

(2010) 04 DEL CK 0069

In the Delhi High Court

Case No : I.A. 2698/07 in CS (OS) No. 549 of 1995

Shri Mangat Ram and Another

APPELLANT

Vs

Shri Ram Narain Gupta and Another

RESPONDENT

Date of Decision : 05-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, 151
Evidence Act, 1872 — Section 91
Registration Act, 1908 — Section 17, 17(1), 17(1A), 17(2), 49
Stamp Act, 1899 — Article 15, 39, 44, 45, 55

Citation : (2010) 04 DEL CK 0069

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : Nemo, for the Appellant; J.R. Midha, Prosenjeet Banerjee and Pritesh Kapur, Amicus Curiae, for the Respondent

Judgement

Vipin Sanghi, J.—Objections have been raised by the registry calling upon the parties to file stamp duty as leviable on an instrument of partition, before the decree is drawn up. Since the defendants have contested this objection by filing I.A. No. 2698/2007, I have heard Mr. Prosenjeet Banerjee for the defendants, Mr. J.R. Midha, Advocate on behalf of the State and Mr. Pritesh Kapoor, Advocate, who was appointed as an Amicus Curiae by the Court. After hearing of arguments of the learned Counsel, the judgment had been reserved on 1st February, 2008. Written Submissions were filed by Mr. Pritesh Kapur along with compilation of relied upon judgments. A compilation of judgments was also filed by Mr. Banerjee on which he placed reliance. However, the Judgment could not be prepared due to preoccupation with other judicial work. Accordingly, the matter was directed to be listed to rehear the submissions of the learned Counsels. Despite notice, there was no appearance on behalf of the State. However, the submissions of Mr. J.R. Midha Advocate (as he then was) had been noted at the time of the initial hearing. Accordingly, Mr. Banerjee on behalf of the defendants and Mr. Pritesh Kapoor, the learned amicus curiae were heard again

on 05.03.2010 and the judgment was again reserved. Mr. Banerjee filed his written submissions on 31.03.2009. Accordingly, I proceed to dispose of the objection raised by the Registry and I.A. No. 2698/2007 filed by the defendants.

2. The plaintiffs, i.e. Shri Mangat Ram and his wife, Smt. Angoori Devi had filed the suit to seek partition with possession of property No. AE-138, Shalimar Bagh in equal share with the defendants i.e. Shri Ram Narain Gupta and his wife Smt. Sushila Gupta. The defendants had filed their written statement disputing the claim of the plaintiffs. However, during the pendency of the suit the parties arrived at a settlement. Along with an application being I.A. No. 4317/2002 filed under Order 23 Rule 3 C.P.C., the parties filed on record a document titled "Memorandum of Oral Family Settlement" (herein referred to as MOFS) which was exhibited as Ex.CX on 3.5.2002 when the aforesaid application was taken up for consideration by the Court. This MOFS is stated to have been drawn, recorded and signed on 24.4.2002 between the parties to the suit to record the Oral Family Settlement stated to have been arrived at between the parties on 3.4.2002. This MOFS, inter alia, records that "the parties are equal owners of built up property bearing No. AE-138, Shalimar Bagh Block AE, admeasuring 207 sq. mts. with roof rights, situated in the lay out plan of Shalimar Bagh Residential Scheme, Shalimar Bagh, Delhi-110088 with leasehold rights of the land under the property. It further records that Shri Ram Narain and Mangat Ram i.e. the defendant No. 1 and plaintiff No. 1 herein "are the owners and in possession of shop bearing No. 109" admeasuring 20" x 85" situated at New Anaj Mandi, Samalkha, Dist. Panipat, Haryana in equal share which was allotted to the firm M/s Chiranjilal Ram Narain - in which the defendant No. 1 and the plaintiff No. 1 were partners. The said firm was dissolved on 1.10.1993 and Shri Ram Narain retired from the firm and Mangat Ram became the sole proprietor of the firm and retained the assets and liabilities of the firm. It further records that "Shri Ram Narain is the owner and in possession of the property with roof rights" of land measuring about 50 sq.yds on the back side of house of Shri Mangat Ram bearing No. 75/13, Old Gur Mandi, Samalkha, Dist. Panipat, Haryana. It records that disputes had arisen between the parties in respect of the aforesaid properties and the plaintiffs filed the present suit against the defendants which is pending. It records that with the intervention of family friends, and in order to solve the family disputes, for the sake of family peace and to avoid further litigation, the parties held amicable negotiations in order to effect a Partition/distribution through mutual adjustment of their already existing rights and interests in the above mentioned properties for exclusive possession, ownership and better use, occupation and enjoyment of the divided properties in the manner described in the said memorandum. In the meeting of the parties and family friends held on 3.4.2002 the parties had arrived at "a full and final oral, negotiated and amicable Family Settlement in respect of the said properties". It was further agreed between the parties that the property bearing No. AE-138, situated at Shalimar Bagh, Delhi-110088, "will go and belong to the First Party" i.e. the defendants herein and the property bearing Shop No. 109, situated at

New Anaj Mandi, Samalkha, Distt. Panipat, Haryana, along with the share of Shri Ram Narain in Property No. 75/13 situated at Old Gur Mandi, Samalkha, Distt. Panipat, Haryana "will go and belong to the Second Party" i.e. plaintiffs herein. This MOFS further records as follows:

Now this memorandum records the oral family settlement as hereunder:

1. That the property bearing No. AE-138, Shalimar Bagh, Delhi-10088 after the agreed adjustment between the parties shall absolutely and irreversibly be in the sole and absolute ownership and legal as well as actual possession of Mr. Ram Narain and Mrs. Sushila Gupta i.e. First Party. Shri Mangat Ram and Smt. Angoori Devi i.e. Second Party shall have no right whatsoever in the same and therefore shall never claim any legal right, title, claim or interest in the same or ever contest or challenge the same before any forum or Authority of law or Government Instrumentality or in any Court of Law.
2. That the property bearing Shop No. 109 at New Anaj Mandi, Samalkha, Distt. Panipat, Haryana and house No. 75/13 at Old Gur Mandi, Samalkha, Distt. Panipat, Haryana, after the agreed adjustment between the parties shall be in the sole and absolute ownership and legal as well as actual possession of Shri Mangat Ram and Smt. Angoori Devi. i.e. the Second Party after the agreed adjustment between the parties. Shri Ram Narain and Smt. Sushila Gutpa i.e. First Party shall never claim any legal right, title, claim or interest in the same or ever contest or challenge the same before any Forum or Authority of law or Government Instrumentality or in any Court of Law.
3. That it was agreed that in future both the parties will enjoy, occupy and possess as absolute owners their respective properties as mentioned hereinabove without the intervention of other party. That the effect of the oral settlement is that both the parties shall enjoy the respective properties that have fallen into their lot as property owned and possessed by them actually, legally and notionally and having a perfect title and absolute rights of ownership and further disposal and/or alienation.
4. That it was agreed that both the parties have also taken the consent and acceptance from their legal heirs regarding this memorandum and none of the legal heirs will challenge this Memorandum of Oral Family Settlement and will not file any suit before any court of law from Lowest Jurisdiction to highest Jurisdiction.
5. That it was agreed that all the related title document in respect of respective properties will be handed over to the concerned person(s).
6. That both the parties, as per the Oral Settlement between them, shall execute and sign all papers, documents, applications, affidavits and Forms in any Court of Law, before the Delhi Development Authority , Municipal Corporation of Delhi, Market Committee, Samalkha, Municipal Committee, Samalkha and SR, Samalkha, and/or any other Government Office or Instrumentality in Delhi or

Haryana so that the said properties are mutated/registered in favour of the respective owners in accordance with the Oral Settlement recorded by way of this Memorandum. Both the parties are also bound to personally visit the office of the aforementioned government Departments in case they are so required in order to give effect to this Agreement.

7. That it was agreed between the parties that Shri Mangat Ram and Smt. Angoori Devi i.e. the Second Party shall execute and sign all papers, documents, applications, affidavits etc., so as to enable Shri Ram Narain and Smt. Sushila Gupta, i.e. First Party to receive the Title Deeds of AE-138, Shalimar Bagh, Delhi-88, which are at present in the custody of Life Insurance Corporation, L& HPF Department, Divisional Office-I, Jeewan Prakash, 25 KG Marg, New Delhi-1. Both the parties are also bound to personally visit the Office of the aforementioned Life Insurance Corporation Office in case they are so required in order to give effect to this Agreement.

8. That it was agreed between the parties that Shri Ram Narain and Smt. Sushila Gupta i.e First Party shall execute and sign all papers/documents/applications/affidavits etc. so as to enable Second Party to get their names registered in the Market Committee, Samalkha, Dist. Panipat, Haryana in respect of shop No. 109, New Anaj Mandi, Samalkha. The first party shall also execute and sign all papers/documents/applications/affidavits etc. so as to enable Second Party to have their names mutated in respect of property No. 75/13, Old Gur Mandir, Samalkha, Panipat, Haryana in the records of the Municipal Committee, Samalkha, dist. Panipat, Haryana. Shri Ram Narain and Smt. Sushila Gupta i.e First Party are also bound to personally visit the office of Market Committee/Municipal Committee, Samalkha or Office of the Sub-Registrar Samalkha in case they are so required in order to give effect to this Memorandum of the Oral Family Settlement.

