

**(2010) 07 DEL CK 0297**

**In the Delhi High Court**

**Case No :** CS (OS) 2133 of 1989 and I.A. No. 13792 of 2008

Mrs. Lata Chauhan

APPELLANT

Vs

Sh. L.S. Bisht and Others

RESPONDENT

**Date of Decision :** 02-07-2010

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 19 Rule 1, Order 7 Rule 3  
Contract Act, 1872 — Section 23  
Delhi Co-operative Societies Act, 1972 — Section 26, 60  
Delhi Co-operative Societies Act, 2003 — Section 28  
Hindu Succession Act, 1956 — Section 14, 15  
Insurance Act, 1938 — Section 39  
Limitation Act, 1963 — Section 10, 27  
Registration Act, 1908 — Section 30, 30(2)  
Specific Relief Act, 1963 — Section 31, 31(1)  
Transfer of Property Act, 1882 — Section 3, 6  
Trusts Act, 1882 — Section 90

**Citation :** (2011) 181 DLT 101

**Hon'ble Judges :** S. Ravindra Bhat, J

**Bench :** Single Bench

**Advocate :** G.S. Raghav and Pankuj Sain, for the Appellant; Arun Mohan Jayant Tripathi, for D-6, Riju Raj Jamwal, for D-5, 8, 9 and 11, Jyoti Mehndiratta, Sugam Seth for D-2-4 and 12 and Puneet Aggarwal, for D-7, for the Respondent

**Final Decision :** Dismissed

**Judgement**

S. Ravindra Bhat, J.—In this suit, the plaintiff claims partition and other consequential relief. The pedigree table/Family tree, for a better understanding of the dispute is reproduced below.

Rai Bahadur Dev Singh Bisht \_\_\_\_\_  
\_\_\_\_\_ | | Thakur Dan Singh Bist Thakur Mohan Singh Bist |  
[SEPARATED ON 29-03-1956] | \_\_\_\_\_ | |  
Smt. Ganga Devi | Smt. Lila Wati | | | Smt. Jagat Raj Kumari | | | Smt.  
Parvati Bist | | \_\_\_\_\_ Wife of Defendant No.1



acquisition of the said property by first defendant, it was claimed by the contesting defendants that Late Thakur Dan Singh Bisht was a member of Diplomatic Enclave Extension Co-operative House Building Society and he had nominated his daughter Smt. Parvati Devi to succeed him to the membership. In view of that nomination Smt. Parvati Devi became the member of the said Society in 1965. After acquiring membership in her name she transferred the membership to her husband Leela Singh Bisht. It was further pleaded that after the transfer of the membership of the Society to Leela Singh Bisht he was allotted plot No. A-20 West End, New Delhi by paying its cost and since it was a leasehold land a Perpetual sub-lease deed dated 28.06.1967 was executed in his favour by the Central Government. Thereafter he constructed a residential house on that piece of land exclusively with his own funds. It was further pleaded that Defendant No. 1 had been dealing with the said property as his own ever since 28.06.1967 and had been holding himself out to be its sole and exclusive owner to the world at large including the plaintiff and all other legal heirs of Late Thakur Dan Singh Bisht. Alternatively, it was urged in the written statement that Leela Singh Bisht had, in any case, become of the owner of plot No. A-20 as well as the superstructure raised on it by adverse possession and prescription. It was further contended that the plaintiff being neither in actual physical possession nor in constructive possession of the said house in West End could not, in any case, claim its partition by paying a fixed court fees. As far as the relief of partition in respect of some land in Pithoragarh is concerned the contesting defendants urge that the suit averments are vague in respect of the details of the land, and the plaintiff and the defendant Nos. 5 to 9 had already disposed of that property and, in any case, they had no objection for the partition of Pithoragarh property if at all the same existed. Regarding the property at Nainital, it was claimed that the partition of that property was under a forged and fabricated document and already a suit had been filed to challenge the same. It was alleged that in order to pressurize the defendants to withdraw that suit that the plaintiff had filed the present suit.

6. Defendants 5-9 had also filed a common written statement supporting the claim of the plaintiff. Defendants 10 and 11 did not file any written statement.

7. The aforesaid pleadings of the parties had led to the framing of the following issues:

1. Whether the suit is maintainable in its present form? OPD
2. Whether the suit is bad for non-joinder of necessary parties? OPD
3. Whether the suit is barred by limitation? OPD
4. Whether the suit is valued properly for the purposes of Court fee and jurisdiction and whether the proper Court fees has been paid? OPP
5. Whether the suit is barred under the provisions of Bombay Co-operative Society Act? OPD

6. Whether Late Thakur Dan Singh Bisht was owner of property No. A-20 West End Avenue, New Delhi? OPD

7. Whether any right, title and interest in the property at A-20, West End Avenue, New Delhi, is conferred on the nominee Smt. Parvati Bisht and if so, the extent of her right? OPD

8. If the issue No. 7 is decided in favour of Smt. Parvati Bisht - then whether she could have transferred her membership in favour of defendant No. 1? OPD

9. Whether the defendant No. 1 was the owner in possession of the suit property No. A-20 West End Avenue, New Delhi by virtue of the registered Lease Deed dated 28.06.1967 and also the owner of the super structure? OPD

10. Whether the defendant No. 1 has become the owner of the suit premises and super structure by adverse possession and prescription? OPD

11. Whether the plaintiff as also the other legal heirs of Late Thakur Dan Singh Bisht are estopped from claiming any right to the property or the right to dispossess the defendant No. 1, his agents, successors and assigns? OPD

12. Whether the property at Grassmere House Nainital, U.P. was partitioned amongst the legal heirs of Late Thakur Dan Singh Bisht? OPP

13. Relief.

8. The issues had been framed in the suit on 31-07-98 and thereafter, in view of the submissions of the parties before the Division Bench the parties were ordered to file their respective affidavits. The Court also directed that no oral evidence would be adduced. The Defendant Nos. 2-4 subsequently filed an application under Order XIX Rule 1 CPC for calling the witnesses who had filed affidavits for their cross-examination. By order dated 14.1.2000 their application was rejected in view of the fact that the Division Bench in FAO (OS) 115/92 had recorded that no oral evidence would be adduced and suit could be disposed of on the basis of affidavits of the parties. After more than eight years defendant Nos. 2-4 again moved this seeking permission to lead oral evidence and to cross-examine the witnesses. This application was rejected by this Court's order, dated 28th May, 2008.

Issue Nos. 1, 3 and 11

9. Issue Nos. 1, 3 and 11 are interrelated, and are therefore, considered together. The contesting defendants argue that the suit is liable to be dismissed for more than one reason. It is contended firstly that the plaintiff does not describe the Pithoragarh property at all and, therefore, is non-compliant with the provisions of Order 7 Rule 3 CPC, which mandates that in such civil proceedings, the subject matter of the suit has to be described specifically and with precision. It is contended that if in fact the property exists and there is no possibility of its partition on account of its mis-description or non-description, the suit has to fail since there can be no partial partition. Reliance is placed upon the decision

reported as Kenchegowda (Since Deceased) by Legal representatives Vs. Siddegowda alias Motegowda, . It is next contended that despite disclosure at the earliest opportunity in the contesting defendants' written statement about execution of a Perpetual Sub-Lease in 1967 (creating interest in the property, in favour of the first defendant) the plaintiff has chosen not to seek declaratory relief or a decree for cancellation of that instrument, or even an amendment of the suit, incorporating such fresh relief. Such being the position, the claim for partition cannot be granted as the beneficial interest and title vesting in the contesting defendants by virtue of the Perpetual Lease Deed and the conveyance of interest recorded therein bars such relief. The defendants argue, in addition, that the corollary for not challenging the conveyance or Perpetual Sub Lease is that the relief for cancellation is also consequently time-barred. It is submitted that Section 27 of the Limitation Act, therefore, comes into play as the right to property put forth and the suit claim for it stands extinguished by operation of the Limitation Act. Reliance is placed upon the decision of the Supreme Court in Ramti Devi (Smt) Vs. Union of India (UOI), .

10. The Defendants also rely upon Section 3 of The Transfer of Property Act and contend that registration of the Perpetual Sub Lease produced as Ex. D-3/6 is deemed to act as a constructive notice to the world at large, including the plaintiff and other supporting defendants.

11. In response, the plaintiff contends that the suit for partition is maintainable because the aggrieved parties were kept in the dark about conveyance of title through the Perpetual Sub Lease. It is submitted that the document was procured by fraud played by the first defendant in his capacity as the husband of late Dhan Singh Bisht's daughter, who had been nominated in respect of the suit property. The plaintiff relies upon the proposition that fraud unravels all transactions, and submits that in any event, the vesting of title cannot be presumed because the original owner's (Parvati's) name has not been recorded in the documents. It is also argued that the contesting defendants have nowhere proved payment of Rs. 33,000/- and, on the other hand, the materials on record disclose that Rs. 28,134/- was paid by the late Sh. Dhan Singh Bisht. Learned senior counsel for the plaintiff argues that the evidence points to the first Defendant and other supporting defendants (claiming through him) being constructive Trustees. Reliance is placed upon Section 90 of the Indian Trusts Act. Learned senior counsel submitted that Ex. P-20 - a letter by late Sh. Dhan Singh Bisht, and Ex.P-7, written by the Society to Smt. Parvati Bisht show that Plot No. A-20 had been earmarked in favor of Sh. Dhan Singh Bisht in the draw of lots in the presence of members of the Society, in 1962-63. Thus, Sh. Dhan Singh Bisht had a contingent right or claim in respect of the suit property when he died. Such right was not only heritable, but also partable to the extent of his title. It is submitted that Parvati Bisht could claim the right to property only to the extent of her entitlement as a heir and no more. In other words, she stood in the position of a trustee and by virtue of the first defendant's relationship with her, the title was conveyed in 1967. The plaintiff as the original heir is entitled to

claim partition and also accounts in respect of the property for which the Limitation Act advisedly prescribes no period of limitation.

