by a regular deed. During his lifetime the business was under the control of Abdul Samad, but on his death Defendants 1 and 2 have effectively taken charge of the business and excluded the plaintiff. A suggestion to reconstitute the partnership made and repeated by the plaintiff has been ignored. In reply to the plaintiff's letter seeking information Defendant 2 — petitioner has stated in his letter to the plaintiff that he (the plaintiff) has no interest in the firm. In paragraph 11 of the plaint it is stated that he has on enquiry discovered that Defendants 1 and 2 have been falsely representing before the Income Tax Department, inter alia, that a new deed of partnership had been executed on January 15, 1979 to be effective from January 1, 1979 in which the plaintiff has no interest. The Income Tax Officer passed an order on December 26, 1981 on the basis of the false allegations made by the defendants. The plaintiff has challenged the aforementioned partnership deed of 1979. In paragraph 16 of the plaint the amount of profit from the business has been described as "huge". In the prayer portion of the plaint the plaintiff prayed for declaring the partnership deed of 1979 as illegal and void and for passing a decree for dissolution of the partnership firm and for accounts. The valuation of the suit was put at Rs 150 being the sum of Rs 50 for declaration, Rs 50 for rendition of accounts and another sum of Rs 50 for profit to the share of the plaintiff arising out of the business. Court fee was accordingly paid.

2. Defendants 1 and 2, besides denying the plaint allegations made by the plaintiff, challenged the valuation given by the plaintiff as grossly undervalued and arbitrary. The issues relating to the correct valuation and pecuniary jurisdiction of the court to entertain the suit were taken up as preliminary issues and were decided in favour of the plaintiff. The defendants challenged the order by a civil revision application before the Calcutta High Court which was dismissed. Defendant 2 has now come to this Court against the High Court's order. Special leave is granted.

3. Mr Kacker, the learned counsel for the appellant, has contended that it is manifest that relief to the tune of lakhs of rupees has been claimed by the plaintiff in the suit. He said that the plaintiff has laid claim to a sum of Rs 1,26,796 72 besides another sum of over Rs 84,000 as his share in the profit or a particular period by reference to the proceeding of the Income Tax Department mentioned in paragraph 11 of the plaint, and it is, therefore, preposterous on his part to suggest in paragraph 19 of the plaint that it could be tentatively valued at Rs 50 only. According to the defence case which is challenged as incorrect By the plaintiff, the plaintiff requested for and was allowed a larger share 'in the well established and reputed business of auctioneer known as "Russell Exchange" and its assets and goodwill as well as the amount lying in the Habib Bank. Karachi Branch, solely and absolutely'. The "Russell Exchange" building is a very valuable property near Park Street in the city of Calcutta. A

copy of the Profit and Loss Account for the calendar year 1979 attached by the plaintiff to the additional affidavit filed on his behalf before this Court mentions figures in lakhs.

4. Mr Arun Prakash Chatterjee, the learned counsel or the plaintiff Respondent 1, has argued that the suit is governed for the purpose of court fees by Section 7(iv)(f) of the Court Fees Act, and the plaintiff has the absolute right to put on the plaint any value he wishes to and the court has no jurisdiction to examine the matter. In other words, it is the sweet will of the plaintiff to choose any figure he likes and thus decide finally the court which shall have jurisdiction to entertain the suit without reference to the subject matter of the litigation, the nature and extent of the relief claimed or any other factor.

5. We are afraid, the interpretation put by the learned counsel on the decisions of this Court is not correct and cannot be accepted. Neither of the two cited judgments relied upon by Mr Chatterjee helps him. It is true that in a suit for accounts the plaintiff is not obliged to state the exact amount which would result after taking all the accounts and he may, therefore, put a tentative valuation upon the suit, but he is not permitted to choose an unreasonable and arbitrary figure for that purpose. At page 392 of the judgment in **Meenakshisundaram Chettiar v. Venkalachalam Chettiar** [AIR 1979 SC 989], this Court while taking note of the plaintiff's right to give a tentative valuation on the suit, observed :

“The plaintiff cannot arbitrarily and deliberately undervalue the relief.”

In, the view was reiterated thus at page 70: **Smt. Tura Devi v. Thakur Radha Krishna Maharaj** [(1987) 4 SCC 69]:

“The plaintiff however, has not been given the absolute right or option to place any valuation whatever on such relief and where the plaintiff manifestly and deliberately underestimates the relief the court is entitled to examine the correctness of the valuation given by the plaintiff and to revise the same if it is patently arbitrary or unreasonable.”

6. So far as the opinion of the High Courts is concerned, it is not uniform. The argument, “that the plaintiff can give an arbitrary valuation in the plaint, and that the court is bound to accept that” made on behalf of the plaintiff before the Allahabad High Court in **Aijaz Ahmad v. Nuzirul Hasan** [AIR 195 All 849], was rejected, after observing that there was some authority for the extreme, view as urged in two Calcutta decisions but later a different view was taken by the said Court as also by the Allahabad Court. In **Attar Singh v. Manohar Singh** [ILR 1947 Nag 933], the plaintiff non-applicant before the High Court filed a suit for dissolution of partnership and accounts valuing at Rs 150 as has been done in the case before us. The defendant's objection to the valuation was rejected by the trial court “on the ground that the court was powerless to challenge the valuation put by the plaintiff on the relief claimed in the suit”. The Full Bench decision in **Mata Ram v. Daulat** [ILR 1938 Nag 558 (FB)] was attempted to be distinguished on the basis that it was a case covered by Section 7(iv)(c) of the Court Fees Act and not by Section 7(iv)(f). The High Court while repelling the argument pointed out that the principle underlying both the clauses (c) and (f) of Section 7(iv)

is substantially the same and the Full Bench decision governed the case. Accordingly it was held that when the valuation put by the plaintiff appears to be arbitrary and unreasonable the court may reject it and have the plaintiff to correct the valuation or have the suit rejected. Similar was the view of the Patna High Court in suits covered by Section 7(iv) (c) in **Salahuddin Hyder Khan v. Dhanoo Lal** [AIR 1945 Pat 421] and **Shama Pershad Sahi v. Sheoparsan Singh** [AIR 1920 Pat 290]. In **Gauri Lal v. Raja Babu** [AIR 1929 Pat 626], the respondent filed a suit praying for accounts from Appellant 1. Rejecting his claim to put any valuation under Section 7(iv)(f) of the Court Fees Act the High Court observed that when a plaintiff is required to place the valuation on his claim he must state a valuation which need only be approximately correct but qualified it by saying that, “it must not be arbitrary or manifestly inadequate”.

7. It is true that in a suit for accounts the correct amount payable by one party to the other can be ascertained only when the accounts are examined and it is not possible to give an accurate valuation of the claim at the inception of the suit. The plaintiff is, therefore, allowed to give his own tentative valuation. Ordinarily the court shall not examine the correctness of the valuation chosen, but the plaintiff cannot act arbitrarily in this matter. If a plaintiff chooses whimsically a ridiculous figure it is tantamount to not exercising his right in this regard. In such a case it is not only open to the court but its duty is to reject such a valuation. The cases of some of the High Courts which have taken a different view must be held to be incorrectly decided.

8. The learned counsel for the parties have placed before us the materials on the record at considerable length and we do not have any hesitation in holding that the valuation put by the plaintiff (respondent before us) on the plaint is arbitrary and unacceptable. We, however, do not propose to examine the matter further and remit this question to be reconsidered by the trial court. While examining the issue it will be open to the trial court to take into consideration the statement in the plaint that the plaintiff has been ousted from the partnership business, If the court comes to the conclusion that the tentative valuation of the suit would be beyond its pecuniary jurisdiction, it shall pass an appropriate order under Order VII of the Code of Civil Procedure. The appeal is accordingly allowed with costs payable by the plaintiff respondent.