Both the parties hereto have thoroughly understood the facts of this Memorandum in vernacular and admit the same as correct to their knowledge and undertake to abide by the same accordingly and after fully understanding the facts stated hereto, the parties have put their respective hands, in token of its correctness/acceptance on the day, month and year first herein above written in the presence of following witnesses, who have also signed in the presence of the parties.

Signed in the Presence of....

3. In the application moved under Order 23 Rule 3 C.P.C., the parties stated that during the pendency of the suit they had arrived at an amicable and negotiated oral settlement and the terms thereof have been reduced into the MOFS. They further stated that their Oral Family Settlement which took place on 3.4.2002 is legal. The parties to the suit, in this application sought the following substantive reliefs:

a. record the statement of the parties in respect of the Settlement of all their

disputes as mentioned in Memorandum of Oral Family Settlement appended herewith as Annexure A.

b. decree the suit in terms of the Memorandum of Oral Family Settlement appended herewith as Annexure A.

4. Upon consideration of the application, the Court passed the following operative order:

...In view of application marked Exhibit "CY" and the Memorandum of Oral Family Settlement marked Exhibit "CX" and also the statements of the parties, the suit is decreed in terms of oral family settlement Exhibit "CX" which shall form part of the decree. A decree be drawn accordingly.

The application and the suit stand disposed of.

5. The question which needs to be answered in the facts of this case, is whether the MOFS dated 24.04.2002 exhibit "CX" is an "instrument of partition" within the meaning of Section 2(15) of the Indian Stamp Act ("the Act" for short) i.e. whether by the MOFS the co-owners i.e. the parties to the suit have divided, or agreed to divide the properties mentioned therein in severalty. It also needs to be examined whether the decree passed by the Court in terms of the memorandum recording the oral family settlement exhibit "CX" is "a final order for effecting a partition" within the meaning of Section 2(15) of the Act.

6. Mr. Banerjee learned Counsel for the defendants, while opposing the objection raised by the Registry, has contended that partition can be arrived at orally and an oral partition is neither compulsorily registrable nor liable to bear stamp duty. A memorandum that merely records an oral family settlement at a later point of time is also not compulsorily registerable, and no stamp duty is required to be paid on such an instrument, or on a decree founded thereupon. The submission of Mr. Banerjee is that the document in question i.e. MOFS filed along with the application under Order 23 Rule 3 C.P.C. to record the compromise of the parties is nothing more than a memorandum recording an oral family settlement. He submits that the said document is not an "instrument of partition" within the meaning of Section 2(15) of the Indian Stamp Act, 1899 (the Act) but the same is a "mutual release" within the meaning of entry 55 of schedule I of the Act. He, therefore, submits that the objections raised by the Registry are untenable in law. He further submits that this Court cannot, at this stage, go behind the decree passed by the Court which recognizes the fact that the document exhibit "CX" is merely a Memorandum recording a family settlement and this Court cannot hold to the contrary at this stage.

7. Mr. Banerjee submits that the Stamp Act being a fiscal statute, has to be construed strictly against the State and in favour of the subject. There is no scope of equitable or judicious considerations while interpreting a fiscal statute, if the letter of the law is clear and unambiguous. In support of his submission, Mr. Banerjee has relied upon the decision in Distt. Registrar and Collector, Hyderabad

and Another Vs. Canara Bank Etc.,

8. On the characteristics of a family settlement, Mr. Banerjee, by placing reliance on Kale and Others Vs. Deputy Director of Consolidation and Others, submits that family arrangements are governed by a special equity peculiar to themselves and that the Courts should endeavor to enforce such arrangements if made honestly. The family arrangement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied.

9. Mr. Banerjee has also placed reliance upon the decision in Tek Bahadur Bhujil Vs. Debi Singh Bhujil and Others, to submit that where the document was drawn up only to serve the purpose of proof or evidence of what had been decided by the parties, and not to form the basis of their rights in any form over the property, the same constitutes a mere memorandum recording something that has already taken place, and such a document would not require registration or stamping. He also relies on Roshan Singh and Others Vs. Zile Singh and Others, and Madan Lal Kapur Vs. Subhash Lal Kapur and Others, in support of his said submission.

10. Mr. Banerjee further submits that where the property is owned by two co-owners, each having an undivided share in the property and one of them by a deed effaces himself in respect of his title and right to possession, in favour of the other, the document is a "release" and not a "conveyance". In support of this submission, reliance has been placed on Board of Revenue and Another Vs. V.M. Murugesu Mudaliar of Gudiyatham, and Chief Controlling Revenue Authority, Referring Chief Controlling Revenue Authority, Referring Officer Vs. Rustorn Nusserwanji Patel,

11. However, the mainstay of Mr. Banerjee's submission is the decision rendered by a Division Bench of this Court in Shri Mahip Singh Thakur Vs. Mrs. Hema Thakur, Shri Vikram Thakur, Shri Goruv Thakur and Ms. Madhu,

12. In support of his submissions that this Court cannot go behind the decree passed in the suit since this Court is functioning like an executing court, he submits that it is beyond the purview of the executing court to review the reasoning provided by the court in decreeing the suit. He submits that this Court cannot set aside the decree unless the decree has been passed by a court which has no jurisdiction at all. In support of this submission he relies on Rafique Bibi (D) by Lrs. Vs. Sayed Waliuddin (D) by Lrs. and Others, and International Security and Intelligence Agency Limited Vs. Municipal Corporation of Delhi and Others,

13. The learned Amicus has opposed the stand of the defendants. He has made three fold submissions before the Court. His first contention is that even a memorandum of an arrangement is required to be stamped. In support of his first contention the learned Amicus has relied upon the decision in Cohen and Moore v. Commissioners of Inland Revenue 1933 (2) KB 126.

14. His second submission is that the MOFS was a partition deed i.e. an instrument of partition and not a mere memorandum recording an already completed or effectuated oral partition. This contention of his is based upon what, according to him, is the true nature of the instrument. He submits that to decide whether the MOFS is a partition deed or a memorandum recording an oral partition, the question that needs examination is whether it refers to an act in presenti or a mere recital of an act carried out and completed in the past.

15. His third submission is that where a decree is sought to be drawn in terms of a family settlement/compromise, in contradistinction to a case where a suit is merely dismissed in view of compromise, payment of stamp duty on the decree passed by the Court as an instrument of partition cannot be avoided.

16. Mr. Kapoor submits that even though the document exhibit "CX" purports to be a "memorandum of oral family settlement", the question still remains whether the document refers to a completed oral partition or not. He submits that partition is not complete till actual physical division of the property by metes and bounds has been effected and the parties have taken possession of their respective shares pursuant thereto. By placing reliance on the Commissioner of Income Tax, Gujarat Vs. Keshavlal Lallubhai Patel, , he submits that partition is not a mere single act but is essentially a process whereby joint ownership is transformed into an enjoyment in severalty. He submits that this process might be initiated by the expression of an intention to sever joint status but culminates only after an actual physical division of the property by metes and bounds has been effected and the parties have taken possession of their respective shares pursuant thereto, since only then is the joint ownership transformed into an enjoyment in severalty. He also relies on S. Sai Reddy v. S. Narayan Reddy, (1991) 3 SCC 647 to submit that unless and until the final decree is passed and the allottees of the shares are placed in possession of the respective properties/ portions allotted to them, partition is not complete. He submits that the process of partition does not get completed on a mere arriving at the oral arrangement. This is not to say that an oral partition is not binding on the parties. Such an oral partition is enforceable by any of the parties who may be beneficiaries/co-sharers.

17. He submits that the nomenclature accorded to the document by the parties is not determinative of the character of the instrument and what has to be seen is its effect in law. By reference to the MOFS exhibit "CX", he submits that the oral arrangement between the parties arrived at on 03.04.2002 did not effectuate an actual physical division of the properties by metes and bounds, nor exclusive possession upon delivery was taken by the respective parties, prior to the drawing up of the memorandum. He submits that the memorandum asserts the existence of equal ownership and joint possession till the time when the memorandum was drawn up. By referring to the recitals in the said memorandum exhibit "CX", he submits that apparently negotiations as to how the properties "will go" had taken place between the parties. The oral

arrangement did not by itself culminate into a completed process of partition and, therefore, exhibit "CX" could not be said to be memorandum recording a past completed oral partition.