12. From the preceding discussion, what follows is that the contesting defendants' main objection to the maintainability of the suit claim stems from the title or interest conveyed through the Perpetual Sub Lease executed in favor of the late first defendant, Sh. L.S. Bisht on 28.06.1967; a document marked as Ex. D-3/6. Undeniably, the plaintiffs did not disclose this in the suit filed in the year 1989, and have sought for partition of the said property. In the written statement filed on 12.01.1990, the contesting Defendant Nos. 1-4 and 12 clearly mention about the Registered Perpetual Lease Deed dated 28.06.1967. The claim was reiterated in the plaintiff's replication to the said written statement where it was mentioned that the Sub Lease was not within the plaintiff's knowledge and was discerned for the first time after the written statement was filed. The plaintiff further asserted that the Sub-Lease is

liable to be set aside and the plaintiff is entitled to reliefs which have been prayed for in the plaint, i.e. a partition of property....

13. The record as well as the order sheet would disclose that in an appeal against an Interlocutory Order, the parties had agreed to dispense with the requirement of leading oral evidence before the Division Bench, on 15.07.1992 in FAO 115/1992. Thereafter, the pleadings were completed and orders were confirmed on 31.07.1998. The plaintiff did not during that period or in the subsequent period of 11 years take any steps to seek declaratory relief nor seek a decree for cancellation of the Registered Perpetual Sub Lease (Ex. D-3/6). Instead the plaintiff chose to rest her case on what is termed as an alleged constructive trust whereby the defendant created, on account of nomination of the first defendant's wife, late Parvati Devi, which led to execution of the said title documents. It is argued that on an application of principles arising out of Section 90 of the Trusts Act, the Court can ignore the said title deed and proceed to grant the relief claimed. It is submitted in this regard that a constructive trust is one that comes into existence regardless of any party's interest when the law imposes upon one an obligation to hold specific property for another. In such circumstances, the holder of the property becomes a constructive trustee towards the person to whom he owes performance of the obligation. Reliance was placed upon the judgments, in this regard, reported as Delhi Development Authority Vs. Skipper Construction Company (P) Ltd. and another, ; Alvala Balayya v. Alvala Guruvayya AIR 1915 Mad 129; Deo Nandan Prashad v. Janki Singh AIR 1916 PC 227; AIR 1925 200a (Oudh); Babani Soiroo Patel Vs. Dulba Govind Bhandari, and O.R. Abdul Hameed v. O.R. Abdul Raheem 1993 (2) LW 165 and decisions of various High Court, in a similar vein. It is submitted that in these decisions, the Court have recognized creation of constructive trust where the holder of property is obliged to account to the real owners if and when a civil suit or action is brought for enforcement of the trust obligation. It is submitted that in such circumstances, the plaintiff does not have to seek cancellation of the

instruments by which the constructive trustee consolidated his ill-gotten benefit originally secured as a Trustee but that the appropriate relief can be a declaration that the title document, i.e. Perpetual Lease Deed enures for the benefit of all co-heirs and solely not the first defendant.

14. That a plaintiff has to succeed or fail on the basis of averments made in the suit pleadings and the evidence led before the Court is too well-established. What the plaintiff - and the supporting Defendant Nos. 6 - 11 seek here is partition of the suit property. The evidence on record suggests - despite contesting defendants' denial of some documents - that late Sh. Dhan Singh Bisht was member of the society and had paid a substantial amount in excess of Rs. 28,000/- on the basis of which he was informed in 1962 about "earmarking of a plot" or allotment of a plot. No doubt, the allotment letter had not been issued to him. Nevertheless, since the payment of amount is not and cannot be a matter of dispute, he had a claim or chose inaction against the society in respect of which the property to which he was to become subsequently entitled. That was a heritable right. It is also not disputed that in terms of the arrangement made by him, his three widows had life interests in the properties that were subject matter of his Will. The first defendant's wife, Smt. Parvati was nominated as a heir by Sh. Dhan Singh Bisht and in that capacity was informed by the Society on 21.01.1965, eliciting the response about the Will or any other legal document. That letter has been exhibited as Ex. P-2. On 08.02.1965 (Ex. P-3), Smt. Parvati's right to the society, expressing her interest in becoming a member and also disclosing that she was aware of her nomination. The letter, however, did not disclose that the deceased Dhan Singh Bisht was survived by the other heirs. The Society again wrote on 15.02.1965 eliciting information regarding the Will which could have a bearing on her father's assets (Ex. P-4). This letter was replied by Smt. Parvati on 18.02.1965 (Ex. P-5). On the same day, she also sent a Membership Form where the first defendant was named as her nominee (Ex. P-6). The other documents pertaining to payment of some amounts by Smt. Parvati to the society and her requesting for transfer of membership in the society in favor of the first defendant as well as the minutes of meeting of the Society dated 03.03.1966 approving the transfer were not exhibited even though copies of this were filed. What, however, is exhibited is letter dated 22.04.1966 by the society to the first defendant (Ex. D-3/5) informing that the Sub-Lease would be executed and requesting him (the first defendant) to comply with the requirements of previous circular. The Perpetual Sub Lease executed by the President of India in favor of the late first defendant on 28.06.1967 has been produced as Ex. D-3/6.

15. Section 90 of the Indian Trust Act reads as follows:

90. Advantage gained by qualified owner - Where a tenant for life, co-owner, mortgagee, or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all

persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities property contracted, in gaining such advantage.

16. In the plaintiff's pleadings, there is no mention of the first defendant or his wife holding the property as constructive trustees for the benefit of other heirs. Even if the Court were to reasonably assume lack of knowledge about the registered Perpetual Sub Lease of 1967 at the time of institution of suit, its subsequent disclosure on 12.01.1990 should have impelled the plaintiff to seek appropriate relief. The plaintiff's awareness of this is evident from her pleadings in the replication where it is significantly urged that the Perpetual Sub Lease is a fraud and that she is entitled to declaration that the Sub-Lease is liable to be set-aside. In fact, in the replication, allegations have been leveled against the Society for conveying the title in favor of the first defendant. Despite this, the plaintiff did not choose to amend the relief clause by either seeking a declaration in respect of the Registered Sub-Lease or cancellation of the documents. Significantly, none of the pleadings of the plaintiff mentioned about a constructive trust or late Parvati, i.e. wife of late defendant being a constructive trustee and that the first defendant acquired property or interest in abuse of such compensation which the plaintiffs can rightfully challenge. There is no whisper of these facts in the plaintiff's evidence or in the evidence of the supporting defendants. All these aspects have been urged only at the time of final arguments to counter the contesting defendants' argument about maintainability.

17. While the fact as to the method by which Sh. Parvati became owner of the property is a matter of record and cannot be controverted, equally the reality about the right or interest in respect of the property flowing to the late first defendant by virtue of the registered deed dated 28.06.1967 cannot be ignored. In the three-Judge decision reported as Ramti Devi (Smt. ) (supra), the Court held as follows:

XXXX XXXX XXXX no issue in this behalf on the voidity of the sale-deed or its binding nature was raised nor a finding recorded that the sale-deed is void u/s 23 of the Contract Act. Pleading itself is not sufficient. Since the appellant is seeking to have the document avoided or cancelled, necessarily, a declaration has to be given by the court in that behalf. Until the document is avoided or cancelled by proper declaration, the duly registered document remains valid and binds the parties. So the suit necessarily has to be laid within three years from the date when the cause of action had occurred.

XXXX XXXX XXXX 18. There is another aspect of the matter. u/s 3 of the Transfer of Property Act, a person is said to have "notice" of a fact when he actually knows that fact, or when, but for willful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it." The



first explanation to Section 3 reads as follows:

Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under Sub-section (2) of Section 30 of the Indian Registration Act, 1908 (16 of 1908), from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:]

19. In *Bina Murlidhar Hemdev and Others Vs. Kanhaiyalal Lokram Hemdev and Others*, , it was held that the registration of a document which is compulsorily registrable under law amounts to constructive notice on a person aggrieved by the title or interest created by such document. This reasoning had been earlier recognized in *Dattatreya Shanker Mote v. Anand Chintaman Datar* 1975 (2) SCC 799.

20. As observed earlier, none of the pleadings or evidence on record even suggest that the suit is founded on an averment or an alternative plea of constructive trust and its breach by the contesting defendant. Even an issue in this regard has not been struck.

21. The plaintiff, despite being informed about the existence of the registered Perpetual Sub Lease which conveys right and interest in favor of the first defendant, has deliberately refrained from seeking leave to amend the suit. Interestingly, the record also reveals that previously an application for amendment of the suit (I.A. No. 2581/1992) had been filed. In that, the plaintiff sought to challenge the Sale Deed in respect of the suit property and also specified the Pithoragarh properties. Further the order dated 22.07.1997 shows that the application was withdrawn. In the light of these facts, this Court is constrained to observe that the relief of a declaration - made during the submissions of the plaintiff and the supporting defendants that the Perpetual Sub Lease should be construed or declared to be enduring in favor of all heirs of Sh. Dhan Singh Bisht cannot be granted. It is trite law that no amount of evidence or argument in the absence of pleadings can be gone into by the Court In *Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar*, , the Supreme Court held that decisions cannot be founded on grounds outside the pleadings and what has to be considered or granted is the case pleaded. It was also held that without amendment of the pleading in light of facts disclosed or discovered subsequently, the Court would not be entitled to modify or alter the relief claimed. This was based on a previous ruling of the Privy Council in *Mahant Govind Rao v. Sita Ram Kesho and Ors.* (1898) 25 IA 195 (PC). These rulings were subsequently followed in *Ram Kumar Barnwal Vs. Ram Lakhan (dead)*, .

