
(2003) 07 DEL CK 0057

In the Delhi High Court

Case No : Suit No. 719 of 1982 and I.As. 84/99 and 3530/99 with Counter Claim No. 1031 of 1987

Madan Lal Kapur

APPELLANT

Vs

Subhash Lal Kapur and Others

RESPONDENT

Date of Decision : 23-07-2003

Acts Referred:

Arbitration Act, 1940 — Section 34
Evidence Act, 1872 — Section 91, 92, 99
Registration Act, 1908 — Section 17(1), 17(2), 49
Trusts Act, 1882 — Section 3(1), 3(2), 4(1), 4(2), 4(3)

Citation : (2003) 8 AD 108 : (2003) 105 DLT 987 : (2003) 71 DRJ 732

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Y.P. Narula and Anil Panwar, for the Appellant; V.B. Andley Rajender Mathur and Charu Verma, for the Respondent

Judgement

Vikramajit Sen, J.—The plaintiff has prayed for the partition of property bearing No.R-565, New Rajinder Nagar, New Delhi (hereafter referred to as the `suit property") on the grounds that he along with Defendant No.1 are the joint and equal owners thereof. It has been averred that the plaintiff and Defendant No.1 had purchased the undivided half-share each in the said property vide two Sale Deeds dated 21.11.1977. All the parties hereto are brothers. The plaint discloses that Defendant Nos.1 to 4 are working in partnership in the name and style of Messrs. Nawab Packers, New Delhi. Defendant No.1 is stated to have invested the funds of the firm for purchasing the half-share in the suit property and that Defendant Nos.2 to 4 are claiming interest in the said property on the premise of the said investment having been made from the funds of the firm. It is further averred in the plaint that the plaintiff and Defendant No.1 got the Plans sanctioned from the MCD on 27.7.1978 and started rebuilding the property immediately, after demolishing the existing structure. These two parties had agreed to share the cost of construction in equal proportion. The structure of the

building was almost complete by July, 1979. Defendant No.1 had incurred the initial cost of construction and it was agreed between him and the plaintiff that the latter will pay his fifty per cent share of the cost of construction after the completion of the entire building. However, in July, 1979, after the structure had nearly been completed, Defendant No.1 stopped further construction and started demanding from the plaintiff his share of the cost of construction. Defendant Nos.2 to 4, being partners of the firm also started intervening and claiming interest in the property. The plaintiff was forced to enter into an unreasonable Agreement of Construction by Defendants on 9.8.1979. However, despite this Agreement the Defendants failed to complete the building and abandoned the project. The plaintiff thereupon moved into fifty per cent of the first floor portion in the incomplete building and is in possession till date. Thereafter (as pleaded in the plaint) in March, 1981 the plaintiff and the Defendants raised a loan from the New Bank of India towards the cost of construction of the entire building. It is averred that the "plaintiff agreed to that effect with a view to resolve all disputes with the Defendants.". The said Bank advanced a loan of Rs.6 lakhs and also agreed to take part of the premises on loan for five years on a monthly rent of Rs.19,950/-. It is pleaded that before signing the loan documents with the Bank on 30.9.1981 the parties entered into an Agreement, the salient feature of which are that the Defendants will complete the construction in all respects and that the rent proceeds will be distributed in the ratio of thirty-five per cent for the plaintiff and sixty-five per cent for the Defendants; and that the plaintiff will pay thirty-five per cent of the cost of construction upon completion. The Agreement states that it supersedes all the previous agreements. From the loan of Rs.6 lakhs, Rs.2,08,588.50 was received by the plaintiff and the remainder by the Defendants. Out of said amount of Rs.2,08,588.50 the plaintiff paid to the Defendants a sum of Rs.1,60,000/- towards the cost of construction, even though this amount was payable only on the completion of the construction. Despite this, the Defendants have not completed the construction till date. It is further pleaded that the Defendants had received a sum of Rs.5,51,411.50 which is much more than the amounts invested by them in the building. In the plaint it is further averred that the Agreement dated 30.9.1981 is a building contract, and is not a registered instrument. Since the construction was not completed, the plaintiff had terminated the contract on 14.5.1981. The plaintiff has claimed for a decree of rendition of account pertaining to the cost of construction in regard to Defendant Nos.1 to 4; decree of partition; and a permanent injunction against the Defendants restraining them from interfering with the right, title, interest and possession of the plaintiff in the suit property.

2. The Defendants, i.e. the four brothers of the plaintiff, have filed a Written Statement in which a Counter-Claim has also been lodged. It is averred by them that the property already stood partitioned in the ratio of thirty- five per cent with the plaintiff and sixty-five per cent with the Defendants. A wall separating the first floor in this ratio had been erected and the plaintiff's portion had been thereby demarcated and separated from the rest. The second floor was similarly

separated. The basement, ground floor and mezzanine floors have been jointly let out to the New Bank of India as per Lease Deed dated 30.9.1981 and the rent has been apportioned in the said ratio of thirty-five per cent for the plaintiff and sixty-five per cent for the Defendants. It is pleaded that the parties are co-owners of the suit property in the ratio mentioned above. The Defendants have admitted the averments pertaining to the partnership Nawab Packers as also investments mentioned in paragraph 5 of the plaint. It has been categorically denied that the plaintiff and Defendant No.1 agreed to share the cost of construction in equal shares instead of ratio mentioned above. The Defendants have asserted that the plaintiff invested only Rs.1,00,000/- comprising fifty per cent from his own funds and fifty per cent from borrowings from the Laxmi Commercial Bank. The entire expenditure on the construction was incurred by the Defendants. The construction was continuing in August, 1979 by which time the Defendants had spent a sum of Rs.2,70,000/- till 9.8.1979. It has been denied that the plaintiff was forced to enter into the Agreement dated 9.8.1979 of which he has taken advantage and benefit, and is thus bound by its terms. It has been denied that the Defendants had failed to complete the building or had abandoned the project. Instead, it is stated that the entire building has been completed and is presently yielding a monthly rent of Rs.23,000/- as a branch of New Bank of India is in operation in the basement, ground and mezzanine floors. It is averred that the plaintiff did not let the Defendants complete the erection of the wall whereby the first floor was divided in the said ratio, "nor did the plaintiff allow the Defendants to demolish the wall originally erected or constructed". Thereupon a notice dated 9.2.1981 was issued by the Defendants and was replied to by the plaintiff in terms of his letter dated 3.3.1981 whereby the Agreement dated 30.9.1981 was terminated by the plaintiff. It has also been pleaded that after the filing of the plaint on 15.5.1981 a Local Commissioner visited the site on 27.5.1982 and found the wall separating the thirty-five per cent of the First floor and of the Barsati to be in existence. Reliance has been placed on the plaintiff's letter dated 30.9.1981 authorising Defendant No.2 to hand over possession of the plaintiff's thirty-five per cent of building to the Lessee namely New Bank of India. From the loan of Rs.2 lakhs, a sum of Rs.70,000/- was credited to the plaintiff's account while Rs.1,30,000/- was credited to the Defendant's account. Thereafter the possession of the demised portion was handed over to the Bank on 10.11.1981 and the parties borrowed a sum of Rs.6 lakhs and executed sundry documents on 16.11.1981. The disbursements have been made in the said ratio of thirty-five per cent to the plaintiff and the rest to the Defendants. Reliance has been placed on the Agreement dated 30.9.1981 between the parties in which the plaintiff had agreed to pay a sum of Rs.1,50,000/- to the Defendants to be adjusted towards part payment of the cost of construction. The Written Statement highlights that the plaintiff had admitted ownership to the extent of thirty-five per cent in the Lease Deed with the Bank, and the sharing of the rent in this very ratio. Although paragraph 16 of the plaint has been denied, the receipt of the sum of Rs.1,60,000/- stands admitted by the Defendants. It has also been pleaded that