18. Mr. Kapoor submits that if prior to the completion of the process of partition, a formal document or a decree is drawn up as an integral part of this process or in order to effectuate the process, it would be an instrument of partition within the meaning of Section 2(15) of the Stamp Act. He submits that a formal document drawn up subsequently (as in the present case), pursuant to an oral agreement, is also required to be engrossed on stamp paper as an instrument of partition, if any of the following tests is satisfied:

i. The transaction was not complete in all respects prior to the recordal and though the transaction began with the oral agreement it is the Document itself which culminates the transaction and hence forms an integral part of the same transaction i.e. of the process of partition Chief Controlling Revenue Authority Vs. Satyawati Sood and Others, and K. Panchapagesa Ayyar and Another Vs. K. Kalyanasundaram Ayyar and Others,

Or

ii. The parties intended even at the time of the oral agreement to reduce their bargain to a formal document and to be bound by the subsequent written Document and not by the oral arrangement itself; Satyawati Sood (supra) at paras 12-13;

In other words the document has been drawn up with the intention of superseding the oral bargain K. Panchapagesa Ayyar (supra).

Or

iii. The oral bargain has been reduced to a formal document which is intended by the parties to be the primary evidence or proof of partition or to serve as a document on which future rights/title of parties is to be founded i.e. as a Document of Title. Tek Bahadur Bhimji (supra).

19. He submits that in the present case all the aforesaid tests are satisfied as the process of partition was not complete prior to the drawing up of the MOFS exhibit "CX" and the MOFS exhibit "CX" is an integral part of the process of partition. He submits that the oral arrangement between the parties, at best, only resulted in a division of interest but not in an actual physical division of property. He further submits that the MOFS exhibit "CX" was intended by the parties to serve as a document of title and the primary evidence of the transaction of partition ? else there was no need for the parties to seek a decree in terms of the memorandum. He further submits that the terms of the memorandum govern the future rights of the parties, inasmuch as, the parties have undertaken to "abide by this memorandum" (last paragraph) and not to challenge "this memorandum" (Clause II) which evinces the intention of the parties to be bound by the subsequent written document, and not the oral arrangement.

20. By placing reliance upon the Full Bench judgment of this Court in Satyawati Sood (supra) he submits that though it is permissible in law to effect a partition orally, if, however, the parties intend to reduce an oral arrangement into writing and to be bound by the subsequent written document, then it would be reasonable to conclude that the parties are adopting the alternative method of effecting the partition by a written document.

21. He further submits that the principle of Kale's case will apply only where the Memorandum has been drawn up "merely for the purpose of the record, or for the information of the Court, of an already completed oral transaction". However, where a decree "in terms of the Memorandum" has been sought it can hardly be said that the MOFS has been filed merely for "informing" the Court that the suit has been compromised; or that the oral arrangement completed the process of partition. It is thus submitted that the reliance of the parties on Kale's case is misplaced.

22. Mr. Kapoor submits that merely because family arrangements are governed by special equity peculiar to themselves and, therefore, they must be enforced, does not mean that they are exempted from the payment of Stamp Duty under the Stamp Act which is a taxing statute if stamp duty is otherwise payable in the facts of a given case. He submits that unlike u/s 49 of the Registration Act (which has the effect of rendering a document required by Section 17 of that Act to be registered ineffective unless it is so registered), the Stamp Act permits the parties to make up for the deficiency in Stamp Duty. Therefore, the logic in Kale's case would not apply while dealing with the issue of the levy of Stamp Duty.

23. Mr. Kapoor submits that reliance placed by Mr. Banerjee on Roshan Singh (supra) is misplaced as in that case there had already been a division by metes and bounds and the parties had remained in separate exclusive possession of their shares pursuant to the oral transaction.

24. Mr. Kapoor submits that while considering whether the Document is an Instrument of Partition or not, it must be borne in mind that any written agreement is bound to be preceded by a prior meeting of minds. Thus merely because a prior meeting of minds is reflected in the Document, it doesn't mean that the Document does not operate proprio vigore to effect a partition. He submits that the Full Bench of this Court in Satyawati Sood (supra), had held that where the Document recording a past oral arrangement forms part of the same transaction, it would be the Document which, in substance, effectuates the transaction and not the oral arrangement.

25. He also places reliance on A. Krishna and Another Vs. A. Arjun Rao and Another, , to submit that since the actual physical partition by metes and bounds prior to the execution of the MOFS is not discernible by the MOFS Ex.CX, the same cannot be regarded as a mere memorandum recording an already completed partition, and the same is, therefore, liable to be registered and

stamped as an instrument of partition.

26. In response to the submission of Mr. Banerjee that the instrument in question is a mutual release, Mr. Pritesh Kapur, the learned Amicus, has relied upon Nitin Jain Vs. Anuj Jain and Others, to submit that a release is not necessarily destructive of co-ownership. Merely because a partition may involve release, it cannot on that account be said that what is partition is not that but only a release.

27. On the issue whether the decree passed in the suit is required to be engrossed on Stamp Paper, the submission of Mr. Kapoor is that the second part of Section 2(15) of the Stamp Act makes it clear that the definition includes a decree effecting a partition. It is submitted that once it is established that the Document in question is an Instrument of Partition, it necessarily follows that a "decree in terms of" such a document would be a decree "effecting a partition" within the meaning of Section 2(15) of the Act. The verb "to effect" means "to give effect to", "to bring about", "to accomplish" or "to effectuate". When a decree is passed "in terms of" an Instrument of partition, the consequence is that the actual shares in the properties are allotted to the co-owners and they obtain an executable decree giving them the right to physical possession of their respective shares.

28. In support of the above submission, he relies on Article 45 in Schedule I of the Stamp Act. He submits that the said provisos reflect the legislative policy of ensuring that ad valorem stamp duty is paid only once in the entire process of partition, even if more than one Instrument is drawn up for effectuating the partition. He submits that it is apparent on a reading of proviso (a) that "when an instrument of partition...is executed" {i.e. the Document} and in pursuance thereof a second "Instrument effecting such partition" is drawn up {which in this case would be the Decree}, then "the duty chargeable upon the instrument effecting such partition shall be reduced by the amount of duty paid in respect of the first instrument".

29. He submits that it necessarily follows from proviso (a) to Article 45 that the Act envisages a Decree "in pursuance of" or, in other words, "in terms of" an Instrument of Partition, to be a decree effecting a partition and hence liable to be stamped as such. He submits that the only reason why the Legislature thought it necessary to give such relief is that in the understanding of the Legislature itself, a "decree in pursuance of an instrument of partition" would also have been liable to duty under Article 45 ? else there was no necessity to grant such a relief. However, if no ad valorem duty has been paid on the instrument, the same would have to be paid on the decree passed in pursuance of the said instrument of partition.

30. He submits that if the decree is drawn up as a part of the process of partition, it necessarily would be a decree effecting or bringing about a partition. He submits that the real test is whether the Decree is part of the machinery

employed by the parties to complete the process of partition and to secure the future rights of the parties.

31. Learned Amicus Curiae has also placed reliance upon the decision in *Kuppuswami Goundan Vs. Chinnaswami Goundan and Others*, to submit that once the parties reduce the terms to writing, it is the writing that thereafter must be regarded as containing and setting out the terms of the contract. The learned Amicus thus contends that once the terms of any agreement have been reduced into writing the Courts are only concerned with the document which contains the agreement, for all purposes.

32. In support of his third submission that where a decree is drawn up in terms of a compromise, in contradistinction to a case where a suit is merely dismissed in view of a compromise, payment of stamp duty cannot be avoided, Mr. Pritesh Kapoor, learned amicus curiae has placed reliance upon the decision in *R. Thiruvengadathan Aiya v. R. Mangayya* SC (1911) 2 M.W.N. 516 and the decision in *Fazal Rasul Khan v. Mohd-ul-Nisa* AIR 1944 Lah 394.

33. He submits that the parties have neither withdrawn the suit in view of the family arrangement, nor have they sought a mere declaration that the parties have already completed the process of partition of the properties which is evidenced by the memorandum subsequently recorded by them, but they have sought an executable decree in terms of the Memorandum. The effect of such a decree would be to bring about an actual physical allotment of the respective shares in specie and to give the parties an immediate right to exclusive title and possession of their share of the properties by the execution thereof. He submits that a decree "in terms of" an Instrument of partition is necessarily a means of giving effect to the Instrument and hence is a decree that "brings about" or "effectuates" the partition within the meaning of the second part of Section 2(15).

34. The thrust of Mr. Kapoor's argument is that there is a distinction between the cases where a decree is passed in terms of the compromise, and the ones wherein a suit is merely dismissed because of a compromise. In the former, he submits, the terms of the compromise becomes a part of the decree which would then be executable whereas when a suit is merely dismissed, the compromise remains independent of the decree. He submits that while in the former case the decree would be chargeable to Stamp Duty as an instrument of partition and would also be compulsorily registrable as an instrument of partition, in the latter case, the decree would not be chargeable to stamp duty as an instrument of partition.