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**Commercial Aviation and Travel Co. v. Vimla Pannalal**

(1988) 3 SCC 423 : AIR 1988 SC 1636

**M.M. DUTT, J.** - 3. The Respondent, who is the plaintiff, has filed a suit against the appellants, inter alia, for dissolution of partnership and for accounts. The suit has been valued for the purpose of jurisdiction at Rs 25 lakhs and at Rs 500 for the purpose of court fee.

4. The appellants filed an application wherein a preliminary objection was raised as to the valuation of the suit. It was contended by them that the relief sought for in the suit had been grossly undervalued and the court should reject the plaint under Order VII, Rule 11(b) of the Code of Civil Procedure. The learned Single Judge of the High Court overruled the said preliminary objection and held that the suit was not undervalued. On appeal by the appellants, a Division Bench of the High Court took the same view as that of the learned Single Judge. The Division Bench placed reliance upon and followed a Full Bench decision of the same High Court in **Smt Sheila Devi v. Kishan Lal Kalra** [ILR (1974) 2 Del 491], where it has been observed, inter alia, that paragraph (iv) of Section 7 of the Court Fees Act gives a right to the plaintiff in any of the suits mentioned in the clauses of that paragraph to place any value that he likes on the relief he seeks, subject, however, to any rule made under Section 9 of the Suits Valuation Act and the court has no power to interfere with the plaintiff's valuation. The Division Bench felt itself bound by the said Full Bench decision and, accordingly, it dismissed the appeal of the appellants. Hence this appeal.

5. At the outset, it may be mentioned that in regard to suits for accounts, the Punjab High Court has framed rules under Section 9 of the Suits Valuation Act fixing court fee and jurisdictional value of a suit for accounts. Rule 4 of the Rules framed by the Punjab High Court provides as follows:

“4(i) Suits in which the plaintiff in the plaint seeks to recover the amount which may be found due to the plaintiff on taking unsettled account between him and defendant;

(ii) suits of either of the kinds described in Order XX, Rule 13 of the Code of Civil Procedure:

Value for the purpose of court fee ...as determined by the Court Fees Act, 1870.

Value for the purposes of jurisdiction for the purpose of Suits Valuation Act, 1887 and the Punjab Courts Act, 1918 as valued by the plaintiff in the plaint subject to determination by the court at any stage of the trial.”

6. It is not disputed that the above rules framed by the Punjab High Court under Section 9 of the Suits Valuation Act are applicable to the Union Territory of Delhi. It is apparent from Rule 4 extracted above that valuation for the purposes of court fee and jurisdiction is not the same. Indeed, in the instant case, the Respondent has valued the suit at Rs 25 lakhs for the purpose of jurisdiction. That valuation has not been challenged by the appellants either in the



High Court or in this Court. The only challenge that has been made by the appellants is the valuation of the suit for the purpose of court fee.

7. So far as suits coming under Section 7(iv) of the Court Fees Act are concerned, the legislature has left the question of valuation of the relief sought in the plaint or memorandum of appeal to the plaintiff. The reason is obvious. The suits which are mentioned under Section 7(iv) are of such nature that it is difficult to lay down any standard of valuation. Indeed, the legislature has not laid down any standard of valuation in the Court Fees Act. Under Section 9 of the Suits Valuation Act, the High Court may, with the previous sanction of the State Government, frame rules for the valuation of suits referred to in Section 7(iv) of the Court Fees Act. Although the Punjab High Court has framed rules under Section 9 of the Suits Valuation Act which are applicable to the Union Territory of Delhi, such rules do not lay down any standard of valuation with regard to suits coming under Section 7(iv) of the Court Fees Act. It has already been noticed that under Rule 4(i) of the Punjab High Court Rules, the value of suit for accounts for purposes of court fee will be as determined by the Court Fees Act, which means that the valuation of the relief will have to be made by the plaintiff under Section 7(iv) (f) of the Court Fees Act.

8. In a suit for accounts it is almost impossible for the plaintiff to value the relief correctly. So long as the account is not taken, the plaintiff cannot say what amount, if at all, would be found due to him on such accounting. The plaintiff may think that a huge amount would be found due to him, but upon actual accounting it may be found that nothing is due to the plaintiff. A suit for accounts is filed with the fond hope that on accounting a substantial amount would be found due to the plaintiff. But the relief cannot be valued on such hope, surmise or conjecture.

9. In this connection, we may refer to the provision of Order VII, Rule 11 (b) of the Code of Civil Procedure, which provides, inter alia, that the plaint shall be rejected where the relief claimed is undervalued and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so. It is manifestly clear from the provision of Order VII, Rule 11(b) that a court has to come to a finding that the relief claimed has been undervalued, which necessarily means that the court is able to decide and specify proper and correct valuation of the relief and, after determination of the correct value of the relief, requires the plaintiff to correct his valuation within a time to be fixed by the court. If the plaintiff does not correct the valuation within the time allowed, the plaint is liable to be rejected. The question is whether in a suit for accounts simpliciter, the court can come to a finding as to the proper and correct value of the relief until the final determination is made. In our opinion, ordinarily it is not possible for the court at a preliminary stage to determine the value of the relief in a suit for accounts simpliciter. If the court is itself unable to say what the correct valuation of the relief is, it cannot require the plaintiff to correct the valuation that has been made by him. Indeed, in a suit for accounts it is also difficult for the court to come to a

finding even as to the approximate correct valuation of the relief. In such a case, the court has no other alternative than to accept plaintiff's valuation tentatively.

10. There has been a divergence of judicial opinion on the question as to whether the plaintiff in a suit for accounts is entitled to put any valuation he likes. It is not necessary to refer to the decisions of different High Courts on the point, and suffice it to say that they are not uniform, some holding that the plaintiff is free to give his own valuation and others holding that the plaintiff is not entitled to give an arbitrary valuation without having any link or connection with the relief in question.

11. In this connection, we may refer to a Five Judge Bench decision of this Court in **S. Rm. Ar. S. Sp. Sathappa Chettiar v. S. Rm. Ar. Rm. Ramanathan Chettiar** [AIR 1958 SC 245], Gajendragadkar, J. speaking for the Court observed as follows:

“If the scheme laid down for the computation of fees payable in suits covered by the several sub-sections of Section 7 is considered, it would be clear that, in respect of suits falling under sub-section (iv), a departure has been made and liberty has been given to the plaintiff to value his claim for the purposes of court fees. The theoretical basis of this provision appears to be that in cases in which the plaintiff is given the option to value his claim, it is really difficult to value the claim with any precision or definiteness. Take for instance the claim for partition where the plaintiff seeks to enforce his right to share in any property on the ground that it is joint family property. The basis of the claim is that the property in respect of which a share is claimed is joint family property. In other words, it is property in which the plaintiff has an undivided share. What the plaintiff purports to do by making a claim for partition is to ask the court to give him certain specified properties separately and absolutely on his own account for his share in lieu of his undivided share in the whole property. Now it would be clear that the conversion of the plaintiff's alleged undivided share in the joint family property into his separate share cannot be easily valued in terms of rupees with any precision or definiteness. That is why legislature has left it to the option of the plaintiff to value his claim for the payment of court fees. It really means that in suits falling under Section 7(iv)(b) the amount stated by the plaintiff as the value of his claim for partition has ordinarily to be accepted by the court in computing the court fees payable in respect of the said relief. In the circumstances of this case it is unnecessary to consider whether, under the provisions of this section, the plaintiff has been given an absolute right or option to place any valuation whatever on his relief.”