Rs.16,000/- was accepted by the plaintiff from the Defendants in full and final settlement of the amounts spent till that date on the construction and other miscellaneous expenses pertaining to the suit property. Paragraph 17 of the plaint, in which it has been mentioned that a sum of Rs.5,51,411.15 had been received by the Defendants towards the cost of construction, has been denied. It is pleaded that since accounts up to 30.9.1981 having been mutually settled between the parties they cannot be reopened and the Defendants are not liable to render accounts up to that period. It has been further pleaded that a sum of Rs.4,10,000/-has been spent by the Defendants on the construction of the property over and above their sixty-five per cent share and that the plaintiff had admitted that this sum was due from him as on 30.9.1981 and interest at the rate of sixteen per cent per annum has been claimed by the Defendants. It has been categorically denied that the Agreement dated 30.9.1981 is a "building contract", and that the Defendants have failed to perform their obligations, and that the unilateral termination of the Agreement is absolutely illegal and void. It has been asserted that the market value of property on the date of the filing of the suit is not less than Rs.40 lakhs, and that the plaintiff is liable to pay only thirty-five per cent of the total cost of construction and not fifty per cent as claimed by him. It has been pleaded that, so far as rent is concerned, the plaintiff is in a position to ascertain and claim a specific amount and he is liable to pay ad valorem court-fee thereon. The valuation of plaint has been objected to.

3. The case of the Defendant Nos.1 to 4 is that the plaintiff and the Defendants, being real brothers, were at the relevant time residing jointly in House No. B-4/175, Safdarjung Enclave New Delhi. The suit property, which was old and dilapidated, was purchased by them from Shri N.N. Seth, each having 20 per cent undivided share therein. But at the instance of the mother of the parties the plaintiff's share in the said property was enhanced from twenty per cent to thirty-five per cent and the remainder sixty-five per cent belonged to Defendant Nos.1 to 4 jointly. The sale in favor of the plaintiff and Defendant No.1 was benami for and on behalf of and for the benefit of all the five brothers. The plaintiff invested only Rs.1 lac and the remaining entire amount for acquiring, demolishing and reconstructing the said property was incurred and spent by Defendant Nos.1 to 4 from their personal sources as well as from the funds of their partnership firm Messrs. Nawab Packers.

4. Since the plaintiff intended to obtain a loan from the Bank for partly financing the cost of the property, it was agreed that instead of one, two Sale Deeds would be executed, one in favor of the plaintiff and the other in favor of Defendant No.1 because the other Defendants namely, Defendant Nos.2 to 4 were not eligible to purchase any property built on the government land. The plaintiff and the Defendant No.1 were the only two brothers who did not own any property built on government land. Consequently, with the permission of the L & DO two Sale Deeds dated 21/11/77 were executed. It has been contended that at the start the plaintiff had only Rs.50,000/- and the remaining amount in the purchase of the suit property was spent by Defendant Nos.1 to 4 who have been carrying on

business under the name and style of Messrs. Nawab Packers.

5. According to the Agreement dated 22/8/77, the sale consideration was agreed to be Rs.1,85,000/- out of which Rs.25,000/- was paid on 22/8/77, Rs.85,000/- was to be paid on or before 31/10/77 and the balance of Rs.75,000/- was to be paid on the registration of the Sale Deeds. The entire cost of the stamp and registration of the Sale Deed was to be paid by the Vendees. The possession of old and dilapidated property was delivered by Shri N.N.Seth on 31.10.77 and the Vendees paid Rs.85,000/- to the Vendor on 31.10.77 vide Ex. PW-1/2. The Sale Deeds were executed on 21/11/77. The plaintiff pledged the Sale Deed Ex. PW-1/3 with his employer bank and took a loan of Rs.50,000/- which was also invested by him in the deal. Rest of the entire expenditure incurred in acquiring, demolishing and reconstructing the property has been done by the defendants Nos.1 to 4 either from their own sources and/or from the funds of Messrs. Nawab Packers. By August, 1979 the masonry work of the building was practically complete and up to 9.8.1979 the plaintiff and the Defendants went into the accounts of the expenditure made by them and it was agreed that up to 9.8.1979 the Defendants had incurred an expenditure of Rs.2,70,000/- on the re-building. This is admitted by the plaintiff in the Agreement dated 9.8.1979, Ex.D1/1, as also the manner in which the property was purchased, the amount spent in reconstruction, and that all the five brothers were owners of the suit property. However, some dispute had arisen between the parties regarding the share of the plaintiff in the said property it was mutually decided at the intervention of the mother and near relatives and friends and that all the five brothers were the owners of the said property, thirty-five per cent share of the plaintiff and sixty-five per cent share of the Defendants collectively. It was also decided that the Flat towards the Bank side will be exclusively occupied by the plaintiff and the other towards the Fire Brigade side will be occupied by the Defendant Nos.1 to 4 and they were free either to reside in it or to let it out or to deal with it in any manner they like. The construction thereafter further continued and up to 30.9.1981. The plaintiff had invested only a sum of Rs.1 lac (Rs.50,000/- from his own pocket and Rs.50,000/- taken on loan from his employer Bank on the collateral of the equitable mortgage of the Sale Deed executed in his favor). up to 30.9.1981 the Defendant Nos.1 to 4 had spent a sum of Rs.4,10,000/- over and above their sixty-five per cent share of the cost of construction. The plaintiff admitted the said amount due from him in the agreement Ex.D1/1 but was not in a position to repay the same and agreed to pay the same along with interest at the rate of sixteen per cent.