22. It would be now necessary to deal with the case law cited on behalf of the plaintiff. In the Privy Council decision of *Deo Nandan* (supra) the facts were that in an estate in which 12 annas share was held by a number of co-sharers, some of them plaintiffs 17 to 20 created on 23.12.1904 a usufructuary mortgage over a 3 annas share belonging to them and subsequently assigned their shares to the plaintiffs 1 to 6. The mortgage bond provided that the mortgagee was to pay the Government revenue. He however defaulted in the payment resulting in the sale of the estate by the Government, and he became the purchaser thereof at the revenue sale. Then, the co- sharers sued to recover the properties from the mortgagee-purchaser. The subordinate Judge dismissed this suit on the ground that no fraud on the part of the purchaser had been established and that the sale could not therefore be set aside. This judgment was reversed on appeal. The High Court considered the rights of plaintiffs 1 to 6, who were representatives of the mortgagor, and held that the mortgagee in possession was in the position of a trustee, that as the sale was occasioned by his default he could not rely on his purchase for defeating the title of the mortgagors and that it was immaterial whether there was fraud or not. The Privy Council affirmed the Allahabad High Court's decision. It is noticeable that in the narration of facts, the plaintiffs sued the subsequent purchaser for recovery of property, and the plea of constructive trust was taken and considered. In *Abdul Gafur Khan* (supra) the property was a plot of land owned by the Secretary of State for India in Council. On the 29th August, 1902, the land was conveyed by a lease executed by the representative of the Secretary of State in favour of one Ehsan Husain Khan. The lease was for a term of 30 years with retrospective effect. This term was to be counted from the 12th of June, 1882. Before the expiry of the term Ehsan Husain Khan died in May, 1907. His estate was inherited by the defendant, his son, and the plaintiff, his daughter in the proportion of two-thirds and one-third respectively according to Muhammadan Law. The term of the lease expired in June, 1912. It was, however, renewed on the 5th August, 1912, in the name of the defendant. The plaintiff had protested against the renewal in favour of Abdul Ghafur Khan alone. The sister sued, unsuccessfully, contending that the lease was renewed in favour of the brother in a representative capacity; the first appellate court reversed the dismissal, and decreed the suit. The Oudh High Court affirmed the findings of the appellate court, and also upheld the finding regarding constructive trust, based on Section 90. Here too, the parties went to trial with specific pleadings and evidence of constructive trust.

23. In *Babani Sairoo* (supra) the facts were that Government, acquired the lands in 1865; and forty-seven years later, on December 28, 1912, by a resolution of Government, it was resolved that the lands should be restored to the persons from whom they had been acquired. The resolution and the subsequent order - Exhibit 38, dated July 5, 1921, the lands in question were directed to be "restored," to the first and the second defendants. The plaintiff urged that the two defendants held the property as constructive trustees. The High Court held in favour of the plaintiff, on an application of the principle underlying Section 90.

Babani Soiroo Patel Vs. Dulba Govind Bhandari, too, was a case where the plea of constructive trust was contested, after averments, and evidence. The plaintiff sued for declaration of his interest, as heir of the lessee of a government land, on expiry of the grant, when the issue of renewal came up. At the inquiry, the defendant had contended that he alone was entitled to renewal. The first defendant's contentions were overruled, and the court proceeded to affirm the principles underlying Section 90.

24. The argument by the plaintiff and supporting defendants based on creation of a constructive trust is facially attractive. The text of the provision, i.e. Section 90 undoubtedly suggests that property held by a co-owner where others exists does not vest in him absolutely but such ostensibly exclusive title is to be treated as one for the benefit of other co-owners. The plaintiff and supporting defendants have placed heavy reliance on several judgments of various High Courts in India. As discussed earlier, in each of the judgments, the principle underlying Section 90 was affirmed. What is also apparent, equally from the judgments is that Section 90 the creation and existence of a constructive trust or obligation akin to it was put in issue in every case, contentions made and evidence led by the parties based on which findings were rendered. As commented earlier in the preceding portions of the judgment, such is not the case in this suit. There are other singularly distinctive features which the Court has to take into consideration. Significantly enough, the plaintiff consciously also did not amend the suit for appropriate relief after disclosure of the perpetual lease deed in favor of the first defendant. Even more importantly, the plaintiff had moved an application but later consciously withdrew it.

25. The Court is mindful of the first defendant's averments as well as materials on the record which suggest that a construction was put-up on the suit property with the funds of the first defendant. Though the issue of ownership of superstructure does not fall for consideration in Issue No. 1, what cannot be ignored, is that the plaintiff and the supporting defendants nowhere dispute that such construction was put-up in the early 1970s as is contended. The inference which follows from this reality is that the plaintiff and supporting defendants were conscious of the construction carried-out by the contesting defendants and their possession of the property. It has nowhere been suggested that they were misled into believing that the construction inured to their benefit or that they had even paid for the construction of such building or house. Being closely related with Parvati who died in 1975, the plaintiff and the supporting defendants took no steps to assert their rights at any point of time before the filing of the suit. In these circumstances, aside from the technicality of the maintainability of the suit, the supervening equities arising in favor of the contesting defendants who enjoyed the property and have continued to enjoy this property all the while for about 22 years till the filing of the suit, in the opinion of the Court estops and bars the plaintiffs from claiming the reliefs sought in the suit.

26. The plaintiffs have relied upon a recent decision of this Court in Manmohan

Singh Malik v. Avtar Kishan Malik 2009 (113) DRJ 257, in support of their argument that execution of a sublease in favor of one co-owner and long lapse of time would not bar the maintainability of the suit. The Court had, on that occasion held as follows:

XXXX XXXX XXXX 17. In my view once the court has come to the conclusion that the defendant No. 1 as a nominee was entitled to have the perpetual lease deed executed in his favour on behalf of and/or the benefit of all the legal heirs, the execution thereof would not give any right to the defendant No. 1 and notwithstanding the execution of the perpetual lease deed he would continue to hold the property for and/or for the benefit of all the heirs as per the law of succession. The law being, that nomination is only for the purposes of discharging the society and/or the perpetual lessor of the land, mere execution of a perpetual sub lease in such situation cannot be said to be such an Act which would give a cause of action to other who may have a share in the property.

XXXX XXXX XXXX

27. In this Court's opinion, there are certain distinguishing features in the present case which render inapplicable the observations relied upon. One, the plaintiff has not challenged the perpetual lease deed of 1967 - in that case, a declaration that the perpetual lease deed was void, was expressly claimed. Two, it is not clear whether the co-owner lessee had raised constructions and used the property for such a length of time as is the case in this suit. Further, as noted on more than one occasion, the plaintiff here chose to abandon the relief of decree for declaration or cancellation which had been sought through an amendment application during pendency of proceedings. Such or similar facts or features are absent in Manmohan Singh Malik's case.

28. For these reasons, it has to be held that since the relief of partition of the suit property is in respect of the right and interest to the suit property that was conveyed by a registered deed dated 28.06.1967 which has remained unchallenged and in respect of which an amendment sought earlier was abandoned, and also since the plaintiff has never pleaded or proved existence of a constructive trust and its breach, the suit as framed is not maintainable and the reliefs thus cannot be granted. The court is also of the opinion, for the reasons recorded in the preceding findings, that the plaintiffs and supporting are estopped from claiming the reliefs sought in this suit.

29. The question of limitation is to be considered along with the first issue about maintainability of the suit. The contesting defendants argue here that since the plaintiff has failed to seek appropriate relief, of declaration or, alternatively, cancellation of the Registered Lease deed dated 28th June, 1967, either in the suit, or by way of amendment. It is contended that such relief cannot be granted, because the period of limitation prescribed in this regard, by Articles 58 and 59 mandate that suits in regard to such declaration are to be instituted within three years after the cause of action arises. In this case, urge the

contesting defendants, the Perpetual lease deed having been registered in 1967, the plaintiff is deemed to have knowledge about it, from that time. In any case, once actual knowledge is presumed, from the date of filing of written statement, the suit should have been amended, to incorporate the appropriate relief, or leave sought to file a suit for cancellation or declaration. As neither course of action was adopted, and the plaintiff could have in any case obtained knowledge by exercise of reasonable diligence, the claim for cancellation or declaration, as the case may be is time barred. As that is the most appropriate relief which the plaintiff could have, but did not seek, the suit for partition is not maintainable.

30. As is evident, there is a considerable degree of overlap in the first and third issue, as both deal with different facets of maintainability of the suit, in respect of the property. The defendant's contentions are sought to be met with by the plaintiff, who argues that since the present case involves breach of a constructive trust, the suit is not time barred.

31. At the outset, one aspect needs to be highlighted - this was emphasized by the defendant. The plaintiff verified the suit, alleging inter alia, that facts were derived from the records. In support of the suit, the plaintiff filed a list of documents which included correspondence with the society. This establishes that the plaintiff was in a position to verify the true state of affairs regarding the title to the suit property, and could have secured correct information of the state of its ownership. Further, as observed earlier, the plaintiff had moved an application for amendment of the suit, to incorporate a specific challenge to the lease deed. That application was later dismissed as withdrawn; no liberty of any kind whatsoever was sought or granted.

32. Section 10 of the Limitation Act was pressed into service, at one point of time, by the plaintiff, to say that when the suit claim comprehends property that is the subject matter of trust, and when the facts point to breach of trust, there is no period of limitation. It was also contended that most of the other heirs were minor children, when Late Dan Singh Bisht had passed away, and his elder daughter Parvati (who died in 1975) and the late first defendant were not only major, and being the elders in the family, were looked upon as parents. The plaintiff and supporting defendants had argued that given these circumstances, their being kept in the dark about the true state of affairs, on the one hand, and misappropriation of the property, on the other, are self evident facts, which should spur the court to render complete justice. The defendants counter these arguments, by saying that no case of constructive trust was set up or proved, and that in the given circumstances of the case, Section 10 (of the Limitation Act) is inapplicable.

33. That provision (Section 10) reads as follows:

10. Suits against trustees and their representatives - Notwithstanding anything contained in the foregoing provisions of this Act, no suit against a person in whom property has become vested if trust for any specific purpose, or against

his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof or for an account of such property or proceeds, shall be barred by any length of time.