12. In the above decision, this Court took the view that the conversion of the plaintiff's undivided share in the joint family property into his separate share cannot be easily valued in terms of rupees with any precision or definiteness. It is true that the court did not consider whether the plaintiff had been given an absolute right or option to place any valuation whatever on his relief under the provision of Section 7(iv) of the Court Fees Act, but the

difficulty that would be felt by the court in exercising its power under Order VII, Rule 11 (b) of the Code of Civil Procedure is that if it is unable to determine the correct value of the relief, it cannot direct the plaintiff to correct the valuation. Order VII, Rule 11(b) contemplates correct valuation and not approximate correct valuation and such correct valuation of the relief has to be determined by the court. If the court cannot determine the correct valuation of the relief claimed, it cannot require the plaintiff to correct the valuation and, consequently, Order VII, Rule 11(b) will not be applicable.

13. But, there may be cases under Section 7(iv) where certain positive objective standard may be available for the purpose of determination of the valuation of the relief. If there be materials or objective standards for the valuation of the relief, and yet the plaintiff ignores the same and puts an arbitrary valuation, the court, in our opinion, is entitled to interfere under Order VII, Rule 11(b) of the Code of Civil Procedure, for the court will be in a position to determine the correct valuation with reference to the objective standards or materials available to it. In **Urmilabala Biswas, v. Binapani Biswas** [AIR 1938 Cal 161], a suit was instituted for declaration of title to provident fund money amounting to a definite sum with a prayer for injunction restraining the defendant from withdrawing the said money. It was held that there was no real distinction between the right to recover money and the right to that money itself, and that the relief should have been valued at the provident fund amount to which title was claimed by the plaintiff. Thus, it appears that although in that case the suit was one under Section 7(iv) (c) of the Court Fees Act, there was an objective standard which would enable the plaintiff and the court too to value the relief correctly and, in such a case, the court would be competent to direct the plaintiff to value the relief accordingly.

15. In **Nalini Nath Mallik Thakur** case, it has been observed that although a satisfactory valuation may not be possible in the majority of the cases falling under Section 7(iv), when once the court has formed the opinion that the plaintiff's estimate is wrong, it becomes the duty of the court to estimate a correct and reasonable valuation of the relief claimed and it is for the court to decide on the merits of each particular case whether the provisions of Section 8-C should be invoked for the purpose of revising the plaintiff's valuation. Further, it has been observed that if the relief claimed is impossible to value, the court is, of course, not in a position to say that such relief has been wrongly valued and there is consequently no scope for the operation of Section 8-C, but in a suit where it is sought to set aside a decree, such valuation, although difficult, is not impossible. In a suit to set aside a decree prima facie the value of the relief claimed by the plaintiff would be the value of the decree and the onus would clearly lie on him to show that the relief should be valued at some smaller amount. It thus follows from the above decision that if the court is of the opinion that the plaintiff's estimate is wrong, it becomes the duty of the court to estimate a correct and reasonable value of the suit. If, however, the court is not in a position to decide the correct value of the suit, it has to accept the value that has been put by the plaintiff on the relief claimed. In **Nalini Nath Mallik Thakur** case, there was an objective standard of valuation, namely, the decree which was sought to be set aside.

16. Thus, where there are objective standards of valuation or, in other words, the plaintiff or the court can reasonably value the relief correctly on certain definite and positive materials, the plaintiff will not be permitted to put an arbitrary valuation de hors such objective standards or materials.

18. In **Meenaakshisundaram Chettiar v. Venkatachalam Chettiar** [(1979) 3 SCR 385], this Court made the following observation:

“The plaintiff is required to state the amount at which he values the relief sought. In suits for accounts it is not possible for the plaintiff to estimate correctly the amount which he may be entitled to for, as in the present case, when the plaintiff asks for accounting regarding the management by a power of attorney agent he might not know the state of affairs of the defendant’s management and the amount to which he would be entitled to on accounting. But it is necessary that the amount at which he values the relief sought for should be a reasonable estimate.”

19. That observation has been made by this Court with reference to the special provision, namely, Section 35(1) of the Tamil Nadu Court Fees and Suits Valuation Act 14 of 1955. Section 35(1) provides that in a suit for accounts, fee shall be computed on the amount sued for as estimated in the plaint. Section 35(1) of the Tamil Nadu Court Fees and Suits Valuation Act is different from Section 7(iv)(f) of the Court Fees Act. While under Section 7(iv), the court fee is payable according to the amount at which the relief sought is valued in the plaint or memorandum of appeal, under Section 35(1), the court fee shall be computed on the amount sued for as estimated in the plaint. In **Meenakshisundaram** case the plaintiff had given a detailed estimate in the plaint and this Court was satisfied that the estimate was quite adequate and reasonable.

20. In **Tara Devi v. Sri Thakur Radha Krishna Maharaj** [(1987) 4 SCC 69], it has been laid down by this Court that in a suit for declaration with consequential relief falling under Section 7(iv)(c) of the Court Fees Act, the plaintiff is free to make his own estimation of the relief sought in the plaint and such valuation both for purposes of court fee and jurisdiction has to be ordinarily accepted. Further it has been observed that it is only in cases where it appears to the court on a consideration of the facts and circumstances of the case that the valuation is arbitrary, unreasonable and the plaint has been demonstratively undervalued, the court can examine the valuation and can revise the same. In that case, the plaintiff had valued the leasehold interest on the basis of the rent and such valuation was held to be reasonable and not demonstratively arbitrary.

21. In making the above observation, this Court has placed reliance upon its earlier decision in **Meenaakshisundaram** case which, as noticed above, related to Section 35(1) of the Tamil Nadu Court Fees and Suits Valuation Act. But one significant fact that is to be noticed in the case is that there is an objective standard of valuation, that is, the rent of the leasehold interest. It may be reiterated that when there is an objective standard of valuation, to

put a valuation on the relief ignoring such objective standard, might be a demonstratively arbitrary and unreasonable valuation and the Court would be entitled to interfere in the matter.

22. Another decision of this Court on which much reliance has been placed by the appellants in the case of **Abdul Hamid Shamsi v. Abdul Majid** [(1988) 2 SCC 575]. It was also a suit for accounts and came under Section 7(iv)(f) of the Court Fees Act. It has been observed as follows:

“It is true that in a suit for accounts the correct amount payable by one party to the other can be ascertained only when the accounts are examined and it is not possible to give an accurate valuation of the claim at the inception of the suit. The plaintiff is, therefore, allowed to give his own tentative valuation. Ordinarily the court shall not examine the correctness of the valuation chosen, but the plaintiff cannot act arbitrarily in this matter. If a plaintiff chooses whimsically a ridiculous figure it is tantamount to not exercising his right in this regard. In such a case it is not only open to the court but its duty is to reject such a valuation. The cases of some of the High Courts which have taken a different view must be held to be incorrectly decided.”