6. The parties decided to let out a portion of the property with a view to raise funds. The rents would be released at the rate of thirty-five per cent by the plaintiff and sixty-five per cent by the Defendants and the aforesaid amount due from the plaintiff to the Defendants together with interest shall be the first charge on the rents so released by the Bank to the plaintiff till that entire amount is fully paid up. The aforesaid agreement Ex.D1/1 and D1W1/1 were executed by the parties containing the terms and conditions already agreed upon by them, at

the intervention of their mother. The said two documents constitute a family settlement between the parties, which does not require registration.

7. On 30.9.81, the plaintiff, being the owner of thirty-five per cent share and the Defendants being owner of sixty-five per cent collectively of the suit property, let out to the New Bank of India, the basement floor, ground floor and the mezzanine floor of the said property at a rental of Rs.19,550/- per month as registered as per Lease Deed dated 30.9.1981, certified copy of which is Ex.D1W1/A. According to the said Lease Deed the monthly rents of the said property were to be apportioned thirty-five per cent to the plaintiff and sixty-five per cent to the Defendants. The said Lease Deed has since been renewed with enhanced rents and the rents are being apportioned in the said ratio till date, i.e., plaintiff thirty-five per cent and Defendants sixty-five per cent. On 30.9.1981, the plaintiff vide Ex.D1 authorised Shri Jawahar Lal Kapoor, Defendant No.2 to hand over the plaintiff's thirty-five per cent share of the demised premises to the Bank. The possession of the premises was delivered to the Bank on 10.11.1981 vide Ex.D1/6.

8. The Lease Deed Ex.D1W1/A provided that the Bank would pay advance rent to the plaintiff and the Defendants and also advance a loan in which event the Bank would be entitled to appropriate half of the rent towards the repayment of the loan and the interest becoming due thereon and in case advance payment of rent is made, then the Bank will be entitled to adjust remaining half of the current rent to recover the said advance paid.

9. The parties took a loan of Rs.2 lacs from the Bank vide Pronote Ex.D1/2 dated 1.10.1981. The amount of the said loan was deposited by the Bank in the aforementioned ratio viz. thirty-five per cent in the account of the plaintiff and sixty-five per cent in the account of the Defendant Nos.1 to 4 vide voucher Ex.D1W/3. Vide document Ex.D1/7 dated 1.10.1981 the plaintiff directed the lessee Bank to issue a cash order for Rs.44,706/- in favor of Messrs. Laxmi Commercial Bank Ltd. towards adjustment of his loan account with that Bank and directed the lessee Bank to adjust out of his share of the loan of Rs. 2 lacs, the said sum of Rs.44,706/- and on payment of the cash order Laxmi Commercial Bank Ltd. take delivery of the original Sale Deed pledged by him with that Bank. In consideration of the said loan of Rs.2 lacs, the two Sale Deeds referred to above executed by Shri N.N. Seth were deposited with New Bank of India, Rajinder Nagar, New Delhi on 1.10.1981, i.e., the Lessee Bank.

10. On 16.11.1981 the parties further borrowed a sum of Rs.6 lacs from the lessee Bank vide Pronote Ex.D1/4 which was disbursed by the Bank as mentioned in Ex.D1/5. The Bank first deducted a sum of Rs.2,04,032.87 ps. out of the said sum of Rs.6 lacs and the balance sum of Rs.1,38,588.50 ps. was credited to the plaintiff's account representing thirty-five per cent of the amount and a sum of Rs.2,57,378.63 being sixty-five per cent of the amount was credited to the account of Defendant Nos.1 to 4 vide Ex.D1/5.

11. By that time almost the entire building had been completed and the plaintiff had shifted to the flat on the first floor towards the Bank side and had received a sum of Rs.16,000/- alleged to have been spent by him on the construction and all other miscellaneous expenses in settlement of the said investment from the Defendants vide Ex.D1/10. The loan amount taken from the New Bank of India was being paid in the ratio of thirty-five per cent by the plaintiff and sixty-five per cent by the Defendants as stated above.

12. That the parties have acted upon the terms and conditions which were settled before the execution of the documents dated 9/8/79 and 30/9/81. As mentioned in paragraph 40 of the Counter-Claim, a wall demarcating thirty- five per cent portion of the Flat on the Bank side was demarcated by erecting a brick wall which is shown by letter "A-A" in the plan Ex.CD/3. The plaintiff did not permit the said wall to be erected at point "a1 to a2" because the thirty- five per cent share of the flat on the first floor in occupation of the plaintiff is marked A in the said CD/3. The original wall equally dividing the two flats on the first floor is at point "bb". The plaintiff without any right, title or interest is using the space in between the said two lines and is liable to pay Rs.1,484.43 per month as mentioned in paragraph 43 of the Counter-Claim and as on 31/3/87 and up to the date of filing of the Counter-Claim, the plaintiff became liable to pay Rs.1,55,533.43 to the Defendants with accrued interest which is mentioned in Schedule A annexed to and forming part of Counter-Claim. The plaintiff is also liable to pay compensation/manse profit in respect of the said portion at the said rate till he removes himself from the said excess portion and restores possession thereof to the Defendants. The plaintiff has not only acted upon the various agreements mentioned above but has also acquiesced in and is now estopped from contending that his share of the property is fifty-per cent.

13. That when the Defendants asked the plaintiff to pay his thirty-five per cent share of the total investment made by these Defendants in acquiring, demolishing and re-erecting the said property in all respects, the plaintiff for the first time repudiated the Agreement dated 30/9/81 and falsely stated that the construction has not been completed by the Defendants and the Agreement dated 30.9.81 stands terminated vide Ex.D2 dated 14.5.82. The plaintiff has admitted the factum, legality and the validity of the agreement dated 30.9.81 and has not challenged it till the filing of the suit. On the contrary the plaintiff has enjoyed the benefits under the agreement dated 30.9.81. The plaintiff has not even paid his share of the cost of construction calculated at the rate of thirty-five per cent. The plaintiff is liable to render accounts and to pay the amount actually found due by him to the Defendants. The plaintiff is also liable to pay compensation/manse profits amounting to Rs.1,55,533.43 per annum as on 31.3.87 along with interest as per Schedule A and to pay compensation/manse profits till he actually delivers possession of the excess portion in his physical possession out of the first floor flat.

14. That before the filing of the suit the property in question was already

partitioned in the ratio of sixty-five per cent to the Defendants and thirty-five per cent to the plaintiff by erection of the wall A-a on the first floor as shown by letters "C- C" and as such the suit for partition is misconceived and is legally not maintainable.