Explanation - For the purposes of this section any property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of the property shall be deemed to be the trusted thereof.

34. Facially, the provision exempts the applicability of the Limitation Act, in respect of properties, which are created or dedicated for a specific trust purpose. In such event, the beneficiaries or persons interested, can "follow" the properties, irrespective of the period of limitation; the objective being to enable recovery of property by the rightful owner, or action against misfeasance or unlawful diversion of the property. The expression "specific purpose" is the subject matter of judicial decisions in India. The effect of such decisions has therefore, to be examined.

35. In *Krishna Pattar and Another Vs. Lakshmi alias Ammu Ammal and Others*, , it was held that:

The case is of a constructive trust or of an obligation in the nature of a trust...Section 10 of the Limitation Act has never been held to apply to such cases. It is true that in Section 10 the term "express trustee" is not used in the Section itself but only in the marginal note, but the language of the section referring, as it does, to "persons in whom property has become vested in trust for any specific purpose" is explicit enough to show that it refers only to express trustees.

(emphasis supplied)

36. The above principles were followed in *Kishan Dei v. Ramchand* AIR 1927 Lah 773; AIR 1937 373 (Oudh); *Mir Hussain Ali Vs. Mir Baquir Ali*, and *Vankamamidi Balakrishnamurthi Vs. Gogineni Sambayya and Others*, . A similar view has been taken by the Allahabad and Bombay High Courts, as evident from the following observations in *Kripa Nath v. Ganga Prasad* AIR 1962 All. 256:

XXXX XXXX XXXX (31) In the first place, it appears to be well settled that the expression "trust for a specific purpose" used in Section 10 will not apply to a trust arising by operation of law vide *Soonderdass Thakersay v. Bai Laxmibai* AIR 1946 Bom 131

XXXX XXXX XXXX

Earlier, the Privy Council had ruled, in a similar vein, in *Khaw Sim Tek v. Chuah Hooi Gnoh Neoh* AIR 1922 PC 212, when it held that:

...A "specific purpose" within the meaning of Section 10, must, in their Lordships' opinion, be a purpose that is either actually and specifically defined in

terms of the Will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed....

37. It is thus clear that Section 10, (which enjoins inapplicability of the Limitation Act), is premised on existence of an express trust, with a defined specific purpose. Resultantly, it does not apply in the case of a constructive trust, more so when it is neither pleaded nor proved as in the present case. Therefore, if the plaintiff had a cause of action, to seek cancellation of the Registered Lease Deed, dated 28.06.1967, inuring in favor of the first defendant, or to seek an appropriate declaration, it was extinguished after the expiry of 3 years from the date of registration of the document, or, latest, within 3 years from the date of the filing of the written statement, by the first four defendants, i.e. three years from 12th January, 1990. The plaintiff also, significantly omitted to sue for a decree of possession. The effect of these omissions may be best summarized in the following observations of the Supreme Court, in *Md. Noorul Hoda Vs. Bibi Raifunnisa and Others*, :

there is no dispute that Article 59 would apply to set aside the instrument, decree or contract between the inter se parties. The question is whether in case of person claiming title through the party to the decree or instrument or having knowledge of the instrument or decree or contract and seeking to avoid the decree by specific declaration, whether Article 59 gets attracted? As stated earlier, Article 59 is a general provision. In a suit to set aside or cancel instrument, it contract or a decree on the ground of fraud, Article 59 is attracted. Starting point of limitation is the date of knowledge of the alleged fraud. When the plaintiff seeks to establish his to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. Section 31 of the Specific Relief Act, 1963 regulate suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or whatever and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or whatever and the court may in its discretion so adjudge it and order it to be delivered or cancelled. It would thus be clear that the word "person" in Section 31 of the Specific Relief Act is wide enough to encompass a person seeking derivative title from his seller. It would therefore be clear that if he seeks avoidance of the instrument, decree or contract and seek a declaration have the decrees set aside or cancelled is necessarily bound to lay the suit within three years from the date when the facts entitling the plaintiff to have the decree set aside, first became known to him.

Section 27 of the Limitation Act prescribes that upon expiration of the period of limitation provided, any person's right to sue for recovery of possession of immovable property is extinguished. It reads as follows:

27. Extinguishments of right to property - At the determination of the period

hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

Speaking about the imperative nature of the provision, the Supreme Court, in Prem Singh and Others Vs. Birbal and Others, held that:

11. Limitation is a statute of repose. It ordinarily bars a remedy, but, does not extinguish a right. The only exception to the said rule is to be found in Section 27 of the Limitation Act, 1963 which provides that at the determination of the period prescribed thereby, limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

12. An extinction of right, as contemplated by the provisions of the Limitation Act, prima facie would be attracted in all types of suits. The Schedule appended to the Limitation Act, as prescribed by the articles, provides that upon lapse of the prescribed period, the institution of a suit will be barred. Section 3 of the Limitation Act provides that irrespective of the fact as to whether any defence is set out or is raised by the defendant or not, in the event a suit is found to be barred by limitation, every suit instituted, appeal preferred and every application made after the prescribed period shall be dismissed...

In these circumstances, the court finds the third issue also in favour of the first four defendants and the twelfth defendants, and against the plaintiff. The first, third and eleventh issues are accordingly answered against the plaintiff.

#### Issue No. 2

38. This issue appears to have been framed at the instance of defendants who urged that in the absence of the Diplomatic Enclave Extension Cooperative Housing Society Ltd. (hereafter "the society"), the suit was not maintainable. It had been urged that the said party is necessary for a proper and full adjudication of the disputes as the ownership of the West End property which is an issue, is with respect to a sub-lease of which the society is the lessor.

39. Although the issue appears to have been framed at the stage of filing of the suit, to substantiate how the society's presence in these proceedings is a must. Concededly the Society does not lay a claim to the suit property in any capacity. The materials on record suggest that the Society had corresponded with the nominee, late Parvati and on being furnished with the materials complied with the nomination of late Thakur Dan Singh Bisht. The plaintiff do not seeks any relief against the Society nor have they filed finding adverse to it. In these circumstances, at best the Society could have been a proper party but in any case is not a necessary party whose absence would vitiate the suit. This issue is found in the plaintiff's favour and against the defendants.

#### Issue No. 4

40. This issue concerns proper valuation of the suit for the purposes of Court Fees and jurisdiction. It was framed at the defendant's behest. This Court had



heard the parties and returned its findings in the order dated 21 .10.2008. This issue therefore does not have to be considered separately and decision of the Court is in terms of the order dated 21.10.2008.

Issue No. 5

41. The defendants had insisted that the suit is not maintainable as it s barred under provisions of law. It was argued that Civil Court does not have jurisdiction to try the suit that pertains to membership of cooperative society since such disputes are compulsorily arbitrable. Reliance is placed on (the now repealed) Section 54 of the Bombay Co-operative Societies Act, 1925, which was in force at the relevant time. The Act appears to have been amended on many occasions, and provided for arbitration by the Registrar, of certain class of disputes, outlined inter alia, as follows:

(a) between members or past members of the society or persons claiming through a member or past member, or

(b) between members or past members or persons so claiming and any past or present officer, agent or servant of the society, or

(c) between the society or its committee, and any past or present member of the society, or

(d) between the society or its committee, and any past or present officer, agent or servant of the society, or a surety of such officer, agent or servant, whether such surety is or is not a member of the society,

....

A dispute shall include the question whether a person is or was a member of a society and also claims by a society for debts or demands due to it from a member, past member or non-member or the heirs or assets of a past member or non-member whether such debts or demands be admitted or not....

Similarly, provisions of the previously existing Delhi Co-operative Societies Act, 1972, are relied on; Section 60 reads as follows:

60. Disputes which may be referred to arbitration.- (1) Notwithstanding anything contained in any law for the time being in force, if any dispute touching the constitution, management or the business of a co-operative society other than a dispute regarding disciplinary action taken by the society or its committee against a paid employee of the society arises - Among members, past members and persons claiming through members, as members and deceased members, or between a member, past member or person claiming through a member, past member or deceased member and the society, its committee or any officer, agent or employee of the society or liquidator, past or present, or between the society or its committee and any past committee, any officer, agent or employee, or any past officer, past agent or past employee or the nominee, heirs or legal representatives of any deceased officer, deceased agent, or deceased employee

of the society, or between the society and any other co-operative society, between a society and liquidator of another society or between the liquidator of one society and the liquidator of another society, such dispute shall be referred to the Registrar for decision and no court shall have jurisdiction to entertain any suit or other proceedings in respect of such dispute.

For the purposes of Sub-section (1), the following shall be deemed to be disputes touching the constitution, management or the business of a co-operative society, namely: A claim by the society for any debt or deemed due to it from a member or the nominee, heirs or legal representatives of a deceased member, whether such debt or demand be admitted or not, a claim by a surety against the principal debtor where the society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor, whether such debt or demand is admitted or not, any dispute arising in connection with the election of any officer of a society other than a society mentioned in Sub-section (1) of Section 31.

If any question arises whether a dispute referred to the Registrar under this section is or not a dispute touching the constitution, management or the business of a co-operative society, the decision thereon of the Registrar shall be final and shall not be called in question in any court.

Notwithstanding anything contained in the Limitation Act, 1963, but subject to the specific provisions made in this Act, the period of limitation in the case of a dispute referred to the Registrar under Sub-section (1) shall - when the dispute relates to the recovery of any sum including interest thereon due to a co-operative society by a member thereof, be computed from the date on which such member dies or ceases to be a member of the society.

Save as otherwise provided in Sub-clause (iii), when the dispute relates to any act or omission on the part of any of the parties referred to in Clause (b) or Clause (c) of Sub-section (1), be six years from the date on which the act or omission with reference to which the dispute arose, took place, When the dispute relates to a co-operative society which has been ordered to be wound up u/s 63 or in respect of which an administration has been appointed u/s 32, six years from the date of the order issued u/s 63 or Section 32, as the case may be,

When the dispute is in respect of an election of an officer of a co-operative society other than a society referred to in Sub-section (1) of Section 31, be one month from the date of the declaration of the result of the election.