23. We are also of the view that the plaintiff cannot whimsically choose a ridiculous figure for filing the suit most arbitrarily where there are positive materials and/or objective standards of valuation of the relief appearing on the face of the plaint. These materials or objective standards will also enable the court to determine the valuation for the purpose of Order VII, Rule 11(b) of the Code of Civil Procedure. Indeed, in **Abdul Hamid Shamsi**, case, it has been noticed by this Court that the plaintiff has laid a claim to a sum of Rs 1,26,796.72, besides another sum of over Rs 84,000 as his share in the profit for a particular period by reference to the proceeding of the Income Tax Department mentioned in paragraph 11 of the plaint. Further, a copy of the profit and loss account for the calendar year 1979 was annexed by the plaintiff to the additional affidavit filed on his behalf before this Court, which also gave positive indication as to the valuation of the relief. The plaintiff in that case valued the suit without making any reference whatsoever to those materials or objective standards available to him and in the context of these facts, this Court made the above observation. But, if there be no material or objective standard, the plaintiff's valuation has to be accepted.

24. It is, however, urged by Mr Sorabjee that such an objective standard or positive material appears on the face of the plaint. Our attention has been drawn to paragraph 33 of the plaint where it has been stated by the plaintiff that on rendition of accounts, the plaintiff estimates that approximately a sum of Rs 25 lakhs to 30 lakhs would become due to her share. It is submitted on behalf of the appellants that in view of such a statement in the plaint, the Respondent should have valued the relief for rendition of accounts at Rs 25 lakhs. We are unable to accept the contention. The statement does not, in our opinion, constitute any objective standard of valuation or a positive material from which it can be said with any amount of certainty that the valuation of the relief for accounts should be at the sum of Rs 25

lakhs. The Respondent was not required to make such a statement in the plaint. It is the wishful thinking of the Respondent that on account being taken, she would be entitled to such a huge amount. The Respondent has not given in the plaint any material in support of the estimate of Rs 25 lakhs to Rs 30 lakhs to her share. As has been stated already, this is no material at all on which any reliance can be placed for the purpose of valuation of the relief. In that case also, the question was whether the plaintiff had correctly valued the relief for the rendition of accounts. In the plaint, the plaintiff stated that a sum of Rs 8000 was due to him from the defendants, but he valued the suit for purposes of jurisdiction and court fee at Rs 500 tentatively. It was held that the plaintiff could not be prejudiced or damnified merely because he added to the plaint a computation which was unnecessary for him to give.

25. We have considered the facts and circumstances of the case and also the legal position and, in our view, the valuation of the relief for the rendition of accounts under Section 7(iv)(f) of the Court Fees Act is neither unreasonable nor it is demonstratively arbitrary.

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**Ram Narain Prasad v. Atul Chander Mitra**

(1994) 4 SCC 349

**S.P. BHARUCHA, J.** - The appellants were the plaintiffs in a suit filed against the first respondent in the Court of the Munsif 1st, Gaya (being TS No. 278 of 1971). It was alleged in the plaint that the appellants were the sons and daughters of one Jaikishun Lal who died on 1-7-1962, leaving them behind as his sole heirs. The late Jaikishun Lal had purchased the suit property from the defendant under a registered sale deed dated 30-4-1960. After the late Jaikishun Lal became the owner of the property, the first respondent had requested him to let the suit property to him on a monthly rental of Rs 90. The proposal was accepted and the first respondent was inducted as a tenant on 1-5-1960. On 18-5-1960, the first respondent had executed a "Kirayanama" in favour of the late Jaikishun Lal in the aforementioned terms. The first respondent paid some rent to the late Jaikishun Lal and thereafter to the plaintiffs, the last of such payments having been made on 7-8-1962. The first appellant was a minor when Jaikishun Lal died. Upon attaining majority the first appellant had filed a petition for mutation of the Municipal Register in respect of the suit property. The first respondent had filed objections thereto, which had been rejected. The appellants were the owners of the suit property, the first respondent was their tenant and he was in arrears of rent. Being a defaulter he was liable to be evicted from the suit property. The appellants needed the suit property for personal use. For the purposes of jurisdiction and court fees, the suit was "valued at Rs 1080 being the monthly rent of the house in suit for 12 months" and the appellants, on payment of court fees of Rs 157.50, prayed for the following reliefs:

“(i) That a decree for ejection of the defendant from the house in suit be passed.

(ii) That the defendant be ordered to vacate the house in suit within the period fixed by the court failing which the plaintiffs be put in possession over the house in suit through the processes of the court.”

2. The first respondent filed a written statement in which he claimed that in April 1960 he was in need of money and had approached the late Jaikishun Lal for a loan. The late Jaikishun Lal had insisted that the security for the loan should be in the form of a sale deed with a clause for reconveyance as also a "Kirayanama" showing a monthly rent for the suit property of Rs 90. The first respondent being in urgent need of money had executed these documents under undue influence and compulsion. The first respondent denied that there was a relationship of landlord and tenant between the appellants and himself.

3. The first respondent moved a petition in the trial court averring that the court "in view of the pleadings of the parties has to decide in respect of the title not incidentally but in a fullfledged manner" and, therefore, the appellants could not proceed with the suit unless ad valorem court fees on the market value of the suit property were paid. Reliance was placed upon the judgment reported in **Sheo Shankar Prasad v. Barhan Mistry** [1985 PLJR 358]. Upon this petition, the trial court ordered thus:

“In view of the pleadings of the parties. I am of the opinion that the Court has to decide title, not incidentally but in a full-fledged manner. Under such circumstances, in view of the reported decision in **Sheo Shankar Prasad v. Barhan Mistry** the plaintiffs have to pay ad valorem court fee on the market value of the suit property. According (?) the plaintiffs

are directed to pay ad valorem court fee on the market value of the suit property. If the plaintiffs are so advised, they may file petition for amendment of the plaint in the light of declaration of their title to the suit property.”

4. The appellants carried the matter to the Patna High Court by way of a civil revision application. The same was dismissed in limine. From the order thereon the appellants have preferred this appeal by special leave.

5. It is necessary immediately to refer to the judgment of the Patna High Court reported in **Sheo Shankar Prasad v. Barhan Mistry**. Paragraph 2 of the judgment, of a learned Single Judge, reads:

“The plaintiff alleges that rent was paid up to December 1978 only and the defendants have defaulted thereafter. The plaintiff alleges personal necessity also. The defendants have seriously denied the title of the plaintiff to the katras in question. Although initially the suits were filed as between the landlord and tenant and court fee paid accordingly, but as a result of the defence, the parties led evidence on the question of title to the property, and the courts have dealt with the question at considerable length. It has been repeatedly held by this Court, and I may mention a recent case on the point, being SA No. 467 of 1981, allowed on 17-4-1984, that before the Court goes into the question of title not incidentally, but in a full-fledged manner the plaintiff should be asked to pay ad valorem court fee. This has not been done.”

6. Learned counsel for the appellants submitted that the suit had been valued for the purposes of court fees upon the basis that the appellants were the landlords of the suit property, that the first respondent was the tenant thereof, that he was in arrears of rent and, therefore, was liable to be evicted therefrom. The relief that was sought in the suit was the relief of eviction. The plaint had, therefore, been correctly valued. The trial court was in error in requiring the appellants to pay ad valorem court fees on the suit on the basis of the market value of the suit property. Learned counsel for the respondents relied upon the judgment of the Patna High Court referred to above.

7. Section 7 of the Court Fees Act, 1870, sets out how court fees are to be computed upon certain suits. By reason thereof, on a suit between a landlord and tenant for the recovery of immovable property from the tenant, court fees are to be paid “according to the amount of the rent of the immovable property to which the suit refers, payable for the year next before the date of presenting the plaint”.