15. It would be relevant to mention that the Defendants had filed is No.2135/1982 u/s 34 of the Arbitration Act seeking a stay of the present suit. This was predicated on Clause 19 of the Agreement between the parties dated 30.9.1981 which contemplates the sole arbitration of disputes by Shri T.R.Tuli. Hon"ble Justice G.C. Jain, by Orders dated 21.10.1982, dismissed the application holding that the Agreement being compulsorily registerable and having not been registered could not be read in evidence as laid down in Section 49 of the Registration Act. The learned Judge referred to Dorairaj Vs. K. KR. Karuppih Ambalam and Others, , Nanni Bai and Others Vs. Gita Bai, , Ramlaxmi Ranchhodlal Vs. The Bank of Baroda Ltd., , and Om Prakash Chawla Vs.The Union of India 1972 (74) PLR 53, Jawahri Mal Vs. Jagan Nath & Others , AIR 1930 Lah 915, Kidar Nath Vs. Dungar Mal and Sons , AIR 1931 Lah 501 and Mangal Singh Vs. Tek Ram and Others, . In his opinion the Arbitration Clause could not be viewed as a collateral transaction and since it was to be found in an Agreement which was compulsorily registerable, could not be given effect to. This Order was thereafter assailed in an Appeal which was dismissed by the judgment of the Division Bench presided over by the Hon"ble Chief Justice D.K. Kapur. The Bench observed, inter alia, as follows:

"Now it will be seen that two types of differences or disputes are visualised by this clause. There are disputes touching the agreement or disputes touching the property. If the agreement is invalid because it is not admissible in evidence due to lack of registration then such matters can not be referred to Shri Tuli. But even if the agreement is not valid the disputes regarding the property may be referred to the sole arbitration of Shri Tuli. Such disputes may arise in future between any of the brothers. The clause is somewhat vague as to what sort of disputes are covered by it. As, in the present case, the question of the rights of the parties and particularly of plaintiff have to depend on the sale deed and the subsequent agreements or arrangements between the parties, it may have to be held that the terms or rights have to be determined from the document which requires registration. We think we must leave it open to the court if it tries the suit to re-determine this question, because the terms of the agreement are complex, of wide amplitude and cover much more than an agreement regarding transfer of the property i.e. the agreement is not confined to the giving up of a share in the property by Shri Madan Lal Kapoor but covers other matters also. It may be that the court may on a different reasoning hold that the document is inadmissible in evidence. We would like to leave this matter open because eventually the court will have to determine as to what are the rights of the parties from the facts and circumstances of the case. Having made this observation it now remains to be seen whether the arbitration should be ordered in this case.

As already observed above this matter is one which requires the application of a number of legal principles to the question of what are the rights flowing from the various documents. One of the points involved must include the interpretation of the document dated 30.9.1981. This document may be held to be inadmissible because registration is compulsory. It may be held that it is partly referable on certain questions or it may be of some value in interpreting the series of transactions between the parties and the resulting rights in the property. These various facets are such that the matter cannot be referred to Arbitrator and especially not to a lay Arbitrator.

We explored during the hearing the possibility that the matter may be referred to some agreed Arbitrator like a retired Judge or some other lawyers. But having examined the question we feel that the rights of the parties are not at all easy to determine in the present case in view of what has happened during the course of construction of this building. We would, Therefore, prefer that the matter is left to the court and we would decline to accept the appeal, affirm the order but for slightly different reasons. The appeal is dismissed but leaving the parties to bear their own costs".

What has palpably receded to the background is the plaintiff's pleading that this Agreement is in the nature of a Building Contract (which does not mandatorily require registration) and the Defendants denial of this assertion.

16. In my opinion the jural approach should be to give effect to and implement family arrangements rather than shoot it down on legalese and forensic technicalities. I shall read and construe the Agreement as also the Lease Deed with this effort. The Hon'ble Supreme Court in *Kale and Others Vs. Deputy Director of Consolidation and Others*, opined to this effect, thus:

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

"The principles which apply to the case of ordinary compromise between strangers do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties,

originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend."

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

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

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

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

would be fatal to the validity of similar transaction between strangers are not objections to the binding effect of family arrangements".

.....

"10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

"(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

(3) The family arrangement may be even oral in which case no registration is necessary;

(4) It is well-settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and Therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, Therefore, not compulsorily registerable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favor of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement".

17. For reasons which appear to me to be inexplicable, Kale's case (supra) was not cited by the either side, even though it clearly sets down the approach that must be adopted in determining cases of this genre. Mr. Narula has drawn the distinction between joint-family property and property jointly purchased by some members of a family. He had emphasised that the property in question indubitably falls in the latter category. Even so, the principles enunciated in Kale's case (supra) must permeate every decision which endeavors to settle

disputes between siblings and other close blood relatives. The significance of this decision is that it introduces, injects and infuses equitable concepts and considerations into property rights. Mr. Andley had drawn my attention to Tek Bahadur Bhujil Vs. Debi Singh Bhujil and Others, in which it has been observed that -"Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what had been agreed upon so that there be no hazy notions about it in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess". Inasmuch as the consent of the mother was gathered from attending circumstances, this decision also imparts a degree of procedural flexibility, latitude and informality to family arrangements which would be impermissible and fatal in other property transactions.

18. Mr. Andlay has not reiterated before me the plea that the disputes be referred to arbitration. Hence the controversy which previously engaged the attention of this Court as well as of the Division Bench in appeal, need not be pondered upon any further. It may be mentioned, en passant, that had the arbitration clause contained in the unregistered Agreement dated 30.9.1981 (Ex.D1W1/1) also been recorded in the Lease Deed (Ex. D1W1/A) its enforceability may have taken on a completely different complexion. Furthermore, if this document was a Binding Contract as pleaded by the plaintiff, the prescription for registration should have become otiose. The question which has to be answered is whether the rigours of Section 92 of the Evidence Act have been sufficiently complied with. A plethora of precedents was presented by learned counsel for the parties in support of reading the Agreement Ex.D1W1/1 on the one hand, and ignoring it on the other. The exposition and Explanation of the law is available in Roshan Singh and Others Vs. Zile Singh and Others, , which principally dealt with joint ancestral property, and the efficacy of a compromise arrived at by the members of that family. The Apex Court explained the position pertaining to the need to register a partition and/or a memorandum of a family arrangement in these words:-

"9. It is well-settled that while an instrument of partition which operates or is intended to operate as 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 : See Mulla's Registration Act, 8th Edn., pp. 54-57.

....

16 A mere agreement to divide does not require registration. But if the writing itself effects a division, it must be registered. See:Rajangam Ayyar v. Rajangam Ayyar (1923) 69 Ind Cas 123: AIR 1922 PC 266 and Nanni Bai and Others Vs. Gita Bai, . 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."

It is indeed remarkable that Roshan Singh's case was decided without reference to the Apex Court's earlier decision in Tek Bahadur Bhujil Vs. Debi Singh Bhujil and Others, , where the following passage encapsulates the same dicta:-

"12 . Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be found. It is usually prepared as a record of what had been agreed upon so that there be no hazy notions about it in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, the document would require registration as it is then that it would be document of title declaring for future what rights in what properties the parties possess."