(b) The period of limitation in the case of any other dispute except those mentioned in the foregoing clause which are required to be referred to the Registrar under the last preceding section shall be regulated by the provisions of the Limitation Act, 1963, (30 of 1963), as if the dispute was a suit and the Registrar a civil court.

Notwithstanding anything contained in Clauses (a) and (b) the Registrar may

admit a dispute after the expiry of the period of limitation, if the applicant satisfies the Registrar that he had sufficient cause for not referring the dispute within such period and the dispute so admitted shall be a dispute which shall not be barred on the ground that the period of limitation has expired.

42. It is submitted that the question as to who is or ought to be a member in his capacity of heir of a deceased member of the Cooperative Society is to be decided exclusively by the Registrar exercising adjudicatory functions. Learned senior counsel argued that the express mention of heirs of deceased members in Section 4 of the Bombay Act which was in force at the time of death of Thakur Dan Singh Bisht bars the jurisdiction of this Court in respect of the dispute.

43. A careful reading of Section 54 of the Bombay enactment and Section 60 of the Delhi enactment would reveal that the primary legislative concern was to exclude disputes which touched upon the management of a Cooperative Society including its finances and such membership disputes which affected its functioning. The inter se disputes of one or the other claimant towards the membership or right to claim membership however has not been made the subject matter of arbitration. It is a settled proposition that exclusion of Civil Court's jurisdiction cannot be readily inferred and there must be clear provisions to that effect or provisions which necessarily imply such exclusion. The mention of heirs in Section 54 is in the context of the debt owed by a member to the Society. The corollary to such specific mention is that the legislature provided for inclusion of one class of disputes between an heir of deceased member and the society whereas all other classes of disputes involving deceased members' heirs were excluded. Therefore, a dispute pertaining to who should be the rightful member or who can be called heirs of a deceased member as to lay a valid claim to the benefit of membership rightfully falls within the domain of the Civil Court. This issue is accordingly answered against the defendants and in the plaintiff's favor; this Court has the jurisdiction to entertain and try the present suit.

#### Issue No. 6

44. This issue concerns late Thakur Dan Singh Bisht's ownership of the suit property, A-20, West End Avenue, New Delhi. The contesting defendants argue that he never owned the property, and had nominated Smt. Parvati Devi on 12.07.1961, (Ex. P-1) to succeed to his membership on his death, and that after his death, she was invited to membership of the society, on 20.01.1965 ( Ex. P-2/ D2-D4) to which she applied on 18.02.1965, (Ex. P-6/D-2-D4) and that the society recognized her as a member on 12.04.1965 (Ex. P-7/D-2-D4). The contesting defendants have denied certain documents (Ex. P-10, a request for membership of the society by Dan Singh Bisht); Ex. P-11, a letter by the society dated 20th August, 1956 informing about the decision to accept the membership application of Dan Singh Bisht; Ex. P-12, his response to the society's intimation; Ex. P-13, letter dated 29th April, 1961 by Dan Singh Bisht, inquiring about the amount to be remitted; Ex. P-14, his letter requesting allotment of a 1200 square yard plot, to the society (dated 31-5-1961). However, in view of

admission of the letter nominating late Parwati Devi as Dan Singh Bisht's nominee, the denial of such documents is of no avail, as their genuineness, in this Court's opinion, stands established by internal evidence, and can be safely inferred. The same logic applies to Ex. P-15 to P-22, all letters and correspondence by Dan Singh Bisht with the society, regarding payment of amounts, from time to time, towards the consideration for the plot, and execution of certain document to facilitate allotment. The contesting defendants have selectively and carefully denied these documents, even while admitting documents which are seemingly neutral. However, what cannot be lost sight of is that these documents are part of the same series whereby Parwati Devi was nominated by Dan Singh Bisht, and whose nomination and subsequent membership after the death, are admitted. In other words, the contesting defendants do not dispute that Dan Singh Bisht was a member of the society, and that Parwati Devi was nominated to succeed to that membership after his death. Yet strangely they dispute (perhaps, ostrich like) the letters which evidence payments made by him during his lifetime. The reason for such plea is the argument that Dan Singh Bisht was never the owner of any plot, or the suit property, which came to be allotted and the possession of which was handed over, after his death, to his nominee.

45. The contesting defendants argue that on the date of Dan Singh Bisht's death, the society had not even been allotted land by the competent authority, and there was no Lease Deed inuring in its favour. It is submitted that the expression "earmarking" of a plot, used by the society, in one of its letters to Dan Singh Bisht, during his lifetime, does not amount to an allotment, or any enforceable right, in prasenti. The contesting defendants place reliance on a decision of this Court in *The Chief Commissioner and Anr. v. Mrs. Kitty Puri and Anr.* AIR 1973 Del 148, particularly, the following passage:

In paragraph 12 of the counter-affidavit of the Government it is clearly stated that the Society was given only a license to enter upon the land for the purpose of development and no lease had been granted to the Society. In paragraph 9 of the rejoinder the petitioner Respondent No. 1 did not deny this assertion of the Government but argued on the assumption that only a license had been granted to the Society. It is clear, therefore, that no right or interest as such had been created in favor of the Society by the Government till the license granted to the Society was replaced by a lease. Even then it is the Society but not its members who would get a right or interest in the land. The right in favor of the members is created only through the Society when the lease is granted to the Society by the Government and then sub-lease is given to a member by the Society as lessee by the Government as the Lesser. This is the standard pattern of development of land for construction of buildings adopted by the Government in Delhi and is a matter of common knowledge. The petitioner Respondent No. 1 did not have, Therefore, any interest in any particular piece of land at all. The allotment of a particular plot by the Society to Shri B.S. Puri was only by way of anticipation to be carried out after a sublease is executed in favor of the member.

46. The contesting defendants also rely on the judgment of the Supreme Court in Krishna Dass Agarwal Vs. Kanhaiyalal, , and Bay Berry Apartments Pvt. Ltd. and Another Vs. Shobha and Others, , arguing that Dan Singh Bisht's right, if it could be termed so, on the date of his death, was inchoate as it did not pertain to any specific property; the society had not been allotted any land, nor was it a lessee. In such event there is no question of his entitlement to any property, and that Parwati Devi, as his nominee for membership of the society, subsequently acquired such rights of allotment, and possession of a plot, for which the lease was executed later. In the circumstances, say the contesting defendants, there was no right in present enforceable, and cannot be the basis of the present claim in the suit. It is lastly argued that the inchoate right to a plot is a mere "chance" within the meaning of Section 6(a) of the Transfer of Property Act, 1882, which does not constitute property, and is therefore, not heritable. Section 6(a) reads as follows:

#### 6. WHAT MAY BE TRANSFERRED.

Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force,-

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

47. The facts here (gathered from the admitted documents on record) are that at the time of Dan Singh Bisht's death he had paid Rs. 100/- as share money, to the society for his membership, and an amount of Rs. 28,194/- (Ex. P-7) to the society. The amount was short by Rs. 6/- which was made good by Parwati Devi (Ex. P-8). On 7-1-1965, she received intimation containing progress about allotment of plot to members (Ex. P-2). All these, to in this Court's opinion do not amount to a mere chance to come upon a legacy, or bequest, or succeed to some property; they also do not point to an inchoate right. Rather, the payment of sums demanded by the society, admission of Dan Singh Bisht to the membership of the society, and in that capacity, his application for allotment of a 1200 square yard plot, which was acceded to, but the actual allotment of which matured after his death, and even its subsequent enjoyment by Parwati Devi, and later, the deceased first defendant, show that he had an enforceable right and claim for a plot, after allotment of the land to the society, at the time of his death. Looked at in another way, acceptance of the contesting defendant's argument would lead to startling and unwholesome results, whereby despite payment of substantial amounts to a builder, developer or some such service provider, for a plot of land (undetermined) or a flat, the death of the customer or client would deprive his legal heirs the right to enjoy that asset - as there can be no dispute that such plot, or flat, whenever developed or built (as the case may be) would amount to property, by all accounts. It is therefore, held that at the time of his death, Dan Singh Bisht had a right to claim allotment of a plot, which had been earmarked in his favour. That was an enforceable and heritable right,

and not a mere chance u/s 6(a) of the Transfer of Property Act. This issue is therefore, found in the plaintiff's favour and against the contesting defendants.

Issue Nos. 7 and 8:

48. These issues are inter-related and require to be considered together; they pertain to the extent of right of late Parwati Devi, and if she had any rights, whether she could have transferred the membership and allotment (in respect of the suit property) to her husband, the late first defendant.

49. The contesting defendants rely on Bye laws 9 and 15 of the Society, which are extracted below:

9. A member or a nominee or successor of an ex-member may transfer his shares to another member or applicant qualified under bye-law (5) & approved by the Managing Committee...

15. Every member may nominate a person or persons to whom on his death his shares shall be transferred...If not admitted to the membership the nominee or nominees shall be paid the value of the shares or interest subject to the provisions of bye-law 9...

It is argued that the above indicate that a member, during his lifetime, can transfer his share; nominate someone to succeed, after his death. Reliance is placed on the judgment in *Kitty Puri (supra)* and *Santosh Kakkar v. Ram Prasad and Ors.* 1998 (1) AD (Del) 938 to say that when land, particularly leasehold land, is not allotted by a society, the right of such a member, who dies before the allotment, does not form part of his estate. The contesting defendants argue therefore, that upon Dan Singh Bisht's death, he was not allottee in respect of any plot, and therefore, the nomination of Parwati Devi resulted in her entitlement as successor, and the subsequent allotment in her favour, after her admission as member of the society, vested the right and interest to the suit plot, exclusively in her favour, which she legitimately transferred and assigned to the first defendant, her husband.