8. In **Sathappa Chettiar v. Ramanathan Chettiar** [AIR 1958 SC 245], this Court noted that the question of court fees had to be considered in the light of the allegations made in the plaint *Ram Narain Prasad v. Atul Chander Mitra* 187 and its decision could not be influenced either by the pleas in the written statement or by the final decision of the suit on the merits. Though this was stated upon a concession, we have no doubt that the statement lays down the law correctly. For the purposes of valuation of the suit for determination of the court fees payable thereon, what is relevant is the plaint. The averments made and relief sought in the plaint determines the character of the suit for the purposes of the court fees



payable thereon. What is stated in the written statement is not material in this regard. This view has also been taken by many High Courts.

9. The plaint in this case sought the relief of eviction of the first respondent from the suit property upon the averments that the appellants were the landlords and the first respondent was their tenant and he was in arrears of rent. The suit could only be valued as an eviction suit, regardless of the fact that the first respondent had denied the appellants' title to the suit property so that this became an issue in the suit.

10. The appeal is, accordingly, allowed. The order of the High Court dismissing the plaintiffs' civil revision application and the order of the trial court allowing the first respondent's petition for seeking payment of ad valorem court fees on the market value of the suit property are set aside. The said petition is dismissed.

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**Suhrid Singh @ Sardool Singh V. Randhir Singh & Ors.**

2010 (12) SCC 112

**R.V.RAVEENDRAN, J.** - Leave granted.

The appellant filed a suit (Case No.381/2007) on the file of the Civil Judge, Senior Division, Chandigarh for several reliefs. The plaint contains several elaborate prayers, summarizes below :

(i) for a declaration that two houses and certain agricultural lands purchased by his father S. Rajinder Singh were co-parcenary properties as they were purchased from the sale proceeds of ancestral properties, and that he was entitled to joint possession thereof;

(ii) for a declaration that the will dated 14.7.1985 with the codicil dated 17.8.1988 made in favour of the third defendant, and gift deed dated 10.9.2003 made in favour of fourth defendant were void and non-est "qua the co-parcenary";

(iii) for a declaration that the sale deeds dated 20.4.2001, 24.4.2001 and 6.7.2001 executed by his father S. Rajinder Singh in favour of the first defendant and sale deed dated 27.9.2003 executed by the alleged power of attorney holder of S. Rajinder Singh in favour of second defendant, in regard to certain agricultural lands (described in the prayer), are null and void qua the rights of the "co-parcenary", as they were not for legal necessity or for benefit of the family; and

(iv) for consequential injunctions restraining defendants 1 to 4 from alienating the suit properties.

2. The appellant claims to have paid a court fee of Rs.19.50 for the relief of declaration, Rs.117/- for the relief of joint possession, and Rs.42/- for the relief of permanent injunction, in all Rs.179/-. The learned Civil Judge heard the appellant-plaintiff on the question of court fee and made an order dated 27.2.2007 holding that the prayers relating to the sale deeds amounted to seeking cancellation of the sale deeds and therefore ad valorem court fee was payable on the sale consideration in respect of the sale deeds.

3. Feeling aggrieved the appellant filed a revision contending that he had paid the court fee under section 7(iv)(c) of the Court-fees Act, 1870; and that the suit was not for cancellation of any sale deed and therefore the court fee paid by him was adequate and proper. The High Court by the impugned order dated 19.3.2007 dismissed the revision petition holding that if a decree is granted as sought by the plaintiff, it would amount to cancellation of the sale deeds and therefore, the order of the trial court did not call for interference. The application filed by the appellant for review was dismissed on 11.2.2008. The application for recalling the order dated 19.3.2007 was dismissed on 24.4.2008 and further application for recalling the order dated 24.4.2008 was dismissed on 16.5.2008. Feeling aggrieved, the appellant has filed these appeals by special leave.

4. The limited question that arises for consideration is what is the court fee payable in regard to the prayer for a declaration that the sale deeds were void and not 'binding on the co-parcenary', and for the consequential relief of joint possession and injunction.

5. Court fee in the State of Punjab is governed by the Court Fees Act, 1870 as amended in Punjab ('Act' for short). Section 6 requires that no document of the kind specified as chargeable in the First and Second Schedules to the Act shall be filed in any court, unless the fee indicated therein is paid. Entry 17(iii) of Second Schedule requires payment of a court fee of Rs.19/50 on plaints in suits to obtain a declaratory decree where no consequential relief is prayed for. But where the suit is for a declaration and consequential relief of possession and injunction, court fee thereon is governed by section 7(iv)(c) of the Act which provides :

"7. Computation of fees payable in certain suits : The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows :

(iv) in suits - x x x x (c) for a declaratory decree and consequential relief.- to obtain a declaratory decree or order, where consequential relief is prayed, x x x x according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

In all such suits the plaintiff shall state the amount at which he values the relief sought:

Provided that minimum court-fee in each shall be thirteen rupees.

Provided further that in suits coming under sub-clause (c), in cases where the relief sought is with reference to any property such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of this section."

The second proviso to section 7(iv) of the Act will apply in this case and the valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of the said section. Clause (v) provides that where the relief is in regard to agricultural lands, court fee should be reckoned with reference to the revenue payable under clauses (a) to (d) thereof; and where the relief is in regard to the houses, court fee shall be on the market value of the houses, under clause (e) thereof.

6. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to 'A' and 'B' -- two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non- est/ illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if 'B', a non- executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section 7(iv)(c) of the Act. Section 7(iv)(c) provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto

makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of Section 7.

7. In this case, there is no prayer for cancellation of the sale deeds. The prayer is for a declaration that the deeds do not bind the "co-parceners" and for joint possession. The plaintiff in the suit was not the executant of the sale deeds. Therefore, the court fee was computable under section 7(iv)(c) of the Act. The trial court and the High Court were therefore not justified in holding that the effect of the prayer was to seek cancellation of the sale deeds or that therefore court fee had to be paid on the sale consideration mentioned in the sale deeds.

8. We accordingly allow these appeals, set aside the orders of the trial court and the High Court directing payment of court fee on the sale consideration under the sale deeds dated 20.4.2001, 24.4.2001, 6.7.2001 and 27.9.2003 and direct the trial court to calculate the court fee in accordance with Section 7(iv)(c) read with Section 7(v) of the Act, as indicated above, with reference to the plaint averments.

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**Hardeep Singh v. Baldev Singh & Ors.**

CM (M) No.476 of 2013 decided on 01.12.2014

2015(1) Capital Law Judgment 122 (Delhi High Court)

**NAJMI WAZIRI, J.** – 1. This petition impugns an order dated 21.12.2012 of the learned ADJ, Tis Hazari Courts in Suit No.434/2012 whereby the plaint was returned to the plaintiff/petitioner under Order VII, Rule 10 of the Code of Civil Procedure, 1908 (hereinafter referred to as „the Code”) to be filed before the Court of appropriate jurisdiction. The Court was of the view that the valuation report of the suit property as on 10.9.2012 showed it to be of the value of Rs.40,73,500/-, which was more than its pecuniary jurisdiction where the suit was filed. In these circumstances, the plaint was returned.