19. The distinction and interplay between Sections 91 and 92 of the Evidence Act has been explained by the Apex Court in *Bai Hira Devi and Others Vs. The Official Assignee of Bombay*, in these words:-

"4. Chapter VI, Evidence Act which begins with S. 91 deals with the exclusion of oral by documentary evidence. Section 91 provides that :

"when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

The normal rule is that the contents of a document must be proved by primary evidence which is the document itself in original. Section 91 is based on what is sometimes described as the "best evidence rule". The best evidence about the contents of a document is the document itself and it is the production of the document that is required by S. 91 in proof of its contents. In a sense, the rule enunciated by S. 91 can be said to be an exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act.

5. Section 92 excludes the evidence of oral agreements and it applies to cases where the terms of contracts, grants or other dispositions of property have been proved by the production of the relevant documents themselves under S. 91; in other words, it is after the document has been produced to prove its terms under S. 91 that the provisions of S. 92 come into operation for the purpose of excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. The application of this rule is limited to cases as between parties to the instrument or their representatives in interest. There are six provisos to this section with which we are not concerned in the present appeal. It would be noticed that Ss.91 and 92 in effect supplement each other. Section 91 would be frustrated without the aid of S. 92 and S. 92 would be inoperative without the aid of S. 91. Since S. 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding or subtracting from the terms of the document properly proved under S. 91, it may be said that it makes the proof of the document conclusive of its contents. Like S. 91, S. 92 also can be said to be based on the best evidence rule. The two sections, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas S. 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike S. 92 the application of which is confined only to bilateral documents. Section 91 lays down the rule of universal application and is not confined to the executant or

executants of the documents. Section 92, on the other hand, applies only between the parties to the instrument or their representatives in interest. There is no doubt that S. 92 does not apply to strangers who are not bound or affected by the terms of the document. Persons other than those who are parties to the document are not precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the terms of the document. It is only where a question arises about the effect of the document as between the parties or their representatives in interest that the rule enunciated by S. 92 about the exclusion of oral agreement can be invoked. This position is made absolutely clear by the provisions of S. 99 itself. Section 99 provides that "persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document." Though it is only variation which is specifically mentioned in S. 99, there can be no doubt that the third party's right to lead evidence which is recognized by S. 99 would include a right to lead evidence not only to vary the terms of the document, but to contradict the said terms or to add to or subtract from them. If that be the true position, before considering the effect of the provisions of S. 92 in regard to the appellants' right to lead oral evidence, it would be necessary to examine whether S. 92 applies at all to the present proceedings between the official assignee who is the respondent and the donees from the insolvent who are the appellants before us.

.....

As a matter of fact, from the terms of s. 92 itself, it is clear that strangers to the document are outside the scope of s. 92; but s. 99 has presumably been enacted to clarify the same position. It would be unreasonable, we think, to hold that s. 99 was intended not only to clarify the position with regard to the strangers to the document, but also to lay down a rule of exclusion of oral evidence by implication in respect of the parties to the document or their representatives in interest. In our opinion, the true position is that, if the terms of any transfer reduced to writing are in dispute between a stranger to a document and a party to it or his representative in interest, the restriction imposed by s. 92 in regard to the exclusion of evidence of oral agreement is inapplicable; and both the stranger to the document and the party to the document or his representative in interest are at liberty to lead evidence of oral agreement notwithstanding the fact that such evidence, if believed, may contradict, vary add to or subtract from its term. The rule of exclusion enunciated by s. 92 applies to both parties to the document and is based on the doctrine of mutuality. It would be inequitable and unfair to enforce that rule against a party to a document or his representative in interest in the case of a dispute between the said party or his representative in interest on the one hand and the stranger on the other. In dealing with this point we may incidentally refer to the relevant statement of the law by Phipson in his treatise on "Evidence" :

"Where the transaction has been reduced into writing merely by agreement of

the parties", it is observed, "extrinsic evidence to contradict or vary the writing is excluded only in proceedings between such parties or their privies, and not in those between strangers, or a party and a stranger; since strangers cannot be precluded from proving the truth by the ignorance, carelessness, or fraud of the parties (R.v.Cheadle, 3 B. and Ad.833); nor, in proceeding between a party and a stranger, will the former be estopped, since there would be no mutuality".

20. So far as the present dispute is concerned, differences have erupted not between the Vendor of the suit property on the one side and the Vendee on the other; the lis is between the Vendee and other persons who are not parties to the Sale Deed. On a plain reading of Section 92 of the Evidence Act, its prohibition does not have any applicability to the present circumstances. I am also supported in taking this view by the opinion in Jhajhan Singh Vs. Ram Singh and others, 1982 Allahabad Law Journal 264 which was surprisingly decided without advertng to Bai Hira Devi's case (supra).

21. In Abdulla Ahmed Vs. Animendra Kissen Mitter, it has been observed that extrinsic evidence to determine the effect of an instrument is permissible where there is a doubt as to its true meaning, and evidence of the actions taken under it guide the intention of the parties. In Ram Narayan Pandey and Others Vs. Kedar Nath Tewari and Others, the Division Bench has highlighted that S. 92 refers to the terms of the contract and not the parties thereto, and Therefore does not preclude oral evidence being admitted to show who the real contracting parties are. This opinion was expressed without reference to the view of the Division Bench in Raghunath Tewari Vs. Budhoo Ram Tewari and Others to the effect that where a lease is ostensibly taken in the name of only one particular member of a joint Hindu family, Section 92 of the Evidence Act does not prohibit oral evidence being presented to prove that it is a lease for the entire family.

22. To my mind, this is but another manifestation and expression of the rule that the principles of estoppel can apply only between parties to a document, as set down by another Division Bench in Mohd. Afzal and Others vs. Ch. Din Mohammad and Others, AIR (34) 1947 Lah 117. It would be of advantage to reproduce the following exposition of the Apex Court in Chhaganlal Keshavlal Mehta Vs. Patel Narandas Haribhai, pertaining to estoppel:-

"To bring the case within the scope of estoppel as defined in S. 115 of the Evidence Act : (1) there must be a representation by a person or his authorised agent to another in any form-a declaration, act or omission; (2) the representation must have been of the existence of a fact and not of promises de futuro or intention which might or might not be enforceable in contract; (3) the representation must have been meant to be relied upon; (4) there must have been belief on the part of the other party in its truth; (5) there must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment; (6) the misrepresentation or conduct or omission must have been the proximate cause of leading the other

party to act to his prejudice; (7) the person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel; (8) Only the person to whom representation was made or for whom it was designed can avail himself of it. A person is entitled to plead estoppel in his own individual character and not as a representative of his assignee."