35. Mr. J.R. Midha, learned Counsel (as he then was) appearing for the State has supported the submission of Mr. Banerjee. Mr. Midha has submitted that the document in question is, in fact, a "release" and that the same falls in entry 55 of the first schedule to the Stamp Act. He submits that alternatively, the document in question is a "settlement" defined in Section 2(24) of the Act. By

placing reliance on Mahip Singh (supra) he submits that the document in question requires stamping as a release and not as a partition deed. He submits that under the Registration Act, decree is not required to be registered. Mr. Midha also relied on Shri Rajinder Kumar Vs. Shri Iqbal Singh and Others, to submit that the document in question is a release and not partition deed. He has also cited B.S. Goel and Others Vs. The Registrar, High Court of Delhi, and Nitin Jain (supra) as they are of some relevance to decide the issue being considered by me.

36. The submission of Mr. Midha that the instrument in question is a "settlement" as defined in Section 2(24) of the Act does not appear to be correct. Settlement has been defined to mean any non-testamentary disposition in writing, of movable or Immovable property made?

(a) in consideration of marriage,

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

(c) for any religious or charitable purpose;

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

37. It is not even the case of the parties, and it is not evidenced on a bare perusal of the MOFS that the family arrangement in question is either in consideration of marriage, or for the purpose of distribution of property of the settler amongst his family, or for those whom the settler desires to provide, or for the purpose of providing for some person dependant upon him. In fact, there is no "settler" in the facts of the present case. There is no disposition of any property for religious or charitable purpose. Consequently, the aforesaid submission of Mr. Midha is rejected.

38. I may now take note of a few relevant provisions of the Indian Stamp Act 1899. The term "Instrument" is defined in Section 2(14) to include every document "by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded". The term "Conveyance" is defined in Section 2(10) to include "a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I". The term "Instrument of Partition" is defined in Section 2(15) to mean any instrument "whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any revenue-authority or any Civil Court and an award by an arbitrator directing a partition."

39. Section 3 of the Stamp Act is the charging section and, inter alia, states that the instruments mentioned in Schedule I shall be chargeable to duty of the amount indicated in the said Schedule. Entry at serial No. 23 of Schedule-I provides for the Stamp Duty payable on a "conveyance" as defined by Section 2(10) (not being a transfer charged or exempted under entry at serial No. 62). Entry at serial No. 45 provides for the Stamp Duty payable on an "instrument of partition" as defined by Section 2(15) of the Act. Entry at serial No. 55 provides for the Stamp Duty payable on a "release", that is to say, any instrument not being such release as is provided for by Section 23A whereby a person renounces a claim upon another person or against any specified property.

40. Section 5 of the Act states that "Any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under this Act". Section 6 provides that, subject to the provision contained in Section 5, an instrument so framed as to come within two or more of the descriptions in Schedule I, shall, where the duties chargeable there under are different, be chargeable only with the highest of such duties. The stamp duty on a release is Rs. 5/- at the maximum. Whereas, on an instrument of partition, if the value of the separated share or shares of the property is more than Rs. 1000/-, which in the present case would be the position, it is ad valorem @ Rs. 2.50 for every Rs. 500/- or part thereof in excess of Rs. 1000/-. (See Article 45 read with Article 15 which provides the stamp duty payable on a Bond). Consequently, the stamp duty leviable in the present case, would be more if the MOSF or the Decree passed by the Court is an instrument of partition and not merely a mutual release. Therefore, if the MOFS exhibit "CX", and the final order passed by the Court, i.e. the Decree of the Court, fall within the meaning of an "Instrument of partition", even if exhibit "CX" meets the criteria for being treated as a "mutual release", the same would be of no avail to the defendants, as it would still be liable to bear Stamp Duty as an "instrument of partition", the stamp duty on "instrument of partition" being higher than that levied on a "release".

41. Section 33 of the Act, inter alia, states that every person having by law or by consent of parties, authority to receive evidence and every person in-charge of a public office before whom any instrument, chargeable, in his opinion with duty is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same. Section 33(2) of the Stamp Act, 1899 states:

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed.

42. Therefore, it is the obligation of this Court to examine the instrument produced and coming before it, i.e. the MOFS and the decree passed by the

Court, to ascertain whether they are stamped with the stamp of the value and denomination required by law in force in India.

43. Section 35 of the Stamp Act, inter alia, states that no instrument chargeable with duty shall be admitted in evidence for any purpose or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped. The proviso to this section, however, permits an unstamped/insufficiently stamped instrument to be admitted in evidence, in case the document is stamped and the penalty provided by law is paid. Consequently, an instrument that is unstamped or insufficiently stamped does not suffer from a fatal defect, and it is not rendered inadmissible in evidence altogether. If the stamp duty along with the requisite penalty is paid, the document would become admissible in evidence.

44. I may also note the relevant provisions of the Registration Act, 1908. Section 17 of the Registration Act, 1908 enlists the documents which shall be got registered under the Act. Clause (b) of Section 17(1) reads:

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

45. Section 17(2), inter alia, provides that nothing in Clause (b) of Sub-section (1) of Section 17 applies to:

(v) any document other than the documents specified in Sub-section (1A)] not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

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

46. Section 49 of the Registration Act provides that no documents required by Section 17, inter alia, to be registered shall affect any immovable property comprised therein; confer any power to adopt; or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered. Consequently, unlike u/s 35 of the Stamp Act, an instrument/document that is compulsorily registrable, but is not so registered, is denuded of its efficacy and it is not receivable in evidence, and the law does not enable the party relying upon the instrument/document to unilaterally get the same subsequently registered.

47. Counsels have relied upon various decisions in support of their respective submissions. Many of these decisions have been taken note of hereinabove.

Others shall be referred to by me in the course of my discussion.

48. I shall deal with the submission of Mr. Banerjee about lack of jurisdiction of this Court to deal with the aforesaid issue first. In my view, there is no merit at all in this submission. Firstly, this Court is not functioning as an executing Court in respect of the decree passed in this suit. The application preferred by the defendant is not an application in execution proceedings. The decree is yet to be drawn up. In fact, in the course of preparation of the decree the aforesaid issue has arisen as to whether the MOFS exhibit "CX" and/or the decree passed by the court are liable to bear Stamp Duty as an instrument of partition or not. Before the decree itself is drawn up, the aforesaid objection has been raised and it has to be decided by the Court. This is the obligation of the Court cast by Sections 33 and 35 of the Act. By examining the aforesaid issue with regard to the excigibility of the instrument/decreed passed by the Court, the Court, in any event, does not go behind the decree. As the MOFS forms a part of the decree, this Court can certainly examine the said instrument i.e. exhibit "CX" to determine its character. Pertinently, there is no adjudication by the court while passing the decree on the issue whether the said MOFS is an instrument of partition or not. No doubt, the said issue could have been raised before the court by the parties to the suit, or even by the Court suo moto. However, merely because the said issue was not raised before the passing of the decree, it does not relieve the court of its responsibility to examine the issue once it has been raised by its office before the preparation of the formal decree. Simply because the court had referred to the document as the "memorandum of oral family settlement" (the title to the said document given by the parties themselves) for the purpose of identifying the document, it cannot be said that the court had adjudicated on the issue one way or another. The two decisions relied upon by Mr. Banerjee in Rafique Bibi (supra) and International Security and Intelligence Agency Limited (supra), have no applicability in the facts of the present case for the reason that both these decisions deal with execution proceedings. These cases pertain to issues which arose post the passing of the decree. In my view, the defendants cannot derive any support from these decisions. The objection of Mr. Banerjee to the jurisdiction of this Court to go into the aforesaid issue is, therefore, rejected.

49. Having considered the rival submissions of the learned Counsels, including the host of decisions relied upon by them, and on an examination of the facts of the case, I am of the view that the MOFS Ex. CX is not merely a memorandum recording an already completed and effectuated oral partition and the same is also not merely a mutual release. It is, in fact, an instrument of partition which came to be recorded before the completion of the process of effectuating a partition, and the purpose of drawing up the same was not merely to record an already completed/effectuated process of partition for the sake of posterity, but to found the rights of the parties upon it. The MOFS clearly is the document by which the parties intended their right to be governed and that is why they obtained an executable decree in terms thereof. The executable decree passed by the court is indeed "a final order for effecting a partition passed by...civil

court".

50. At this stage, I would like to deal with the first submission of Mr. Kapoor that a memorandum in relation to any transaction, once drawn, would attract stamp duty. This submission is founded upon the decision in *Cohen and Moore v. Commissioners of Inland Revenue 1933(2) KB 126* relied upon by Mr. Kapoor. In *Cohen (supra)* the court held:

...It has been pointed out on more than one occasion that the Stamp Act does not require transactions to bear stamp duty; it is dealing and dealing only with documents. Where, therefore, there has been an oral agreement of sale no stamp duty is exigible: but if the parties choose to make a record of the fact that they have entered into an agreement there seems every reason why stamp duty should be exigible. I cannot myself think that in Section 59 the Legislature intended to draw any distinction between the case where by a document in writing the parties record an agreement entered into at the time of signing the record by means of an offer and acceptance contained in the written document, and the case where they are making a record in writing of an oral offer and an oral acceptance, made, it may be, only a few days before. In my opinion, Section 59 does apply to a record made of an oral agreement arrived at between the parties....