2. The petitioner has challenged the impugned order on the ground that he was seeking only 1/4th of the share in the suit property bearing No.221/71A, S-Block, Vishnu Garden, New Delhi. The suit property is said to be an area of 100 sq.yds. The petitioner claims an equal share of 25 per cent in the suit property along with the respondents which is claimed to have been acquired by his deceased mother from her own savings and resources. He contends that his request for division of the property for his portion was unheeded, hence, a legal notice was served, which too went unanswered. The petitioner had assessed the value of his share, i.e. 25 per cent on Rs.19,45,000/- for which ad valorem court fee, had been paid. However, the valuation report showed the properties valued at Rs.40,73,500/-, according to which the petitioner’s share came to be Rs.10,18,375/- and the court fee payable thereon would be Rs.12,299/-, which is far less than what had already been paid. The learned counsel for the petitioner has argued that the Trial Court erred in taking the value of the entire property into consideration for the purpose of jurisdiction instead of the share claimed by the petitioner/plaintiff. He submits that the Court is required to take into consideration the value of the share claimed and not of the entire property. In support of his contentions he relied upon the following judgments:

**i. Prakash Wati v. Dayawanti & Anr. AIR 1991 Delhi 48.**

**ii. Rani Devi v. Ashok Kumar Nagi & Anr. AIR 1999 Delhi**

**iii. Nisheet Bhalla & Ors. v. Malini Raj Bhalla & Ors. AIR 2007 Delhi 60.**

3. In **Prakash Wati** (supra), this Court held as under:

“2. .... It is settled law that in order to decide as to what relief has been claimed by the plaintiff, in fact, the whole of the plaint has to be read. It is clear that in case from the perusal of the plaint it is to be inferred that the plaintiff and defendants are in joint possession of the property in question, then the court fee paid initially on the relief regarding partition is correct but if the court is to come to the conclusion that the plaintiff is not in possession of any portion of the property in question then the plaintiff has to pay the court fee on the value of her share.

3. ...In view of these pleadings it cannot be inferred that the plaintiff is in joint possession of any portion of the property in question. Hence, the plaintiff has to, in

my opinion, pay the court fee on the value of her share for seeking the relief of partition and for possession of her separated share. In re Nanda Lal Makherjee. It has been held that if a person who is entitled to claim partition of the property is out of possession of his share he has to pay the court fee on the value of his share for seeking relief of possession of his share by partition...

4. ....Counsel for the plaintiff has made reference to Jagdish Pershad v. Joti Pershad 1975 Rajdhani Law Reporter 203, wherein it has been laid down that keeping in view the peculiar facts of the case that where the plaintiff claims to be in joint possession of the property of which partition is sought, the plaintiff is to pay only fixed court fee as per Article 17(vi) in Schedule II. There is no dispute about this proposition of law. Counsel for the plaintiff has then placed reliance on Neelavathi & others v. N. Natarajan & others, wherein the Supreme Court has laid down that it is settled law that the question of court fee must be considered in the light of the allegations made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on merits. It was held that the general principle of law is that in the case of co-owners the possession of one is in law the possession of all unless ouster or exclusion is proved. I think these observations of the Supreme Court go against the case of the plaintiff because in the present case reading of the whole of the plaint makes it clear that the plaintiff is alleging ouster from possession and thus, the plaintiff has to pay ad valorem court fee on the value of her share. I order accordingly. The deficiency in the court fee be made up within ten days and the suit be listed for further proceedings on August 21, 1990, in Short Matters."

4. In **Nisheet Bhalla** (supra), this Court while referring to Prakash Wati (supra), which had discussed the Supreme Court's dicta held as under:

"12. From a reading of all these three judgments, it is clear that normally if joint possession is pleaded by the plaintiff on the basis that he is the co-owner of the property, the Court-fee to be paid would be fixed Court-fee presuming the joint possession and even if the person is not in actual possession. However, if from the reading of the pleadings it becomes clear that the plaintiff was excluded from such possession, then he is unable to pay the ad valorem court-fee on the market value of his share. That is held by the Supreme Court also where it is stated that „the general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved."

5. In reply, the respondents have denied that the property was acquired by the deceased mother from her own savings and resources but she only lived in it till her demise; that the petitioner was fully well aware of this and had filed the suit with mala fide intentions; that the pecuniary jurisdiction of a Court is assessed on the total value of the property and not on the share claimed by the plaintiff. The learned counsel for the respondents has relied upon the judgement of this Court in **CS (OS) No.2546/2010 titled Anu v. Suresh Verma & Ors. decided on 12.7.2011**, which held inter alia as under:

"5. ....It would thus be seen that in view of the rules framed by Punjab High Court under Section 9 of Suits Valuation Act, which admittedly are applicable to Delhi, there can be separate valuations for the purpose of Court fee and jurisdiction. The

valuation for the purpose of jurisdiction has to be the value of the whole of the properties subject matter of partition, whereas valuation for the purpose of Court fee would be such as is provided by the Court-fees Act.

Section 7(iv)(b) of Court Fees Act, provides that in a suit to enforce the right to share in any property on the ground that it is a joint family property, the amount of fee payable under Court-fee Act, shall be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. It further provides that in all such suits the plaintiff shall state the amount at which he values the relief sought by him. Article 17(vi) of Schedule II of Court-fees Act provides for payment of a fixed Court fee in a suit where it is not possible to estimate at a money value the subject matter in dispute, and which is not otherwise provided for by this Act."

6. The plaintiff had claimed that the suit property was acquired by his mother, Smt.Narender Kaur from her own savings and resources and he being a Class-I Legal Heir, was entitled to 1/4th of its share. Although, he admits that he is out of possession, but insofar as he Neelavathi v. N. Natarajan AIR 1980 SC 691, claims joint possession as a successor and seeking and partition of the said property, he would be required to pay the court fee on the value of his share as held in Prakash Wati (supra). However, for the purpose of jurisdiction, the valuation of the entire property will have to be seen as prescribed under Rule 8 of the Rules made by the Punjab High Court under section 9 of the Suits Valuation Act which are applicable to Delhi. The dicta of this Court in Suresh Verma (supra) would be clearly applicable to the present case which held that "The valuation for the purpose of jurisdiction has to be the value of the whole of the properties subject matter of partition, whereas valuation for the purpose of Court fee would be such as is provided by the Court-fees Act." Insofar as the plaint was returned on the ground that the value of the property was more than the pecuniary jurisdiction of the Court, the decision of the Trial Court cannot be faulted.

7. This Court finds no reason to interfere with the impugned order. It does not suffer from material irregularity. This petition is without merit and is accordingly dismissed.

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**NAND KISHORE KALRA V. HARISH MATHUR**

RSA 271/2015 and C.M No. 13014/2015

2015 (3) Capital Law Judgement 612 (Delhi HC)

**VIPIN SANGHI, J.** – 1. The present second appeal has been preferred by the appellant to assail the judgment dated 15.07.2015 passed by the learned Additional District Judge-02, South District, Saket Courts Complex in R.C.A. No.8/2015 titled Nand Kishore Kalra Vs. Harish Mathur. By the impugned judgment, the First Appellate Court has dismissed the first appeal preferred by the appellant/ defendant against the judgment passed by the learned Civil Judge-02 (South), Saket Courts Complex, New Delhi in CS No.355/2014 titled Harish Mathur Vs. Nand Kishore Kalra. The respondent/ plaintiff had preferred the said suit to seek possession (the same was, in fact, a suit for ejection), recovery of Rs.2,88,600/- along with damages/ mesne profits, and future mesne profits/ damages for use and occupation of the suit property against the appellant herein.

2. The undisputed facts are that the appellant is a tenant of the respondent in a portion in property bearing No. E-38, Hauz Khas, New Delhi. The tenanted property consisted of one shop on the ground floor of the said property. The case of the plaintiff was that his father had initially let out the shop on the ground floor to the defendant vide lease deed dated 01.09.1980 at a monthly rent of Rs.130/-. After the demise of the plaintiff's father on 09.02.1995, the defendant started paying rent to the mother of the plaintiff, who also expired on 27.09.2005. The plaintiff claimed that he is the sole heir and the owner of the entire property, including the suit/ tenanted premises. The plaintiff stated that the last rent paid by the defendant was Rs.600/-, which was deposited by the defendant in the Court of the learned Rent Controller for the period January 2011 to February 2012 in a petition for deposit of rent being D.R. No.78/2012.