23. "Estoppel by deed" is defined in Black's Law Dictionary to be a "bar which precludes one party to a deed and his privies from assenting against the other party and his privies any right or title in derogation of the deed or from denying the truth of any material facts assented in it". The precedents as well as this definition clearly indicate that persons who are not parties are not bound by the contents of the documents. Since Defendant Nos. 2 to 4 are not parties to either of the Sale Deeds neither Section 92 nor "estoppel" can prohibit them from adducing evidence to prove their case. Accordingly, even if the Agreement is not perused, the Lease Deed also sufficiently outlines the family arrangements arrived at between all the brothers on the prompting and persuasion of their mother.

24. It should be recalled that the two Sale Deeds by which the suit property was purchased in equal shares in the names of the plaintiff and Defendant No.1 (viz. Ex.PW1/3) and the Agreements dated 9.8.1979 (Ex.D-1/1) and Ex. D1W1/1 dated 30.9.1981 and Lease Deed dated 30.9.1981 bearing Ex. D1W1/A have been filed and proved. In these circumstances the rigours of Section 91 of the Evidence Act have been complied with. So far as Section 92 of the Evidence Act is concerned the Lease Deed (Ex. D1W1/A) is duly registered. It mentions that the plaintiff would receive thirty-five per cent of the rent and inter alia contains the following recital:-

"AND WHEREAS all the Lessers mentioned above being brothers, claimed to have interest in the said property and it has been agreed to by said Shri S.L. Kapoor and Shri K.L. Kapoor that all the Lessers are and be deemed as the owners of the said property No.B-565, New Rajinder Nagar, New Delhi with the modification that Shri K.L. Kapoor is agreed to be owner of thirty five per cent share and the others collectively as owners of sixty five per cent in the said property as equal partners."

25. A holistic reading of the Written Statement discloses that the Defendants 2 to 4 have set up a case of a benami transaction in that they have pleaded that the suit property was collectively purchased by all the brothers in the names of the plaintiff and Defendant No.1, which position has been admitted by the latter. In other words, the suit property is only nominally and titularly held by the plaintiff and Defendant No.1 benami. In *Rebti Devi (Smt) Vs. Ram Dutt and Another*, the following eight facts of the Benami Transaction (Prohibition) Act, 1988 have been spelt out:-

"(1) Firstly, while Section 4(1) prohibited a plea of benami to be raised in a suit,

claim or action and again Section 4(2) precluded a defense of benami in suits, claims or actions, -- these two provisions did not come in the way of a decision on such pleas in matters pending as on 19-5-1988 if such pleas were already raised before 19-5-1988, by one party or other. This was because such pleas which were already raised before 19-5-1988 were not intended to be affected by the Act, if they were raised in suits, claims or actions pending as on 19-5-1988. The repeal provision in Section 7 repealed Section 82 of the Trust Act only in that manner and to that extent.

(2) Secondly, on the express language of Section 4(1), any right inhering in the real owner in respect of any property held benami would be not enforceable once Section 4(1) operated, even if such transaction had been entered into prior to 19-5-1988 and no suit could be filed on the basis of such a plea after 19-5-1988. The same prohibition applied in case of Section 4(2) to a defense taken after 19-5-1988 pleading benami in respect of a transaction prior to 19-5-1988. The Act could be said to be retrospective only to that extent. But from this it did not follow that where such a plea was already taken before 19-5-1988 to the effect that the property was held benami, such a plea got shut out merely because the proceeding in which such plea was raised before 19-5-1988 was pending on 19-5-1988.

(3) Thirdly, where a suit had been filed before 19-5-1988, and in any written statement filed on or after 19-5-1988, a plea of benami was raised, then such a plea of benami could not also be gone into. If however such a plea in defense had been raised before 19-5-1988, the Act did not preclude that question from being decided in proceedings which were pending on 19-5-1988. Mithilesh Kumari case was wrong in holding that such a defense could not be decided after 19-5-1988 even though the plea was raised before 19-5-1988.

(4) Fourthly, if such an interpretation as stated in (1) to (3) was given, it could not be validly contended that a question of invalid discrimination arose between cases where suits were filed on or before 19-5-1988 and those filed after 19-5-1988.

(5) Fifthly, even though the word "suit" might include appeal or further appeals, Sections 4(1) and 4(2) could not be made applicable to these subsequent stages.

(6) Sixthly, pleas by plaintiffs or applicants and defenses after 19-5-1988 of real owners against benamidars were barred u/s 4(1) and Section 4(2), only to the extent indicated above.

(7) Seventhly, if in a suit, claim or action, a plea or defense based on benami is raised even after 19-5-1988 and the purchase is in the name of a wife or unmarried daughter, such a plea of benami is permissible and R. Rajagopal Reddy case will not come in the way merely because the plea is raised after 19-5-1988. Such a plea if raised, will however have to be decided taking into account the statutory presumption laid down in Section 3(2). This is because the Act says that if the purchase is in the name of the wife or unmarried daughter,

the prohibition in Section 3(1) will not apply. Section 3(2) is enacted as an exception to the provisions in the Act and does not depend for its interpretation on the question as to what extent Sections 4(1) and 4(2) are retrospective.

(8) Eighthly, if the case falls within the exception in Section 4(3)(a) i.e. where the person in whose name the property is held is a coparcener in a Hindu Undivided Family and the property is held for the benefit of the coparceners in the family, or where as stated in Section 4(3)(b) the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity, then in both situations if such a plea or defense is raised in a suit filed after 19-5-1988, the same can be decided by the Court notwithstanding Section 4(1) or 4(2) and notwithstanding what is decided in R. Rajagopal Reddy case."

26. The case in hand does not transgress any of the above. So far as the Benami Transaction (Prohibition) Act is concerned it should be observed that it does not invalidate all benami transactions, but recognizes those in the name of the wife and unmarried daughters, and where coparceners of a Hindu Undivided Family are concerned. The special treatment that the law in India has imparted to transactions involving members of a family has been only partially truncated or narrowed down. The homogeneity and integrity of the family continues to be a cherished institution in our society. Before departing from the 'Benami' aspect of the transaction it would be wise to recount the observations made by the Apex Court in Jaydayal Poddar (Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others, .

"It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of Benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favor that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is Benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid tests, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances : (1) the source from which the purchase money came; (2) the

nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless no.1, viz. the source whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another."

27. With this discussion of the law pertaining to the questions raised in this suit, I shall now proceed to deliberate upon the Issues that have been framed.

28. Issue Nos. 1 to 3

1. Whether the plaintiff and defendant No.1 are the only owners of property R-565 New Rajinder Nagar, New Delhi having equal shares? OPP

2. Whether the defendants 2 to 4 are entitled to raise the plea of benami with regard to the ownership of the property in question? If so, to what effect? OPD

3. Whether the defendants 2 to 4 have any right title or interest in the property R-565 New Rajinder Nagar, New Delhi? OPD

29. In my opinion it shall be convenient to decide these Issues together, since they are almost inseparably interwoven with each other.