50. The plaintiff and supporting defendants argue that a nomination in favour of one heir, or in favour of a stranger does not result in exclusion of the rights to the benefits flowing from membership (of a society) to the other heirs. They rely on Section 27 of the Bombay Cooperative Societies Act, 1925, previously in force in Delhi, as well as Section 26 of the (now repealed) Delhi Co-operative Societies Act, 1972 and Section 28 of the Delhi Co-operative Societies Act, 2003, all of which are in pari materia. Section 27 (of the Bombay Act) reads as follows:

Section 27(1). On the death of a member of a society such society may within a period one year from the death of such member transfer the share or interest of the deceased member to a person or persons nominated in accordance with the bye-laws of the society, if duly admitted a member of the society in accordance with the rules or the bye-laws of the society, or if there is no person so nominated, to such person as may appear to the committee to be the heir or

legal representative of the deceased member, if duly elected a member of the society or may pay such nominee, heir or legal representative as the case may be a sum representing the value of such members share or interest as ascertained in accordance with the rules of bye-laws.

Provided that such nominee, heir or legal representative, as the case may be, may require that payment shall be made by the society within one year from death of the member, of the value of the share or interest of such member, ascertained as aforesaid.

(2) A society shall subject to the provisions of Section 25 and unless presented by an order of a competent court, pay to such nominee, heir or legal representatives, as the case may be, all other moneys due to the deceased member from the society.

(3) All transfer and payments made by a society in accordance with the provisions this section shall be valid and effectual against any demand made upon the society by any other person.

The plaintiff also relies on the judgment of the Supreme Court in Smt. Sarbati Devi and Another Vs. Smt. Usha Devi, and contends that mere nomination of someone does not disturb the line of succession, which has to follow according to the law of inheritance.

51. The facts here point to membership of late Dan Singh Bisht, in the society; his having paid not only the share money, but opting for a 1200 square yard plot, and most importantly, having paid all the amounts demanded (Rs. 28,194/)) towards cost of the plot, by the time of his death. The materials also suggest that the balance of about Rs. 5000/- was paid after his death, and after Parwati Devi was accepted as member of the society in his stead. Therefore, as on the date of his death, unlike in Santosh Kakkar (where a miniscule amount had been paid) substantial consideration or the lions share of the plot money had been paid.

52. The Supreme Court, in Smt. Sarbati Devi (supra) emphasizing that nomination does not derogate from the normal line of succession, according to laws of inheritance (though in the case involving nomination to receive the proceeds of a life insurance policy) held that:

We approve the views expressed by the other High Courts on the meaning of Section 39 of the Act and hold that a mere nomination made u/s 39 of the Act does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them.

This view was reiterated in Shri Vishin N. Kanchandani and Another Vs. Vidya

Lachmandas Khanchandani and Another, where the Supreme Court observed that:

The High Court equated a nominee to the heirs and legatees of the assured and proceeded to hold that the nominee succeeded to the estate with all "plus and minus points". We find it difficult to treat a nominee as being equivalent to an heir or legatee.... In the light of what has been noticed hereinabove, it is apparent that though the language and phraseology of Section 6 of the Act is different from the one used in Section 39 of the Insurance Act, yet, the effect of both the provisions is the same. The Act only makes the Provisions regarding avoiding delay and expense in making the payment of the amount of the National Savings Certificates, to the nominee of the holder, which has been considered to be beneficial both for the holder as also for the post office. Any amount paid to the nominee after valid deductions becomes the estate of the deceased. Such an estate devolves upon all persons who are entitled to succession under law, custom or testament of the deceased holder. In other words, the law laid down by this Court in Smt. Sarbati Devi and Another Vs. Smt. Usha Devi, : A.T. Brij Paul Singh and Others Vs. State of Gujarat, holds the field and is equally applicable to the nominee becoming entitled to the payment of the amount on account of National Savings Certificates received by him u/s 6 read with Section 7 of the Act who in turn is liable to return the amount to those in whose favour the law creates a beneficial interest, subject to the provisions of Sub-section (2) of Section 8 of the Act.

In a later judgment Gayatri De Vs. Mousumi Co-operative Housing Society Ltd. and Others, , the Supreme Court again held as follows:

The appellant being one of the heirs of the deceased member, in our opinion, is entitled to succeed to the estate of the deceased and that being so, the right, title and interest of the deceased member in the apartment of the Society devolves upon his heirs and the aforesaid Section 85(3) and Rule 135(3) cannot have any application in the instant case.

In Pran Nath Mallick Vs. Dr. Netar Prakash Mallick and Others, , a Division Bench of this Court adopted an identical approach. It was held (in paragraph 12 of the Report) an allotment of a plot once made to a member of a society, it cannot be said that his nominee or legal representative is not entitled to hold or inherit the plot so allotted and that after allotment is made, legal rights get vested in the member and the society cannot stop the inheritance of those rights on the legal representatives and heirs.

53. In Manmohan Kishan Malik (supra) this Court followed the decision in Sarbati Devi (supra) repelling the argument that nomination to membership of a co-operative society does not displace the right of heirs, stated as follows:

There is yet another reason for not disturbing the aforesaid consistent dicta. The Supreme Court in Smt. Sarbati Devi (supra) has also held that when all along the High Courts have taken the view that mere nomination does not deprive the



heirs of their rights and when inspite thereof the Parliament has not chosen to make any amendment to the act, in such situation, unless there are strong and compelling reasons to hold all these decisions to be erroneous, the court should be slow to take a different view.

In view of the above discussion, it is held that the nomination of Parwati Devi, which resulted in her applying and becoming a member of the society, did not confer exclusive rights upon her; she was one of the heirs of late Dan Singh Bisht, and could not have transferred or alienated the entire property, without express consent and authorization of the other heirs, i.e the other parties to the present suit. Issue Nos. 7 and 8 are accordingly answered against the contesting defendants, and in favour of the plaintiff.

#### Issue No. 9

54. The onus of proving this issue, i.e. ownership of the suit property is upon the contesting defendants, who rely upon the documents such as Ex.P-3 dated 08.02.1965 where Parvati Devi consented to be member of the Society (Ex. P-6) dated 18.02.1965 where she applied for membership and declared that she was eligible to do so and the Society's response dated 12.04.1965 (Ex. P-7). It is further argued by the contesting defendants that Parvati Devi transferred her membership in favor of the first defendant, her husband, sometime in 1966 which was accepted. In support, reliance is placed upon Ex. D-3/5, i.e. letter by the Society intimating the first defendant about the further amounts payable by him and also requesting him for taking action for execution of Perpetual Sub-Lease Deed and the Perpetual Sub Lease (Ex. D-3) dated 28.06.1967.

55. So far as the ownership and title to superstructure is concerned, reliance is placed by the contesting defendants on the documents where the first defendant informed the Government about the likely cost of construction - Ex. D-3/13, approval of the Central Government (since the first defendant was an All-India Service officer) belonging to the Indian Police Service (IPS), dated 20.06.1972, for construction of the house at the estimated cost of Rs. 1,22,150/- (i.e. Ex. D-3/14). Other documents such as Ex. D-3/15 dated 30.01.1973 intimating that the cost of construction had gone up and the Central Government's sanction permitting raising of additional loan dated 29.05.1973 (Ex. D-3/16) as well as the late first defendant's intimation of the source of funds extended to the extent of Rs. 1,85,700/- dated 14.01 .1976 (Ex.D-3/17) are relied upon. The defendants, however, rely upon the Ex. D-3/7, D-3/8 and D-3/9, i.e. applications to the Municipal Corporation of Delhi and C and D forms issued by the MCD dated 04.06.1972 and 04.12.1972. Ex. D-3/1 1 dated 06.05.1976 evidences that the first defendant had deposited the charges payable to MCD. Ex.D-3/12 dated 06.05.1976 is the Occupancy Certificate issued by the Municipal authorities, to contend that late first defendant had raised amounts against mortgage Life Insurance Policies and also borrowings from his relatives, Ex. D-3/18 dated 03.06.1972 has been relied upon. Other corroborative evidence such as correspondence with the Income Tax authorities towards valuation of the suit

property and the building constructed (Ex. D-3/22 and D-3/23) have been placed on the record. Apart from these, a series of other documents, such as Electricity Bill receipts issued by the Society towards payment of ground rent, copies of House Tax Receipts etc. (Ex. D-3/26A to D-3/58) have been produced.

56. The plaintiff and the supporting defendants argue that the first defendant, not being an owner could not have acquired title by mere assignment, gift or transfer from late Parvati Devi as she in turn was not exclusive owner of the suit property. It is submitted that resultantly, a vendee such as the first defendant cannot acquire better title than his vendor or seller. It is further argued that since Parvati Devi only acquired the suit property in her capacity as a nominee and was obliged to hold it on behalf of the others, any transfer as is sought to be in the first defendant's favor is not sustainable and that in any event, execution of the Perpetual Lease Deed did not result in conferment of a superior right to the first defendant.

57. This Court has already rendered findings in respect of Issue Nos. 7 and 8 that Parvati Devi was a mere nominee, in the facts and circumstances of the case. However, as regards the maintainability, the Court has concluded that the suit is not maintainable and is also time-barred and further that the plaintiff and supporting defendants are estopped from claiming the relief. Though these would be dispositive of the suit, the Court has to nevertheless notice the effect of the materials and pleadings placed on the record.

58. Although the contesting defendants argue that Parvati Devi had assigned or transferred her right, title and interest in favor of the late first defendant, in 1966, no documents in that regard is forthcoming. There is no Gift or Relinquishment Deed in favor of the late first defendant or otherwise brought on the record. Similarly, the copy of a letter or intimation assigning Parvati Devi's right to the first defendant as intimated to the Society too has not been revealed to the Court. Thus the manner by which the membership or the benefit of the membership towards allotments of the plot occurred is not known. However, what stands proved is the fact that the Society consented to the arrangement and consequently a registered Perpetual Lease Deed by the paramount lesser, i.e. the President of India and late first defendant on 28.06.1967. That is an irrefutable fact; the plaintiff has chosen not to impeach the said registered Lease Deed after it was revealed during the pendency of the proceedings. In these circumstances, it is concluded and found that the first defendant became the owner of the suit property with effect from 28.06.1967 and was treated as such by the Society, the lessor. This is apparent from the several copies of several receipts towards ground rent paid by the late first defendant to the Society in respect of the property.