3. The plaintiff further stated that he desired to take back the premises from the appellant, and consequently preferred an eviction petition in the Court of learned Rent Controller under Section 14(1)(e) of the Delhi Rent Control Act (the Act). The appellant defendant filed his application to seek leave to defend the said petition and in the said leave to defend, the stand taken by the appellant/ defendant was that the rent of the tenanted premises had been increased from January 2011 onwards from Rs.600/- to Rs.11,000/-. The plaintiff claimed that he had terminated the tenancy of the defendant w.e.f 31.03.2013, however, the defendant had not vacated the suit premises, and consequently, the suit had been filed. The plaintiff also claimed arrears of rent for the period January 2011 to 31.03.2013 at the rate of Rs.11,000/- per month after granting adjustment of the amount of Rs.8,400/- deposited by the appellant/ defendant in the Court of the learned Rent Controller. The balance amount claimed by the plaintiff was Rs.2,88,600/-.

4. The appellant/ defendant filed his written statement and took the plea that the rent was Rs.600/- per month and, therefore, the suit before the Civil Court was barred under Section 50 of the Act. The defendant/ appellant also took a plea - in paragraph 5 of the preliminary objections, that the suit is not maintainable on account of the same not being properly valued for the purpose of Court Fees and pecuniary jurisdiction. It was claimed that since the rent of



the premises is Rs.600/- per month, therefore, the plaintiff is not entitled to seek recovery of possession of the suit property on the basis of the alleged rent to be Rs.11,000/- per month. It was claimed that the suit had been undervalued. The objection was that the plaintiff had to pay ad- valorem Court Fee on the market value of the property, since he was seeking possession.

5. The issues were framed by the Trial Court on the basis of the pleadings, which read as follows:

- "1. Whether the plaintiff is entitled to decree of possession in his favour against the defendant as prayed for in prayer clause (a)? OPP
2. Whether the plaintiff is entitled to decree of recovery of arrears of rent as prayed for in prayer clause (b)? OPP
3. Whether the plaintiff is entitled to decree of mesne profit/damages as prayed for in prayer clause (c)? OPP
4. Whether the plaintiff is entitled to decree of any interest?  
If so, at what rate and from which period? OPP
5. Whether the jurisdiction of present Court is barred by the provisions of Section 50 of the DRC Act? OPD
6. Whether the rate of rent is Rs.11,000/- per month or Rs. 600/- per month? Onus of proof on the parties
7. Whether the suit of the plaintiff is valued properly for purpose of Court fees and jurisdiction? OPD
8. Relief, if any."

6. The parties led their respective evidence. The plaintiff led in evidence the application seeking leave to defend filed by the appellant/ defendant in eviction petition under Section 14(1)(e) filed by him before the learned Rent Controller as Ex.PW-1/5.

7. The Trial Court decreed the suit after returning findings on all the issues in favour of the plaintiff. Consequently, apart from ejection of the appellant/ defendant, money decree was also passed in respect of arrears of rent for the period 01.01.2011 to 31.03.2013 for Rs.2,88,700/-, apart from mesne profits/ damages @ Rs.11,000/- per month from the date of termination of tenancy, i.e. 01.04.2013 till vacation of the suit premises. Interest was also granted @ 12% per annum on the mesne profits/ damages from the date of filing of the suit till realization. Costs were also awarded to the respondent/ tenant.

8. In the first appeal preferred by the defendant/ appellant, the said findings were affirmed. Both the Courts below have held that the rent, as admitted by the appellant/ defendant himself in his application to seek leave to defend (Ex.PW-1/5), was Rs.11,000/- per month.

9. At the appellate stage, it appears that the appellant herein raised an objection to the pecuniary jurisdiction of the Trial Court, by claiming that the aggregate value of the reliefs sought were in excess of Rs. 3 Lakhs, which is the limit of pecuniary jurisdiction of the learned Civil Judge. This was on the premise that the annual letting value of the suit premises

- on the basis of rent of Rs.11,000/- came to Rs.1,32,000/-, and the claim for arrears of rent was Rs.2,88,600/-. Consequently, the aggregate of value of the claim came to Rs.4,20,600/-.

10. In view of the said objection raised by the appellant, the respondent plaintiff moved an application under Order VI Rule 17 CPC seeking to amend the plaint, and thereby give up a part of his claim. Paragraph 2 of the said application reads as follows:

"2. That the suit filed by the Respondent/ Plaintiff had been decreed qua possession and arrears of rent for the period January 2011 to march, 2013 amounting to Rs.2,88,600/- (Rupees two lakhs eighty eight thousand and six hundred only) from the defendant. However, there is a technical issue regarding the adjudication of the present suit by the Court of the Ld. Civil Judge as the claims of the Respondent in the suit oust the pecuniary jurisdiction of the Ld. Civil Judge. The respondent/ plaintiff therefore, seeks leave of this Hon'ble Court to suitably amend the original plaint and abandon part of his claim towards arrears of rent and is only now claiming a sum of Rs.1,66,700/- (Rupees one lakh sixty six thousand and seven hundred only) from the appellant/ defendant towards arrears of rent and is abandoning his claim of Rs.1,25,000/- (Rupees one lakh and twenty five thousand only)"

11. This application was allowed by the First Appellate Court on 15.07.2015 itself. Learned counsel for the appellant submits that the said order has been assailed by the appellant by filing a petition under Article 227 of the Constitution of India being CM(M) No.428/2015. However, learned counsel for the appellant has made his submissions on this aspect as well, being fully conscious of the fact that the findings returned by this Court on the said aspect shall also have a bearing on the pending CM(M) No. 428/2015.

12. The first submission of learned counsel for the appellant is that even though the appellant/ defendant had stated, that in January 2011, the parties had compromised their disputes and differences, and on the demand of the respondent herein to increase the rent to Rs.11,000/- per month, the same was so increased by the appellant/ defendant, the plaintiff in his cross-examination in the present suit had admitted that the rent was Rs.600/- per month at the time of filing of the present eviction petition.

13. Learned counsel for the appellant further submits that the mere tendering in evidence of the petition seeking leave to defend filed by the appellant/ defendant in the eviction petition, i.e. Ex.PW-1/5 was not sufficient, and it was necessary for the respondent/ plaintiff to confront the appellant with the said application to seek leave to defendant (Ex.PW-1/5) so as to give an opportunity to the appellant to explain the said admission. In this regard, reliance has been placed by learned counsel on *Udham Singh Vs. Ram Singh & Another*, (2007) 15 SCC 529, and in particular on the following extract from paragraph 9 of the said judgment.

"9. ... .. It is a question which needs to be considered as to what weight is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act. It would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission. In our view, the High Court was again wrong in attaching much weight to the averments made in

the earlier plaint and coming to the conclusion that the defendants were admitted to be the tenants by the plaintiff on the land in question."

14. Learned counsel for the appellant further submits that, firstly, the mere amendment of the plaint at the appellate stage would not confer pecuniary jurisdiction on the learned Civil Judge when he did not have the said jurisdiction at the time when the suit was filed, or when the suit was decreed. He further submits that the amendment was unjustifiably granted by the First Appellate Court.