30. It has been seen that the suit property was purchased in equal shares by two Sale Deeds in the name of the plaintiff and in the name of Defendant No.1. At that time a "dilapidated" construction was in existence. It is the common case of the parties that this structure was pulled down and thereafter a new building was constructed as per sanctioned plan. Indubitably, title to the property, at the commencement, vested in half shares between the plaintiff and Defendant No.1. It has already been discussed that family arrangements should be assiduously given effect to, even if it requires some jural engineering. Is it possible to detect an arrangement between the brothers whereby the title to the suit property was agreed to be novated? Keeping the close relationship between the parties in mind, it is the duty of the Court to consider all attending circumstances before arriving at a conclusion. There can be no two opinions that when the property was purchased the documentation contemplated only the plaintiff and Defendant No.1. This documentation includes Agreement to Sell, two Sale Deeds, Affidavit of Defendant No.1, division of the property between them in the specified shares viz. 153 yards land ground floor and 153 yard first floor to these parties; Mutation is also in their names only. The unquestionable fact, however, is that the plaintiff did not pay fifty per cent of the cost of construction, and it is his say that it was agreed that he would pay this at the end. A perusal of Ex. D1/1 dated 9.8.1979 discloses that all the parties had agreed that the suit property would be divided in the ratio of sixty-five per cent to the Defendants and thirty-five per

cent to the plaintiff. This position is reiterated in Ex. D1W1/1 dated 30.9.1981 which also records an agreement between the parties that a sum of Rs.4,10,000/- has been invested by the Defendants over and above their sixty-five per cent. Obviously, accounts have had been gone into between the brothers at that stage. It should not be forgotten that the property which had been purchased in equal shares by the plaintiff and Defendant No.1 had undergone a complete transformation in which all the brothers had participated. A family arrangement, as envisaged by the Hon"ble Supreme Court in its numerous decisions, can be gathered from these documents. They do not bring about change in presenti but witness that some change had already occurred. I hold that Ex.D1W1/1 is admissible in evidence. It, no doubt, varies the terms of the two Sale Deeds but since Defendants No. 2 to 4 were not parties to the Deed, the Agreement does not violate Section 92 of the Evidence Act. It is now commonplace that although the land may vest exclusively in one party alone, title to the construction carried out thereon can legally vest in other parties. The Delhi Apartments ownership Act has been passed keeping this development and reality in view. In respect of the new construction, Therefore, a totally new arrangement has come into effect de hors Ex. D1/1 and Ex.D1W1/1. A reading of the Lease Deed also leads to the conclusion that the property which was in existence in September, 1981 was agreed to be owned in the ratio of thirty-five per cent with the plaintiff and sixty-five per cent with the Defendants. The said Lease Deed dated 30.9.1981 between the parties and the new Bank of India, Ex.D1W1/A is not a document of title vis-a-vis the suit property and inasmuch as it indicates the terms of a family arrangement which has already taken place, it can be read in evidence. It has certainly more evidentiary value in respect of the disputes inter se parties than the Sale Deeds to which Defendants No. 2 to 4 were not signatories. The possession letter as well as the receipt of rent in the ratio of thirty-five per cent and sixty-five per cent is clearly indicative of the fact that the parties had agreed to share any usufruct or income from the suit property in accordance with the common ownership of the construction by all the brothers. Principles of Estoppel come into play and overwhelmingly lead to the conclusion that the property had come to be owned in the aforementioned ratio.

31. At the time when the property was purchased in 1981, benami transactions were not prohibited. The burden of proving that the suit property was benami in the hands of the plaintiff and Defendant No.1 has been duly discharged by the Defendants.

32. I hold that the plaintiff and Defendant No.1 are not the only owners of the property R-565, New Rajinder Nagar, New Delhi and that they do not own it in equal shares. I hold that Defendants No. 2 to 4 are entitled to raise the plea that the property was benami. I hold that Defendants No. 2 to 4 are joint owners with Defendant No.1 of sixty-five per cent of the suit property.

33. Issue No.4

4. If Issues No.2 & 3 are decided in favor of defendants 2 to 4, whether the suit

property was orally partitioned by the parties to the suit in the ratio of 35% for the plaintiff and 65% for the defendants jointly, as stated in the Preliminary Objection No.1? OPD

34. I hold that the suit property was orally partitioned by the parties to the suit in the ratio of thirty-five per cent for the plaintiff and sixty-five per cent for the Defendants jointly.

35. Issue No.5

5. If issues No.4 is decided in favor of the defendants, whether the said partition has been acted upon by the parties and they are consequently estopped from challenging the same? OPD

36. I hold that the parties have acted on the said partition from the date of the execution of the Lease Deed dated 30.9.1981 and are also estopped from challenging the partition.

37. It should not be overlooked that the primary and preeminent document in any lis is the pleadings of the respective parties. Every statement incorporated therein is the most significant and detract able admission of fact. All statements in the pleadings may not be successfully proved in which case the party may be disqualified or disentitled from relying on it. However, the opposite party is always free to take advantage of the pleadings, as well as any document of its adversary. The plaint categorically mentions that the plaintiff was "forced to enter into an unreasonable agreement of construction by defendants 1 to 4 on 9-8-1979". In paragraphs 10 and 11 of the plaint, however, the plaintiff has relied on this agreement. Thereafter in paragraph 13 of the plaint the plaintiff has also mentioned and relied on the Agreement dated 30.9.1981, a copy whereof has been filed. These are clear admissions which the plaintiff cannot be allowed to retract or resile from. In paragraph 11 of the plaint it has been pleaded "that in view of the malafide conduct of the Defendants, the plaintiff moved into fifty per cent of the first floor portion of the 1st floor in the incomplete building and is in possession of the same till date". The Local Commissioner has reported in Ex.CD/I on visiting the site on 27.5.1982 that a wall from "A" to "a" with a provision for a door on the first floor, and from "C" to "c" on the Barsati floor was in existence. Both these walls, I find, divide these floors approximately into thirty-five per cent and sixty-five per cent portions, and not equally. Although the Local Commissioner has made no mention of it, on a reading of paragraph 11 of the Written Statement and a perusal of the plan filed along with it, another wall dividing the First Floor into roughly equal parts, had been "originally erected or constructed"; this is also the suggestion of the Defendants during the cross examination of the plaintiff. Mohan Lal Kapur has deposed in his Examination in Chief that " the wall A to a was the one which was erected in the flat of the plaintiff and wall C to c was the one which was erected on the terrace. Wall B to b was the original one constructed at the time of construction of the building. Portion A represents thirty-five per cent share of the

plaintiff". In his cross examination this witness has stated that "the partitioned wall remained on the first floor in the ratio of 65% and 35% but subsequently the plaintiff removed a portion of the wall to increase his share from 35% to 50% which was brought to the notice of the Court and the Local Commissioner was appointed who gave his report to that effect accordingly". This assertion/clarification has not been challenged by the plaintiff. Therefore, even so far as the partitioning of the property in the first floor and the Barsati floor is concerned I find that the parties had carried out partition by metes and bounds of these areas in the ratio of thirty-five per cent to sixty-five per cent. This is in consonance with the sharing of the suit property.