51. The aforesaid observations, in the Indian context and on the basis of the law as it stands, would have to be qualified. Firstly a sale or any other form of transfer of the value of more than Rs. 100/- of immovable property can be made only by a registered instrument. The instrument once drawn would be liable to bear stamp duty. Secondly, even if a sale of immovable property is made orally for consideration less than Rs. 100/- with delivery of possession, a subsequent memorandum created merely for posterity, in my view, would neither require stamping nor registration. Therefore, I do not accept the first submission of Mr. Kapoor in the wide terms as it is advanced. The same would have to be qualified in the aforesaid terms.

52. However, I find myself in agreement with the second and third contentions of Mr. Kapoor, as set out in paras 14 & 15 above. Before examining the facts of this case, I consider it appropriate to refer to some of the relevant decisions cited before me.

53. In *West Punjab Government v. Raizada Babu Gain Chand and Ors. AIR 1949 Lahore 126*, the Court held:

6. The real test of "instrument of partition" is whether there was any property of which the parties were co-owners and the property was being divided by that deed in severalty. The deed nowhere recited that the property now going to the share of the executants had already been divided. All that was stated was that there had been disruption of the joint Hindu family but some property was still held by the executants and his father of which they were the co-owners. It is for the first time that it is being divided by this deed. It would, therefore, be an

"instrument of partition" entitling the parties to the separate enjoyment of the property. The father also signed his document in token of his assent.

54. The same test was applied by the Court in *Mt. Jileba Vs. Mt. Parmesra, K. Panchapagesa Ayyar and Another Vs. K. Kalyanasundaram Ayyar and Others*, it was observed:

17. If the parties elect to reduce the transaction of partition into writing with the intention that the document itself should constitute the sole repository and the only appropriate evidence of the partition and to serve, so to speak, as a document of title, the writing must be regarded as the formal and operative deed of partition and as such requiring registration u/s 17, Clause (b), provided the property affected is of the value of over Rs. 100. It is not the less a partition deed because its terms and contents were previously discussed and decided upon and then alone put into writing. But if the document is drawn up only with the intention of reciting an already completed oral partition and is merely in the minutes or incidental recital of a *fait-accompl*i it is not compulsorily registrable.

18. Thus documents so drawn up may fall under two heads viz., (a) a document may be drawn up with the intention of reciting an already completed oral partition or (b) with that of superseding the oral bargain and formally reducing the terms of the partition to the form of a document. In the former case when the document itself does not effect any partition but which maintains a partition already effected, or which simply acknowledges, or makes an admission, as to a prior partition, or which merely gives a right to have a document of partition executed it is not an instrument of partition which is compulsorily registrable.

But when the document is not intended by the parties to be merely the minutes or incidental recital of a *fait accompli*, i.e., of a partition that had already taken place, perhaps by oral arrangement, and was complete when the document was executed but forms an integral and essential part of the partition transaction i.e., of the process of dividing the property and was intended to be the only evidence of and to be the formal instrument of partition superseding and embodying the oral bargain and was intended to serve as the sole repository of the arrangement of partition arrived at by them, and to be the only evidence, the document would undoubtedly require registration. The question to be determined in effect is, does the document constitute a bargain between the parties i.e., is it a deed of partition effected in *praesenti* or is it merely the record of an already completed transaction, i.e., partition or to put it shortly is it a speaking partition instrument as aptly observed in the course of the arguments by Govinda Menon, J.

19. In construing such documents for the purpose of determining whether or not there is a creation or declaration of a right or title in the sense contemplated by Section 17 of the Act, undue emphasis should not be laid on isolated words and phrases in the document. The Court must read the document as a whole and take a broad view of the circumstances in which and the purpose for which it was written.

Looking at the substance of the transaction the Court must arrive at the conclusion one way or the other whether the parties in fact intended the document to be an instrument of partition and the sole evidence of partition and as actually effecting a division of the property. *Vatrapu Subbarao alias Pamireddi Subbareddi and Others Vs. Pamireddi Mahalakshamma, Bhangaji v. Pandurang* 76 Ind Cas 158 at p. 160 : AIR 1924 Nag 395 at pp. 397-398 (N) *Rudragouda Venkangouda Patil Vs. Basangouda Danappagouda Patil*,

20. It is in the light of these principles that partition lis should be judged and the standard text books on the Indian Registration Act have laid down the following considerations relating thereto.

Where lists are drawn up showing the properties that have fallen to the shares of the dividing co-owners, and have been signed by the parties, the question whether such lists require registration will depend upon the further question whether, such lists have, on the facts of the particular case, been intended by the parties to be the sole and formal record of the partition. If they are so intended then they would be compulsorily registrable as instruments of partition.

If they are, on the other hand, intended to be merely a memo of a partition that had already taken place or of the way in which a partition is intended to be effected later on by a formal document, they are not compulsorily registrable. The degree of formality of the document is a factor that may be taken into consideration in deciding the question" (*Chitale and Annaji Rao's Indian Registration Act (2nd Edition) (AIR Commentaries) pages 228-229*).

55. In *The Chief Controlling Revenue Authority v. Rasikchandra Tulsidas Patel* (1958) 50 Bom. L.R. 1379, the Court broadly classified deeds pertaining to partitions as follows:

Before we look at the document itself and before we look at the authorities which were cited at the Bar, perhaps it is just as well to look at the principle underlying this section. When you have a joint Hindu family, you may have a partition effected, which partition may only result in a division of interest. Members of the joint family may not specifically divide the joint family property. The result of this would be that the members of the joint family would cease to be coparceners and would become tenants-in-common and would hold the property as tenants-in-common. At a subsequent stage by a document the tenants-in-common may specifically divide the property. In such a case, although in one sense the partition has already taken place, still the fact that the tenants-in-common are specifically dividing the property would attract the application of Section 2(15). You may have another case where a partition may take place not only in interest but also a specific partition of property. The coparceners may by this partition divide the property which belongs to the joint family and then you may have a subsequent document which may recite the fact not only of partition in interest but the actual partition specifically of the property of the joint family. In such a case it is difficult to understand how the document which merely admits and

acknowledges a past event, which recites a partition which has already taken place, and which does not in any sense of the term bring about a partition, can be considered to be an instrument of partition u/s 2(15). The third case may be where the document itself may bring about both a division in interest and a partition with regard to specific property. That would be a clear case of an instrument of partition partitioning the joint family property. If these principles are understood and appreciated, then there is not much difficulty in deciding in which category the document we are considering falls.

56. The Court further emphasized on one of the tests which may be safely applied, that is:

Has everything which is necessary to be done in order to bring about a partition been done before the document is executed? If everything has been done, then there is nothing which the document brings about. If something is left to be done which is done by the document, then the document may be considered as an instrument of partition.

57. The court held that members of a joint family who have effected a partition, though not an actual physical partition by metes and bounds, cease to be coparceners but continue to be tenants in common. If, at a subsequent stage the tenants in common specifically divide the property, the document by which the property is partitioned would attract the application of Section 2(15) of the Stamp Act as it would be an instrument of partition.

58. In *Tek Bahadur Bhujil Vs. Debi Singh Bhujil and Others*, the Supreme Court held that where the document was drawn up only to serve the purpose of proof or evidence of what had been decided by the parties, and not to form the basis of their rights in any form over the property, the same constitutes a mere memorandum recording something that has already taken place, and such a document would not require registration or stamping. The court was dealing with an agreement which incorporated the statements of three brothers. The two questions urged before the Supreme Court on behalf of the appellant were: (i) that the agreement Exhibit 3 did not amount to a family arrangement; (ii) that if it did amount to a family arrangement, it required registration. The Supreme Court observed:

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

the parties possess. The document Exhibit 3 does not appear to be of such a nature. It merely records the statements which the three brothers made, each referring to others as brothers and referring to the properties as joint property. In fact the appellant, in his statement, referred to respondents 1 and 2 as two brother copartners; and the last paragraph said:

We, the three brothers, having agreed over the above statement and having made our own statements in the presence of the Panch called by us, and signed and kept a copy of each of this document as proof of it.

The document would serve the purpose of proof or evidence of what had been decided between the brothers. It was not the basis of their rights in any form over the property which each brother had agreed to enjoy to the exclusion of the others. In substance it records what had already been decided by the parties. We may mention that the appellant and respondent No. 1, even under this arrangement, were to enjoy the property in suit jointly and it is this agreement of theirs at the time which has later given rise to the present litigation between the two. The document, to our mind, is nothing but a memorandum of what had taken place and, therefore, is not a document which would require compulsory registration u/s 17 of the Registration Act.

59. In *Satyawati Sood* (supra) the Court examined the scheme of the Stamp Act and broadly laid down the conditions to be kept in mind while determining the provision under which a document was chargeable to Stamp Duty. The Court observed that the chargeability of an instrument to duty has to be determined, as a rule, on the basis of the recitals made in the deed. The Court took note of use of future tense to describe the undertakings of the lessee under letter pertaining to lease in question. The court observed:

The use of the present and future tenses favours the intention of the parties that the lease was to be created by the letters themselves. If the letters were intended only to record a past transaction then the recitals should have stated that on 3rd March 1961 parties agreed that the lessee was to do such and such thing and so on.