15. Having heard learned counsel for the appellant, I am of the view that there is absolutely no merit in this appeal and no question of law, much less a substantial question of law arises for consideration of this Court. There is absolutely no perversity, or illegality in the approach of the Courts below, and none has been pointed out by learned counsel.

16. The admission made by the appellant/ defendant in paragraphs 8 & 9 of the application to seek leave to defend (Ex.PW-1/5) in the earlier eviction petition preferred by the respondent/ landlord may be extracted. The same reads as follows:

"8. That in Jan.2011, the Petitioner also compromised his dispute and differences with the Respondent and he demanded increment in rent to Rs.11,000/- which was accepted by the Respondent, who has paying the rent to the Petitioner at the said rate. Hence, the current rate @ Rs.11,000/- (Eleven Thousand Only) p.m. is being charged by the Petitioner from the Respondent since January 2011, but no rent receipt has been issued by the Petitioner, despite request and demands of the Respondent. The rent of Rs.11,000/- has been increased by the Respondent in good faith on the demand of the Petitioner. However, the rate of Rs.600/- per month has been shown tendered and got deposited in the Court of Ld. Rent Controller, Delhi, to avoid any kind of dispute and harassment to the Respondent, so much so that the Petitioner had assured and promised the Respondent as such. But the Petitioner has backed out from his promises and assurances, which is misuse of faith and trust of the Respondent.

9. That the Petitioner is also received a sum of Rs.4,60,000/- from the Respondent besides the increment of rent @ Rs.11,000/- per month but no receipt was issued by the Petitioner except one receipt of Rs.10,000/- (Rs. Ten Thousand only) was issued by the wife of the Petitioner. Hence, the Petitioner had resolved all the disputes and differences with the above understanding and that he did not make any demand of increment rent from the Respondent, which has proved futile."(emphasis supplied)

17. From the above, it would be seen that the positive and categorical case of the appellant/ defendant was that on account of a compromise arrived at between the parties, and to meet the demand of the respondent/ plaintiff, the appellant/ defendant had agreed to increase the rent of the said premises to Rs.11,000/- per month and that he "has been (sic) paying the rent to the Petitioner at the said rate. Hence, the current rate @ Rs.11,000/ (Eleven Thousand Only) p.m. is being charged by the Petitioner from the Respondent since January 2011, but no rent receipt has been issued by the Petitioner, despite request and demands of the Respondent. The rent of Rs.11,000/- has been increased by the Respondent in good faith on the demand of the Petitioner". He also stated that the rent at the rate of Rs.600/- per month has been shown to have been tendered and got deposited in the Court of learned Rent Controller, Delhi to avoid

any kind of dispute and harassment to the appellant/ defendant herein. Pertinently, the said eviction petition under Section 14(1)(e) was withdrawn by the respondent herein on account of the stand taken by the appellant/ defendant that the rent was Rs.11,000/- per month.

18. The statement made by the respondent/ plaintiff in his cross- examination- to the effect that the rate of rent on the date of filing the above said petition, (namely, the eviction petition), was Rs.600/- per month, is of no avail for several reasons. Firstly, the said statement pertains to the period prior to the filing of the eviction petition. However, thereafter the appellant had filed his application to seek leave to defend (Ex.PW-1/5), thereby setting up a defence that the rent was Rs.11,000/- per month since January 2011. Secondly, in answer to the suggestion that the rent for the month of January 2011 was not Rs.11,000/-, the respondent/ plaintiff had stated that on mutual agreement between the parties, the rate of rent has been increased from Rs.600/- to Rs.11,000/- directly. However, he did not remember when the said increase was effected. Lastly, the appellant himself having categorically stated that the rent had been increased to Rs.11,000/- per month from January 2011 upon mutual agreement of the parties, is bound by his admission. This admission of the appellant/defendant had been accepted and acted upon by the respondent/plaintiff, who withdrew his eviction petition under Section 14(1)(e) of the Act. The endeavour of the appellant to wriggle out of his said admission, and to blow hot & cold could not have been countenanced.

19. The findings returned by the Trial Court as well as the First Appellate Court on the issue of rate of rent, are findings of fact arrived at upon appreciation of evidence led by the parties, and it cannot be said that the said findings are perverse, or arrived at on the basis of no evidence, or wrong appreciation of evidence. It also cannot be said that the Courts below have misdirected themselves in law, in returning the said findings. In these circumstances, this Court would not interfere with the consistent findings of fact in second appeal.

20. The submission that the appellant should have been confronted with Ex.PW-1/5, has no merit. The extract quoted above from Udham Singh (supra) shows that it is only where the admission sought to be relied upon is not clear, or unambiguous, "it would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission". Firstly, the Supreme Court could not be said to have laid down a rule of evidence while making the said observation. Secondly, in the present case, the admission of the appellant/ defendant was as clear as day light. It was categorical, that the rent had been increased to Rs.11,000/- per month from January 2011 in view of the compromise arrived at between the parties. It was for the appellant/defendant to establish his defence on his own, and it was sufficient for the respondent/plaintiff to establish on record the clear and unambiguous admission of the appellant/defendant.

21. The submission that the learned Civil Judge did not have pecuniary jurisdiction to try the suit, and that the amendment application moved by the respondent/ plaintiff at the appellate stage, firstly, could not have been allowed; and secondly, would not vest jurisdiction in the Trial Court, also has not merit. Pertinently, the preliminary objection raised by the appellant, as extracted above, in substance is an objection to the valuation of the reliefs and payment of Court Fees by the plaintiff. Though the said objection was that the suit is not maintainable on account of the same not being properly valued for the purposes of pecuniary jurisdiction, a

complete reading of paragraph 5, as extracted above, shows that the said preliminary objection is to the non-payment of Court Fees on the basis of market value of the suit property. It is well-settled that a suit for ejectment of a tenant, or an erstwhile tenant is valued for the purpose of Court Fees and jurisdiction on the basis of annual letting value. It is not to be valued on the market value of the suit property. Reference in this regard may be made to Section 7 of the Court Fees Act, 1870.

22. In any event, no issue was pressed by the appellant/ defendant to say that the reliefs sought were beyond the pecuniary jurisdiction of the Civil Court. Issue No.7 framed by the Court at the behest of the appellant was: "Whether the suit of the plaintiff is valued properly for purpose of Court fees and jurisdiction". From the judgment of the Trial Court, it appears that it was not even the case of the appellant that the reliefs sought were beyond the pecuniary jurisdiction of the Civil Court. Thus, by virtue of Section 21(2) CPC, the said objection could not have been raised at the first appellate stage, and cannot be raised now before this Court. In *Subhash Mahadevasa Habib vs. Nemasa Ambasa Dharmadas & Others*, (2007) 13 SCC 650, in para 34, the Supreme Court has considered the said provision. Moreover, the respondent/ plaintiff upon becoming conscious of the said objection at the appellate stage, moved the amendment application, as aforesaid, to obviate the said technical objection. It is open to a plaintiff, at any stage of the proceedings, to give up a part of his claim unconditionally. Therefore, prima-facie, it appears that there could be no justification to deny the amendment application moved by the respondent/ plaintiff to seek amendment of the plaint, so as to give up a part of his claim to obviate the objection with regard to the pecuniary jurisdiction of the Civil Judge. The amendment, having been allowed, relates back to the original filing of the plaint. Consequently, for all purposes and intents, the amended suit was maintainable before the learned Civil Judge, and fell within the pecuniary jurisdiction of the said Court, at all material times.

23. For all the aforesaid reasons, I find absolutely no merit in this petition and dismiss the same.