59. As far as the building and superstructure raised on the suit plot is concerned, there is overwhelming evidence in the form of declaration issued to the Central Government, seeking permission to raise the construction, intimation regarding additional cost of construction, disclosure as to the sources from which funds

were raised by the late first defendant and the sanction for construction sought from the MCD and lastly, Occupation Certificate issued by the MCD. The first defendant also revealed these details to the Income Tax authorities as is evident from the correspondence exchanged with them; he paid municipal taxes and also bore the electricity and water charges. All these establish that the building and construction put-up on the plot between 1972, 1976 was at the expense of the late first defendant. The third defendant has, in his affidavit, deposed about these facts in detail and also mentioned that the premises had been let-out sometime without any hindrance by the plaintiff and supporting defendants. It is, therefore, held that the ownership of the plot and the superstructure is that of the contesting defendants. The issue is accordingly answered against the plaintiff and in favor of the contesting defendants.

#### Issue No. 10

60. The contesting defendants submitted that the plaintiff cannot rely on the argument that possession by Smt. Parvati Devi was, in law theirs. Even if the plaintiff had the said alleged right, she has obviously lost it owing to her inaction and complete disregard of her own interest for more than 23 years. It is submitted that the following would completely dislodge the false claim of the plaintiff and other co-heirs and prove the open repudiation of their title by Smt. Parvati Devi and Sh. L.S. Bisht as well as the long, continuous and exclusive possession of the subject property by Sh. L.S. Bisht and his family members without any objection or demand by the plaintiff and other co-heirs:

(a) In her letter dated 08.02.1965 (Ex. P-3/D2-4), Smt. Parvati Devi, while responding to the invitation of the Society to become its member in place of her father, stated "Since my husband is a Central Government servant serving directly under Government of India, his tour of duty in Delhi is likely to be of a very prolonged duration. We are, therefore, greatly interested in having a plot in New Delhi where we hope to build a cottage for our residence." This letter filed by the plaintiff, clearly evidences the intention of Parvati Devi to take the proposed plot for her residence and not for or on behalf of other legal heirs.

(b) On 18.02.1965, Parvati Devi in her letter (Ex. P-5/D 2-4), replied in negative to the query raised by the Society as to whether there was any Will or legal document having a bearing on the assets of Shri Dan Singh Bisht.

(c) Smt. Parvati Bisht by her letter dated 18.02.1965 (Ex. P-6/D 2-4) nominated her husband, Sh. L.S. Bisht as her nominee. If the plaintiff deemed herself to be the co-owner of the subject property, then appointment as nominee of Sh. L.S. Bisht, who was outside the line of succession of Shri Dan Singh Bisht, should have been objected to by the plaintiff as breach of duty by Parvati Devi as the purported constructive trustee.

(d) In 1966, Parvati Devi transferred her membership to Sh. L.S. Bisht, Defendant No. 1.

(e) On 28.06.1967, a registered Perpetual Sub-lease was executed between the society, the President of India acting through the Land and Building Department of Delhi Administration and first Defendant in respect of the suit property. The first Defendant, not being a legal heir of Parvati Devi under Sections 14 and 15 of the Hindu Succession Act, could not have held the suit property in trust on behalf of the other legal heirs of Thakur Dan Singh Bisht.

(f). Assuming, while denying, that the plaintiff or the other co-owners had no knowledge of the subsequent transfer of membership of the Society and/or execution of perpetual lease deed dated 28.06.1967 in favor of Defendant No. 1 and that the plaintiff continued to assume that the property was held by Smt. Parvati on behalf of all co-owners, it is submitted that even after Parvati Devi passed away on 09.12.1975 and the contesting defendants continued with the possession of the subject property, for more than 13 years, i.e. till the filing of the suit on 07.08.1989, there was no assertion of the purported right of co-ownership by the plaintiff.

(g) The first defendant dealt with the land as his own since 28.06.1967, i.e. more than 23 years. He held himself out to be the sole and exclusive owner to the world at large, of the land and as also the construction thereon which was done from 1972 to 1974 and in respect of which a completion certificate was granted in his name in 1976. The plot was purchased by him from his own funds and the construction too was made by him from loan and his own funds after obtaining permissions as he was a Government servant. He corresponded with the Government departments holding himself out as the sole and exclusive owner of the property. He has paid the entire House Tax which is in his name since the beginning till date. Water and electricity connections in the premises are also in his name. He let out the property to the tenant and collected rents as the sole-owner/landlord of the premises.

61. The contesting defendants submit that bare allegations of oral demand for partition by the plaintiff are baseless, wholly unsubstantiated and devoid of any merit or credence. Further, the plaintiff's allegation that she contributed in the construction of the subject property is also not supported by any evidence. The plaintiff was always aware of the ownership of Sh. L.S. Bisht of the subject property and in any event, she and other legal heirs acquiesced into the same. Thus, Defendant No. 1 also became the owner of the subject premises being the plot and the superstructure by law of adverse possession and prescription.

62. It is lastly contended that the plaintiff's argument that by raising a plea of adverse possession, the first Defendant, he would be deemed to have denounced his title and absolute ownership is misconceived, and is in ignorance of the distinction between adverse possession and adverse possession by prescription. It is submitted that while the former rests on a hostile possession under a claim of title to the exclusion of the true owner while the latter rests on the presumption of a grant of incorporeal rights ripening into title after a lapse of years.

63. The plaintiff argues that generally, the plea of adverse possession has traditionally been frowned upon, but of late there is an increasing reluctance to accept that plea. They cite the decisions reported as P.T. Munichikkanna Reddy v. Revamma 2007 (6) SCC 5 and Hemaji Waghaji Jat Vs. Bhikhabhai Khengarbhai Harijan and Others, . In the latter judgment, it was held that:

Before parting with this case, we deem it appropriate to observe that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This is substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.

We fail to comprehend why the law should place premium on dishonesty by legitimizing possession of a rank trespasser and compelling the owner to loose its possession only because of his inaction in taking back the possession within limitation.

In our considered view, there is an urgent need of fresh look regarding the law on adverse possession. We recommend the Union of India to seriously consider and make suitable changes in the law of adverse possession....

64. It is argued that unless there is knowledge of the true owner - which means he is the owner and someone else is in possession - adverse possession does not begin. Reliance is placed on the decision reported as Charles Edward Victor Seneviratne Corea v. Mahatantrigey Iseris AIR 1914 PC 243, to the following effect:

...Entering into possession, and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title as all. His title must have ensured for the benefit of his co-proprietors. The principle recognized by Wood, V.C. in Thomas v. Thomas 2 K&J 79 holds goods: "Possession is never considered adverse if it can be referred to a lawful title.

Similarly, the decision in P.T. Munichikkanna Reddy and Others Vs. Revamma and Others, was relied on, where the Court held that "Thus, there must be intention to dispossess." And it needs to be open and hostile enough to bring the same to the knowledge and plaintiff has an opportunity to object. Next, the judgment in T. Anjanappa and Others Vs. Somalingappa and Another, , to the following effect, was relied on:

The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the

same was inconsequential. Obviously, the requirements of proving adverse possession have not been established. If the defendants are not sure who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not arise. Above being the position the High Court's judgment is clearly unsustainable....

There is another aspect of the matter, which cannot be lost sight of. The right of property is now considered to be not only a constitutional or statutory right but also a human right.

Therefore, it will have to be kept in mind the Courts around the world are taking an unkind view toward statutes of limitation overriding property rights.

65. It is next submitted that as between co-owners, the hostility of the one claiming exclusive ownership due to adverse possession has to be more explicit. The plaintiff and supporting defendants rely on *Karbalai Begum Vs. Mohd. Sayeed and Another*, particularly the following observations:

...It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Indeed even if this fact be admitted, then the legal position would be that *Mohd. Basir and Mohd. Rashid*, being co-sharers of plaintiff, would become constructive trustees on behalf of the plaintiff and the right of the plaintiff would be deemed to be protected by the trustees. The learned Counsel appearing for the respondent was unable to contest this position of law. In the present case, it is therefore manifest that the possession of the defendants, apart from being in the nature of constructive trustees, would be in law the possession of the plaintiff.

To the same effect, the decision in *Mohd. Zainulabudeen (since Deceased) by Lrs. Vs. Sayed Ahmed Mohideen and Others*, was relied, where it was held that:

Thus it is a settled rule of law as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to construe ouster....

Similarly, *P. Periasami (Dead) by Lrs. Vs. P. Periathambi and Others*, ; *Md. Mohammad Ali (Dead) by Lrs. Vs. Sri Jagadish Kalita and Others*, ; *Govindammal Vs. R. Perumal Chettiar and Others*, ; and *Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil (dead) by LRs. and heirs etc.*, were relied on.

66. Here, the facts on record reveal the following:

(i) After death of Dan Singh Bisht, Parwati Devi applied for membership, and was granted it by the society;

(ii) Although the major portion of the share for allotment of the plot was by Dan Singh Bisht, some amount - over Rs. 4000/- was paid by late first defendant;

- (iii) The society granted membership to the late first defendant;
- (iv) A registered Perpetual Deed, conveying rights and interest, in respect of the suit plot, was executed in favour of the late first defendant, on 28th June, 1967;
- (v) The late first defendant constructed a residential house, by using his money, on the suit property, in 1972-74;
- (vi) The Municipal Corporation of Delhi issued sanction for the proposed plan, and occupation certificate permitting the first defendant to occupy in the premises;
- (vii) The first defendant continuously paid ground rent to the society, in respect of the suit property, in his exclusive name;
- (viii) He also paid water, and electricity charges in respect of the suit property;
- (ix) The suit property was let out by the first defendant, who collected rents from tenants, from time to time

67. As against the above evidence, the plaintiff and the supporting defendants rely on the following contentions and circumstances:

- (i) Parwati Devi secured membership, and the right to allotment in her capacity as nominee, and not exclusive heir of late Dan Singh Bisht;
- (ii) The society allowed transfer of membership, which cannot bind them (the other heirs) or compromise their legal rights as heirs of Dan Singh Bisht;
- (iii) The registration of the Perpetual Lease Deed would only amount to late first defendant stepping into the shoes of the previous owner, i.e. his wife. He could not have acquired better title, despite registration of the lease deed or construction of the property.
- (iv) Assertion of adverse possession against the plaintiff and other heirs, i.e co-owners, is impermissible in the facts of this case, and in any case is inconsistent with the independent assertion of acquisition of title by ownership, by the first defendant.