(2) Paragraph 15 does not refer to the past arrangement at all. It begins by saying "we further undertake" etc. The word "further" means that this additional undertaking was given on 6th March 1961 even if an oral arrangement was arrived at on 3rd March 1961. This would mean that the oral arrangement (even if there was any) was not complete. It became complete by the addition of paragraph 15 to it.

60. The Court then went on to examine the degree of formal nature of the document in question and observed:

...It is certainly open for parties to avoid the incidence of stamp duty and avail themselves of the cheaper method of making a lease orally. To succeed in so avoiding the chargeability to stamp duty, however, the parties should either be

content with an oral agreement or should make it clear that the terms of the oral agreement were merely being recorded subsequently, the intention being that the oral agreement and not the subsequent record constituted the transaction of lease. It would not be harsh to subject the writings containing the terms of the lease to a legal scrutiny with a view to decide whether the particular document is entitled to be exempt from stamp duty on the ground that it is a mere record of a previous oral agreement.

61. In *Roshan Singh and Others Vs. Zile Singh and Others*, , the Supreme Court reiterated the test to determine whether an instrument is merely a memorandum recording a completed family arrangement or an instrument of partition, in the following words:

9. It is well-settled that while an instrument of partition which operates or is intended to operate as a declared volition Constituting or severing ownership and causes a change of legal relation to the property divided amongst the parties to it, requires registration u/s 17(1)(b) of the Act, a writing which merely recites that there has in time past been a partition, is not a declaration of will, but a mere statement of fact, and it does not require registration. The essence of the matter is whether the deed is a part of the partition transaction or contains merely an incidental recital of a previously completed transaction. The use of the past tense does not necessarily indicate that it is merely a recital of a past transaction. It is equally well-settled that a mere list of properties allotted at a partition is not an instrument of partition and does not require registration. Section 17(1)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property. Therefore, a mere recital of what has already taken place cannot be held to declare any right and there would be no necessity of registering such a document. Two propositions must therefore flow: (1) A partition may be effected orally; but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it. If it be not registered, Section 49 of the Act will prevent its being admitted in evidence. Secondary evidence of the factum of partition will not be admissible by reason of Section 91 of the Evidence Act, 1872. (2) Partition lists which are mere records of a previously completed partition between the parties, will be admitted in evidence even though they are unregistered, to prove the fact of partition: See Mulla's Registration Act, 8th edn., pp. 54-57.

15. ...The true principle that emerges can be stated thus: If the arrangement of compromise is one under which a person having an absolute title to the property transfers his title in some of the items thereof to the others, the formalities prescribed by law have to be complied with, since the transferees derive their respective title through the transferor. If, on the other hand, the parties set up competing titles and the differences are resolved by the compromise, there is no question of one deriving title from the other, and therefore the arrangement does

not fall within the mischief of Section 17 read with Section 49 of the Registration Act as no interest in property is created or declared by the document for the first time....

16. ...The document Exh. P-12 does not effect a partition but merely records the nature of the arrangement arrived at as regards the division of the remaining property. A mere agreement to divide does not require registration. But if the writing itself effects a division, it must be registered. See: *Rajangam Ayyar v. Rajangam Ayyar* (1923) 69 Ind Cas 123 : AIR 1922 PC 266 and *Nanni Bai and Others Vs. Gita Bai*, . It is well-settled that the document though unregistered can however be looked into for the limited purpose of establishing a severance in status, though that severance would ultimately affect the nature of the possession held by the members of the separated family as co-tenants. The document Exh. P-12 can be used for the limited and collateral purpose of showing that the subsequent division of the properties allotted was in pursuance of the original intention to divide. In any view, the document Exh. P-12 was a mere list of properties allotted to the shares of the parties.

62. Reliance placed upon *Madan Lal Kapur* (supra) by Mr. Banerjee appears to be misplaced. The court took notice of the earlier pronouncements of the Supreme Court in *Kale* (supra), *Tek Bahadur Bhujil* (supra), *Roshan Singh* (supra) which consistently take the view that a mere memorandum recording an already completed partition does not require registration, but if the instrument effects a division, it must be registered. This decision does not advance the case of the defendants in any manner.

63. In *Nitin Jain Vs. Anuj Jain and Others*, the Court was dealing with a situation where during the pendency of the proceedings, the parties negotiated and arrived at a settlement. Pursuant to the settlement, parties distributed the moveable and immovable properties. The possession of respective portions was taken over by the parties. The properties stood orally partitioned. The Court observed:

...that it is legally permissible to arrive at an oral family settlement dividing/partitioning the properties and thereafter record a memorandum in writing whereby the existing joint owners for the sake of propriety record that the property has been already partitioned or divided. The memorandum does not by itself partition the properties but only records for information what has already been done by oral partition. The memorandum itself does not create or extinguish any rights. A record of oral partition in writing is created. The writing records a pre existing right and does not by itself partition the properties for the first time. As the memorandum only records oral partition which has already taken place but does not in praesenti create any right, it cannot be treated as an instrument creating partition. Refer, *Tek Bahadur Bhujil Vs. Debi Singh Bhujil and Others*, *Bakhtawar Singh v. Gurdev Singh*, (1996) 9 SCC 370 *Kale and Others Vs. Deputy Director of Consolidation and Others*, *Roshan Singh and Others Vs. Zile Singh and Others*, and *Bachan Singh Vs. Kartar Singh and Others*,

64. The Court, after taking note of the application for compromise and the orders passed by the Court, observed:

In the application it is specifically stated that the parties had entered into an oral family settlement and had distributed movable and immovable properties. In fact it is further stated that the parties had already been put in possession of the respective portions and the possession had been taken over. The compromise application merely records the oral family settlement to avoid any ambiguity. Therefore, in this case the Court was not required to pass any decree of partition but only declare the existing factual position on the date when the compromise application was filed, that the parties had entered into an oral family settlement and had partitioned and separated the properties amongst themselves. It was a decree of declaration that there exists an oral family settlement that was passed and no decree that amounts to an instrument of partition u/s 2(15) of the Stamp Act was passed. Thus, the objection raised by the Registry that the appellant and other co-owners must furnish valuation report and pay stamp duty is not correct and legally tenable. However, it is clarified that in case the appellant or any of the co-sharers want to have a decree of partition prepared by the Registry, they shall have to file valuation report and also pay stamp duty.

65. I may now examine the MOFS to ascertain its true nature and scope. According to the said memorandum, the properties dealt with thereunder are:

(i) One property stated to be owned by Sh. Ram Narain and his brother Mangat Ram, both sons of Sh. Chiranji Lal and their respective wives in equal shares situated in Shalimar Bagh, Delhi, which is stated to have been acquired vide a perpetual lease deed dated 13.01.1988. The suit had been filed by the plaintiff to seek partition with possession of property No. AE-138 Shalimar Bagh in equal share with the defendants.

(ii) Second property is stated to be shop in Anaj Mandi, Samalkha, District Panipat, Haryana which is stated to have been held equally by Sh. Ram Narain and Sh. Mangat Ram. It is stated that this property had been allotted to their firm M/s. Chiranji Lal Ram Narain in which both the brothers Sh. Ram Narain and Mangat Ram were partners. The firm had been dissolved and Sh. Ram Narain had been retired from the firm. Thereafter, it is stated, that Sh. Mangat Ram became the proprietor of the firm, who retained the assets and liabilities of the firm.

(iii) The third property dealt with was one plot admeasuring 50 Sq. Yds. situated on the back side of the house of Sh. Mangat Ram situated in Samalkha, District Panipat, Haryana which as per the MOFS was owned and possessed by Sh. Ram Narain.

66. The MOFS records that after mutual adjustment property bearing No. AE-138, Shalimar Bagh, Delhi shall absolutely and irreversibly be in the sole ownership of Sh. Ram Narain and Smt. Sushila Gupta, the first party (the defendants herein), and that Sh. Mangat Ram and Angoori Devi (the plaintiffs

herein) shall have no surviving right , title or interest in that property. It also records that Shop No. 109, New Anaj Mandi, Samalkha and House No. 75/13, Old Gur Mandi, Samalkha, after the agreed adjustment, shall be in the sole and absolute ownership as well as in actual possession of Sh. Mangat Ram and Angoori Devi, the second party.

67. The MOFS records that the parties held amicable negotiations in order to effect the partition/distribution through mutual adjustment of their already existing rights and interest in all the three properties "for exclusive possession, ownership and better use, occupation and enjoyment of the divided properties in the manner hereinafter described?. When dealing with the three properties, the parties used the expression that the said properties "will go and belong to...."