38. Issue No.6

6. What was the amount paid by the plaintiff to the defendants in excess of Rs.1,60,000/- for completing the construction? OPP

39. The contention of learned counsel for the plaintiff is that it has been pleaded in the plaint that the said sum of Rs.1,60,000/- had been paid by him to the Defendants. This has not been denied by the Defendants as is also clear from the language of the Issue itself. The plaintiff admits that this amount was derived from the loan which was extended by the Bank by mortgaging the suit property. The plaintiff's contention is that "this amount was admittedly paid by the plaintiff out of the 35% share of loan amount received by mortgaging the property. Since the plaintiff is 50% owner of the property, the plaintiff was entitled to receive Rs.3 Lakhs, i.e. 50% of the loan amount of Rs.6 Lakhs. As such, the Defendants received a total sum of Rs.3,00,000/- (Rupees three lakhs), from the plaintiff towards the cost of construction. The said loan amount was paid out of the rental income of the property and not by the plaintiff & Defendants from their individual sources. In the Income Tax records of the Defendants, the said loan has been shown as the amount spent towards the cost of construction. As such, the plaintiff paid to the Defendants Rs.3 Lakhs towards cost of construction and Rs.15,000/- to the seller of the property on account of Defendant No.1, at the time of purchase of the property".

40. The flaw in the argument is that it presupposes that the plaintiff is fifty per cent owner of the property, whereas it is my finding that he is thirty-five per cent owner only. Even applying the plaintiff's own reasoning his contribution towards completing the construction was Rs.2,10,000/-. Accordingly, I hold that the plaintiff has paid a sum of Rs.50,000/- in excess of Rs.1,60,000/- for completing the construction.

41. Issue No.7

7. Whether defendants 1 to 4 had incurred any expenses on construction of the building on R-565 New Rajinder Nagar, New Delhi? If so how much and its effect? OPD

42. Clause 4 of the Agreement dated 30.9.1981 reads as follows:

"4. That after adjusting the accounts of the entire investment incurred in the purchase of the entire property No.R-565, New Rajinder Nagar, New Delhi and its demolition as well as the expenditure incurred on the construction of the said building so far, i.e. after adjusting the excess amount initially spent by Party No.5 over and above his 35 per cent shares and after taking into account the various investments and after adjusting the various investments made by the Parties No.1 to No.4, a total sum of Rs.4,10,000/- has been invested and spent by Parties No.1 to No.4 over and above their 65 per cent which according to them has been provided to them by Nawab Packers".

43. A holistic reading of the Agreement and from the language and tenor of the above extracted Clause, it is palpably evident that the parties had drawn up accounts and at the end of this exercise had agreed that a sum of Rs.4,10,000/- had been invested by the Defendants in excess of their sixty-five per cent liability for making contributions. Keeping in view the relationship between them, and the emergence of a family settlement, it is not necessary for this Court to give a definitive answer of how much investments the Defendants had made. Suffice it to state that pursuant to accounts having been struck between the parties, an excess of Rs.4,10,000/- have been made by the Defendants. The Issue is decided accordingly.

44. Issue No.8

8. Whether the agreement dated 30.9.81 is a building contract? If so what is its effect? (This issue will also include the question of its admissibility in evidence)?
OPP

45. It has already been noticed that the plaintiff's assertion is that the said Agreement dated 30.9.1981 is a building contract. It has also been discussed that a family settlement can be oral or in the form of a memorandum, or by an actual partition deed. In the third event it can be by registered document alone. A memorandum is one which witnesses the terms and details of a family arrangement which has already taken place in the past. If a document styled as a memorandum carries out division of family property in present, it would cease to be a memorandum. If a family settlement can be effected orally, there ought to be no difficulty or impediment in gathering the terms of the family settlement or a reading of any other document executed between the members of a family. This would apply regardless of whether it is joint family property or self acquired property. The advocated latitude and the degree of informality which is extended towards family settlement need not distinguish between such holdings, since the objective sought to be achieved is to give effect to family arrangement arrived at between family members. It is not the property which is the focal point, but the close relationship between the owners. Once the emphasis shifts from the property to the owners thereof, the position that I have favored becomes inevitable. I have already held that the Agreement is admissible in evidence. I have held that it is in the nature of a building contract. But having arrived at this conclusion I do not find it incongruent or impermissible to also hold that on a

reading of its contents details of a prior family arrangement or settlement can be gathered.

46. Issue No.9

9. Is the plaintiff entitled to rendition of Accounts from the defendants? If so for what period? OPP

47. Accounts already having been settled and reduced to writing in terms of Agreement dated 30.9.1981 the plaintiff is not entitled to rendition of accounts from the Defendants.

48. Issue No.10

10. If defendants are found entitled to any payment whether they are entitled to receive? If so and at what rate and for what period? OPD

49. As observed in Issue No.7 Clause 4 of the Agreement dated 30.9.1981 records that a total sum of Rs.4,10,000/- has been invested by Defendants No.1 to 4 over and above their sixty-five per cent liability. I hold that thirty-five per cent of this sum viz. Rs. 1,43,500/- . is payable by the plaintiff to the Defendants under this head of accounts.

50. Issue No.11.

11. Is the plaintiff in occupation of area in excess of his share at present? If so, to what extent and to what effect? OPD

51. It has been seen that a Local Commissioner had been appointed by this Court who has reported on the existence of a wall dividing the first floor as well as Barsati floor premises approximately in the ratio of thirty-five per cent and sixty-five percent. On the Defendants own showing another wall is in existence dividing the first floor premises in equal portions. The Defendants assertion is not that the plaintiff is in possession of his half portion of the First Floor but that by erection of the wall he has attempted to increase his possession. The entire controversy is in the state of flux and it cannot be affirmatively stated what portions are in the distinct occupation of the parties. The First floor portion is also not in a habitable state. I hold that the Defendants have failed to prove this issue.

52. Issue No. 12. (Relief).

The suit is Dismissed.

I.As. 84/99 & 3530/99

54. While final arguments were being heard no arguments specifically on these applications were addressed. Even otherwise, they are without merit.

55. Dismissed.

Suit (Counter-Claim) No.1031/1987

56. Counter-Claim of the Defendants for a sum of Rs.3,60,000/- (Rs.4,10,000 - Rs.50,000/-.) is decreed. In respect of relief of partition I hold that the property already stands partitioned on the lines indicated in the Report of the Local Commissioner, in the ratio of thirty-five per cent to the plaintiff and sixty-five per cent to the Defendants.

57. Decree-sheet be drawn up accordingly.