68. The following averments as to the right to the suit property have been made by the plaintiff:

5. That the Defendants No. 1 to 4 have illegally and wrongfully taken the control of the aforesaid joint property bearing No. A-20, West End, New Delhi, and as such the aforesaid property ought to have been devolved upon all the heirs/ descendants of Late Thakur Dan Singh Bist, which defendants have got absolutely no legal right or authority to do so. As such, the aforesaid property is a joint property, therefore, the same is liable to be partitioned.

15. That in view of the aforesaid factual position of the matter in controversy, the plaintiff is entitled to her share in property No. A-20 west End New Delhi, and

also the land at Pithoragarh, District, Pithoragarh U.P. with the other defendants in equal share being the rightful co-owner thereof, and as such, the plaintiff is entitled to her shares in the properties which have been detailed and depicted in Schedule A attached to the plaint.

16. That the defendants No. 2 to 4 have been enjoying the profits and income yielded from property No. A-20 West End, New Delhi, and also the land at Pithoragarh, U.P. and the plaintiff has learnt that the aforesaid property at New Delhi was rented out by the defendants No. 1 to 4 some individual of a very high status at a very high rent. Thereafter, the same was got vacated from him by the defendants No. 1 to 4. Thus the value of the property at New Delhi, at present has gone much higher after getting it vacated. The entire rental income accrued from the aforesaid West End Property has been pocketed by the defendants No. 1 to 4 and the account of the rental income so accrued and pocketed by the defendants No. 1 to 4 is also liable to be rendered by them to the plaintiff and the other defendants.

17. That the defendants have been deliberately avoiding the partition of the properties mentioned in Schedule "A" attached to the plaint on frivolous pretest and excuse with the mala fide intent to somehow usurp the rightfully claim and share of the plaintiff and the other defendants.

18. That in view of the aforesaid factual position of the case the plaintiff is entitled to her share in an equal way which the other defendants in the aforesaid properties detailed in Schedule A being the joint and co-owner thereof.

69. The relevant part of the written statement reads as follows:

4. That late Thakur Dan Singh Bist nominated his daughter Smt. Parwati Devi wife of Defendant No. 1 to be member of the society after his death. In pursuance to the nomination Smt. Parwati Devi became the member in 1965, which membership was transferred by her to the Defendant No. 1 in 1966. Under the law as applicable, nomination facility having been done and being valid, the right to membership did not devolve on anyone else except Smt. Parwati Devi. The suit is thus liable to be dismissed.

5. That the Defendant No. 1 has become owner of the subject land and the construction thereon by the law of adverse possession and prescription. The Defendant No. 1 has dealt with the land as his own since 28.6.1967, i.e. more than 23 years. He has held himself out to be a sole and exclusive owner to the world at large of the land and as also the Construction thereon which was done from 1972 to 1974 and in, respect of which a completion certificate was granted in the name of the Defendant No. 1 in 1976. The Plot was purchased by the Defendant No. 1 from his own funds and the construction too was made by him from loan and own funds after obtaining permissions as he was a Government Servant. The Defendant No. 1 has corresponded with the Government Departments holding himself out as the sole and exclusive owner of the property. He has since the beginning till date paid the entire House-Tax which is in his



name since the beginning till date. Water and Electricity Connections in the premises are also in his own name. He letted out the property to the tenants and collected rents as the sole owner- landlord of the premises. The suit is thus time barred and the Defendant No. 1 has become the owner of the subject premises being the plot and the super-structure by law of adverse possession and prescription.

7. That the plaintiff is estopped from filing the present suit. To the plaintiff's knowledge as also the knowledge of the other legal heirs of late Thakur Dan Singh Bist the Defendant No. 1 constructed upon the plot of land on the ground that he is the sole and exclusive owner of the said land. He was not obstructed at any stage by anyone. Thus, till the construction exists, the plaintiff as also the other legal heirs of late Thakur Dan Singh Bist are estopped from Claiming any right to the property or the right to disposes the Defendant No. 1 his agents, successors and assigns etc.

70. It is clear that the pleas taken are in the alternative. The plea of adverse possession is taken in addition to the other plea of the first defendant having acquired title pursuant to the execution of the Registered Perpetual Lease Deed. In the circumstances, the court does not discern any mutually destructive pleas.

71. The plaintiff's submissions regarding there being no presumption of adverse possession by one co-sharer against another, cannot be quarreled with. However, in this case, the property is not co-parcenary or Hindu Undivided Family property. There was no possession, physical, or constructive, at any point of time, during the lifetime of Dan Singh Bisht. Possession of the suit property was handed over to the late first defendant, after membership was granted to his wife, and later, entered in his name. The finding of this Court that the plaintiff was never in constructive possession, has become final, and is a matter of record; the plaintiff has accepted the same. In the circumstances, the question is whether the first defendant's possession - undeniably actual physical possession, was hostile, either openly, or constructively, against the plaintiff and the other heirs of Dan Singh Bisht.

72. In Karnataka Board of Wakf Vs. Government of India and Others, , the basic ingredients of adverse possession, were explained, in the following terms:

Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts

necessary to establish his adverse possession.

73. In *S.M. Karim Vs. Mst. Bibi Sakina*, the Supreme Court explained how possession is deemed to be adverse, and the requirements of proving it:

Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea.

74. The decision in *Uppalapati Veera Venkata Satyanarayanaraju and Anr. v. Josyula Hanummamma and Anr.* (1963) 3 SCR 910, indicates that if a tenant makes an attornment in favour of a person who is not the true owner and follows by paying the rent to him, such a person must be held to have effective possession. The question of adverse possession by a co-sharer was dealt with in *Shambhu Prasad Singh Vs. Mst. Phool Kumari and Others*, , where the Court held as follows:

On the question of adverse possession by a co-sharer against another co-sharer, the law is fairly well settled. Adverse possession has to have the characteristics of adequacy, continuity and exclusiveness. The onus to establish these characteristics is on the adverse possessor. Accordingly, if a holder of title proves that he too had been exercising during the currency of his title various acts of possession, then, the quality of those acts, even though they might not be sufficient to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from a person challenging by possession, the title which he holds, see *Kuthali Moothavar v. Paringati Kunharankutty* [1921] 48 LA. 395, 404. As between co-sharers, the possession of one co-sharer is in law the possession of all co-sharers. Therefore, to constitute adverse possession, ouster of the non-possessing co-sharer has to be made out. As between them, therefore, there must be evidence of open assertion of a hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other, see *P. Lakshmi Reddy Vs. L. Lakshmi Reddy*, and also *Mohammad Baqar and Others Vs. Naim-un-Nisa Bibi and Others*, . But, once the possession of a co-sharer has become adverse as a result of ouster, a mere assertion of a joint title by the dispossessed co-sharer would not interrupt the running of adverse possession. He must actually and effectively break up the exclusive possession of his co-sharer by re-entry upon the property or by resuming possession in such a manner as it was possible to do. see *Wuntakal Yalpi Chenabasavana Gowd Vs. Rao Bahadur Y. Mahabaleswarappa and Another*, . The mere fact that a dispossessed co-sharer comes and stays for a few days as a guest is not sufficient to interrupt the exclusiveness or the continuity of adverse possession

so as not to extinguish the rights of the dispossessed co-sharer, see *Ammakannu Ammal v. Naravanaswami Mudaliar* AIR 1923 Mad. 633.

75. The evidence on record, both documentary, and oral, by way of the affidavit of the second defendant, would reveal that the first defendant was in possession of the suit property since 1967. Although the plaintiff does not say so expressly in the suit, the defendant's assertion about possession from there has not been denied. Further, the facts pertaining to execution of the Registered Lease deed in 1967, as well as construction being put on the plot in 1972-74, and use of the property, indicate possession adverse to the interests of the plaintiff and the other supporting defendants. The first defendant also secured sanction to construct on the plot, spent his money, paid ground rent and other charges continuously, and also secured an occupancy certificate. He also let out the premises. All these facts are such that the plaintiffs could reasonably have known; it is not as if they live in some other city. They even plead about an oral settlement; yet no evidence in that regard, or the bare outlines of the terms, or for that matter, the date or dates when such settlement took place, are brought on record. Having regard to these totality of circumstances, the court concludes that the first defendant, and later, the second, third, fourth and twelfth defendants, perfected title to the suit property by adverse possession. Issue No. 10 is accordingly found against the plaintiff, and in favour of Defendant Nos. 2-4 and 12.

#### Issue No. 12

76. This issue concerns the partition of Grasmere House at Nainital. The plaintiff had alleged that the parties entered into a family settlement and registered it on 25th June, 1988. The answering defendants flatly deny having entered into any such agreement, and say that the twelfth defendant was not even in India and was in the United States on the said date. The contesting defendants rely on a criminal complaint alleging cheating and forgery in respect of the said document, a copy of which has been produced as Ex. D-3/3.

77. No arguments were addressed on the present issue by the plaintiffs; nor was reliance placed on any document. In the circumstances, the issue is answered against the plaintiff.

#### Issue No. 13

78. In view of the findings recorded above, the suit has to fail, and is dismissed with costs. Counsel's fee is quantified at Rs. 1,00,000/-.