68. The use of such language shows that the actual, physical partition and division of the properties by metes and bounds had not come about, and they had not come into occupation of their respective portions as agreed at the time of entering into the oral family settlement. Even in the main body of the MOFS, the parties repeatedly used the expression "after the agreed adjustment between the parties shall absolutely and irreversibly be in the sole and absolute ownership and legal as well as actual possession of...." Even for the extinguishment of the rights of the other parties in the properties allotted to one of the parties, the parties continued to use the future tense by stating that the other party "shall have no right whatsoever in the same". The parties also state that "both the parties shall enjoy the respective properties that have fallen into their lot as property owned and possessed by them actually, legally and notionally...." The MOFS, therefore, is a forward looking document, which records how the parties shall, in future, hold and deal with the properties. It does not look back in the past and recite that the oral partition stated to have been effected on 3.4.2002 had already been implemented by transfer of the possession and partition by metes and bounds.

69. Para 5 of the MOFS shows that the parties continued to retain documents of the properties allotted to the opposite party, inasmuch as, it was agreed that "all the related title document in respect of the respective properties will be handed over to the concerned persons". The parties obviously did not conclude all the paper work required to be executed to perfect their respective titles. This is evident from Clause 6 of the MOFS which says that the parties "shall execute and sign all papers, documents, applications, affidavits and forms in any Court of law before the DDA, Municipal Corporation of Delhi,...so that the said properties are mutated/registered in favour of the respective owners in accordance with the oral settlement recorded by way of this memorandum". The parties also bound themselves personally to visit the government departments in case they are so required "in order to give effect to this agreement".

70. This clearly shows that the MOFS was an agreement which had to be given effect to, and it does not record a concluded and effectuated partition. Similarly Clause 7 also states that Shri Mangat Ram and Smt. Angoori Devi "shall execute

and sign all papers, documents, applications, affidavits etc so as to enable Shri Ram Narain and Smt. Sushila Gupta i.e. the first party to receive title deeds of AE-138, Shalimar Bagh, Delhi-88, which are at present in the custody of Life Insurance Corporation...." Both the parties agreed to visit the office of LIC "in order to give effect to this agreement". Similarly Shri Ram Narain and Smt. Sushila Gupta agreed to "execute and sign all papers/documents/applications/affidavits etc", so as to enable second party to get their names registered in the Market Committee, Samalkha, District Panipat, Haryana in respect of shop No. 109, New Anaz Mandi, Samalkha. The first party agreed that it "shall also execute and sign all papers/documents/applications/affidavits etc," so as to enable second party to have their names mutated in respect of property No. 75/13, Old Gur Mandi, Samalkha, Panipat, Haryana in the records of the Municipal Committee and to visit the concerned offices "in order to give effect to this memorandum of the oral family settlement".

71. Last but not the least, the parties undertook to abide by the MOFS.

72. From the above, it is clear to me that the MOFS was an agreement to partition the property in present and in future, and was not merely a memorandum recording the already completed and effectuated family settlement. Neither of the parties had come into actual, physical and exclusive possession of the properties which were agreed to be allotted to them, nor did they have the title documents in their possession. The mutation of the concerned records had also not been done. The parties therefore agreed that they shall, in future, take the necessary steps to come into occupation of and to get their title duly recorded of their respective properties allotted to each one of them in terms of the family settlement and to abide by the memorandum. If it were a mere memorandum recording a completed family settlement, where was the question of the parties "abiding" by it.

73. Mr. Banerjee has placed reliance on a recent judgement of this Court, reported as Romesh Chander Sethi v. Inder Mohan Sethi and Anr. 2009 (112) DRJ 270 to submit that the use of future tense in the instrument does not necessarily indicate that the settlement had not been completed before the drawing up of the memorandum. In Romesh Chander Sethi (supra), the Id. Single judge has held:

42. It is also trite that whether the past tense or the present tense has been employed in formulating the document is not conclusive in the determination of the question as to whether the document does or does not create or extinguish any right. A memorandum of family settlement may very well be in the present tense, yet the Court may arrive at a conclusion that it is merely evidence of a previously completed transaction. Likewise, use of the past tense does not necessarily indicate that the document is a recital of a past transaction and it may very well create a right, title or interest in praesenti and, therefore, fall within the mischief of Section 17(1)(b) of the Registration Act.

74. It is well settled that the tense used in the instrument may not be decisive of the issue in question, if there are other surrounding circumstances to support a different view. Even in *Satyawati Sood* (supra) the court had taken into account the tense used by the parties in the instrument in relation to the obligations to be performed by them. I have already noticed the facts of the present case. Not only the parties have used the present and the future tense in relation to their respective obligation and rights, they had not, as a matter of fact, performed their obligations and acquired their exclusive rights in terms of their oral agreement before the execution of the MOFS. Therefore the judgment in *Romesh Chander Sethi* (supra) does not advance the case of the Defendants.

75. Partition is a "process" see *Keshavlal Lallubhai Patel* (supra). It is not complete until the parties have divided the properties by metes and bounds. In *S. Sai Reddy v. S. Narayan Reddy*, (1991) 3 SCC 647 the Supreme Court was dealing with the claim of the daughters to claim a share in the joint Hindu family property on the basis of a State amendment to the Hindu Succession Act granting equal rights to the daughters in Hindu joint families. A preliminary decree defining the shares of the parties had already been passed in the suit when the law was amended by the State granting equal rights to daughters. The Supreme Court held "unless and until the final decree is passed and the allottees of the shares are to be in possession of the respective property, the partition is not complete". A completed partition was explained as "a partition of the property by metes and bounds".

76. The aforesaid principle was applied by the A.P. High Court in *A. Krishna and Another Vs. A. Arjun Rao and Another*, The Court held:

10. The underlying object of Section 35 of the Stamp Act is to ensure that the instrument chargeable with duty is duly stamped, as otherwise it would cause loss to the exchequer, and in order to save revenue to the State, the provision makes the instrument which is not duly stamped inadmissible in evidence. In the instant case, the plaintiffs by seeking to produce the document dated 3-6-1977, which is in the nature of memorandum of partition between the parties, are seeking to extinguish the exclusive right created in favour of Defendant No. 2. As per the recitals of the document, it is clear that partition has been effected by specifying the shares, which includes payment of maintenance to their mother, in that view of the matter, the document dated 3-6-1977 cannot be said to be memorandum regarding past partition. A perusal of the document further discloses that actual partition was not done by metes and bounds as per earlier partition. By virtue of the document, according to the plaintiffs, separate possession was sought to be delivered to the respective parties, and as such, it is evidencing partition. In this context, it is relevant to state that the document sought to be marked does not contain recitals that the parties have already taken possession of the properties by virtue of the earlier oral partition and continue to enjoy the said property separately after taking possession by virtue of the earlier partition. In the absence of any such recitals in the document, the

Court below has rightly come to the conclusion that the document is required to be stamped and registered.

77. In *Kuppuswami Goundan v. Chinnaswami Goundan and Ors.* (supra) it was observed:

...But the moment the parties reduce the terms to writing, it is the writing that thereafter must be regarded as containing and setting out the terms of the contract, and it would not be an act or correct description of the transaction to call it a sale by delivery of property....

78. Therefore, assuming that the parties did arrive at an oral family settlement on the terms contained in the MOFS Ex. CX, they proceeded to record the same in the MOFS before implementing all its terms and taking all steps to complete and effectuate the transaction, including division by metes and bounds i.e. by delivering possession of the respective properties to the respective parties as per the oral family settlement. Not only that, they also agreed in the MOFS that they would abide by its terms, and they obtained from the court before which the aforesaid suit was pending an executable decree in terms of their settlement. These factors clearly show that the MOFS is nothing but an instrument of partition.

79. The submission of Mr. Banerjee that the entire transaction in question is a "mutual release" and not a partition does not convince me. The following aspects, in my view, are extremely pertinent to note;

(i) The parties clearly record that prior to the said settlement/adjustment, the 50 sq. yd. plot at the back side of House No. 75/13, Old Gur Mandi, Samalkha, was in the exclusive ownership and possession of Sh. Ram Narain, the defendant No. 1. It is the acknowledged position that Sh. Mangat Ram, the plaintiff No. 1, and his wife Smt. Angoori Devi had no pre-existing right, title or interest in the said plot admeasuring 50 sq. yds. adjoining their house bearing No. 75/13, Old Gur Mandi, Samalkha, before the settlement;

(ii) It is also acknowledged that prior to the said settlement/adjustment, Sh. Ram Narain or his wife had no concern with House No. 75/13, Old Gur Mandi, Samalkha, which was acknowledged to be the house of Sh. Mangat Ram before the settlement;

(iii) Under the mutual adjustment the parties have, therefore, pooled in their respective individually held properties, which they owned exclusively to the exclusion of the other party. Sh. Ram Narain and his wife Smt. Sushila Gupta while entering into the settlement/agreement, agreed to transfer not only the exclusively owned plot of 50 sq. yds. situated at the back side of the house of Sh. Mangat Ram bearing No. 75/13, Old Gur Mandi, Samalkha (owned exclusively by Sh. Ram Narain), but also assured Sh. Mangat Ram and his wife that the property No. 75/13 would be held exclusively by Sh. Mangat Ram and his wife (Second Party);

(iv) Since Sh. Mangat Ram and his wife did not own or possess, prior to the mutual adjustment, any share whatsoever, in the 50 sq. yds. plot lying at the back of their property bearing No. 75/13, Old Gur Mandi, Samalkha, there was no question of their share becoming enlarged on a "release" by Sh. Ram Narain of his undivided share in the said property as Sh. Ram Narain exclusively owned and possessed the said plot.

(v) It is also pertinent to note that though Shop No. 109, New Anaj Mandi, Samalkha, even prior to the said mutual settlement/adjustment, was owned and possessed by Sh. Mangat Ram and he became the proprietor of the firm M/s. Chiranji Lal Ram Narain and also retained its assets and liabilities, at the time of their mutual settlement/adjustment the parties acknowledged and reaffirmed the ownership of Sh. Mangat Ram in respect of the said shop. This was done to extinguish any possible claim by the first party, Sh. Ram Narain and his wife and their heirs in respect of the said shop. Pertinently, there is no release of any share by either of the parties in respect of the said shop. In case the mutual settlement/adjustment was only a mutual release of pre-existing undivided co-ownership rights, there would have been no occasion to specifically rope in property No. 109, Anaj Mandi, Samalkha and to re-assert the ownership of Sh. Mangat Ram. In the mutual settlement/adjustment, the parties have consciously brought in the said shop which shows that the rights in the said shop have also been taken into consideration at the time of the mutual settlement/adjustment of their rights by the parties.

(vi) Since the parties pooled the aforesaid three properties in a common hotchpotch and then partitioned the same as per their settlement/agreement, it cannot be said that the nature of the transaction was a mere "release", only because in the Shalimar Bagh property, the parties had pre-existing equally undivided share and held the same as co-owners. It is for this reason that the parties appear to have used the expression "lot" when they describe the respective properties which went to their shares.

80. In *Kale* (supra) the Supreme Court, inter alia, observed in para 10: "(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;"

81. These observations cannot be understood to mean that the transfer of an exclusively held property by one of the members, to the other member in the course of the family settlement would also be considered as a release. It would be a part of the family settlement transaction/partition and would be recognized by the Court as such, but it would certainly not be a release.

82. The essence of an Instrument of Partition is that there should be co-ownership of property, and by the method employed in the Document the properties are divided amongst the co-owners in such manner that the commonality of interest is put an end to, and separate shares are available for enjoyment in severalty see *Y. Laxmi Prasannam Vs. Y. Narasayya and Another*, , Nitin Jain (supra) and *Chief Controlling Revenue Authority, Madras v. B.A. Mallaya* 1971 (1) MLJ 177. As long as this test is satisfied, it is immaterial whether the Document also operates as a Release. The Act specifically contemplates a situation that a Document satisfies more than one description, and when that happens, by virtue of Section 6 of the Act, the Document would be chargeable with the higher of the two duties.

83. A full bench of the Mysore High Court in *T.N. Nanjunda Setti and Anr. v. State of Mysore* AIR 1964 Mys 124 held that if the result intended to be achieved by the execution of release deed is to divide common property into exclusive shares, there is no reason why it should not be regarded as an instrument of partition. It was held that the substance of the transaction has to be looked into and that in the case of a partition, there is a double or multiple release accompanied by the acquisition of full right by each of the co-owners in the portion of the common property allotted to them. Thus, while every release may not represent a partition of the common property, every partition necessary involves a double or multiple release.

84. In *Chief Controlling Revenue Authority, Board of Revenue, Madras v. B.A. Mallayya* 1971(1) MLJ 177, the full bench of the Madras High Court considered the issue whether the instrument in question was a release deed or an instrument of partition. Some of the members of the joint family executed a document termed as a release deed expressing their desire to separate themselves from the joint family in consideration of they being paid by the releasees, the other members of the joint family, a certain sum by the sale of some property of the joint family. The issue arose whether the document was liable to be stamped under Article 45 of the Act as a partition deed even though it purported to be a mere release deed. The court observed as follows:

5....

The essence of partition, as we mentioned, is that the asset in co-ownership as it were, as in the case of a coparcenary, is split up into severalty, the process involving the destruction of the co-ownership and conversion of the same into several interests which are available for exclusive allotment to each sharer. Such allotment of the interests may be wholly in favour of one of the erstwhile coparceners without the other coparcener getting anything as and by way of share. That will be a partition and not a release. Release is not necessarily destruction of co-ownership. We think that those are the essential elements of distinction between a release and a partition of property owned in co-ownership. Merely because, as we said, in a sense of partition may involve release, it cannot on that account be said that what is partition is not that but only a release.

85. The Supreme Court in *V.N. Sarin Vs. Ajit Kumar Poplai*, in para 10 has also observed that every process of partition involves renunciation (i.e. release) by each co-sharer of undivided rights in respect of the totality of the properties in lieu of the absolute rights over properties allotted to each individual.

86. The two decisions relied upon by Mr. Banerjee in *Murugesu (supra)* and *Rustorn Nusserwanji Patel (supra)* do not support his submissions. On the contrary, these decisions go contrary to the submission advanced by Mr. Banerjee. In *Murugesu (supra)*, there were five persons carrying on business of a firm which owned the property. Of these five, three executed a document in favour of the other two. The document recited that in consideration of certain amount, the executants released, extinguished, abandoned, cancelled and relinquished their rights, claims etc. in respect of the property. There was no division of the property by metes and bounds in accordance with the shares of the executants or of the other two co-sharers. The issue which arose for consideration before the court was whether the document was a deed of dissolution of partnership and consequently Article 39(b) of the Stamp Act applied, or whether it was a release deed falling under Article 44(d) of Schedule IA.

87. The full bench of the Madras High Court held that it was not a case of division of property by metes and bounds in accordance with the respective shares. In such circumstances, the document by which the co-owners purported to abandon or relinquish their claim to the shares which they were entitled to, would not be in the nature of deed of dissolution of partnership within Article 39(b). It was held that there was no need for execution of a conveyance as such by the co-owners releasing their share in favour of the other co-owners. It is sufficient if they release their interest. The result of such release would be enlargement of the share of the other co-owner. The court also held: "There could be no release by one person in favour of another who is not already entitled to the property as a co-owner".

88. The facts of this case are, firstly, different from the facts before me. One of the material differences is that the family arrangement arrived at between the parties involves a distinct property which admittedly was owned exclusively by a defendant and which has been agreed to be transferred to the plaintiffs. Obviously, there could be no release by the defendants in respect of that property in favour of the plaintiffs as the plaintiffs admittedly had no pre-existing right in the said property. Secondly, the court was not even dealing with the issue whether the instrument in question is an instrument of partition or not.

89. In *Rustorm Nusser Wanji Patel (supra)*, the full bench of the Madras High Court relied upon its earlier decision in *Murugesu (supra)*. The court was concerned with the issue whether the instrument before it was release or a conveyance. The court held that the essential ingredients of a release are that there should already be a legal right in the property vested in the release and the release should operate to enlarge that right into an absolute title for the entire

property as far as the parties are concerned. The court held that there could be no release by one person in favour of another who is not already entitled to the property as co-owner. For the aforesaid reasons, the decision in Rustorm (supra) is also of no avail to the defendant.

90. I may here deal with the decision in Mahip Singh (supra) which has been heavily relied upon by Mr. Banerjee. In the case of Mahip Singh (supra), the division of the property was between co-owners. The relevant extracts from the paragraphs of the family settlement in Mahip Singh Thakur were as follows:

And Whereas on the intervention of common relatives...the Parties arrived at the following full and final oral Family Settlement in February 2002, in order to effect distribution through mutual adjustment of their already existing rights and interest in the above mentioned properties for exclusive possession, ownership and better use, occupation and enjoyment, in the manner hereinafter described:

The Delhi property...would now be owned absolutely and exclusively by the First Party. The Fifth Party shall have no right whatsoever in the Delhi property and shall therefore not claim any right, title or interest and shall not challenge or contest the same before any forum, court or any authority.

The Nahan property...would now be owned absolutely and exclusively by the Fifth Party. The First, Second, Third or Fourth Party shall have no right whatsoever in the Nahan property and shall therefore not claim any right, title or interest and shall not challenge or contest the same before any forum, court or any authority.

91. The Court held that in view of the fact that both the parties had shares as co-owners in the properties at Nahan as well as at Delhi, the relinquishment by appellant of his share in the property at Delhi in favor of the respondents and respondent No. 1 releasing her share in the property at Nahan in favor of the appellant, by no stretch of imagination, could be construed as partition. The instrument was held to be an instrument of release and parties directed to pay the requisite stamp duty leviable on a release deed.

92. A comparison of the language used by the parties in the document in question in the case of Mahip Singh (supra) with that of the memorandum of family settlement in the present case shows that on facts the decision in Mahip Singh (supra) cannot be applied to the present case. In the present case the parties to the MOFS have clearly stated that the "respective properties that have fallen into their lot..." which signifies a division of the properties by partition and not by mere release. I have already analyzed hereinabove the transaction in question which shows that properties which were not even co-owned by the parties were brought in and thrown in a common hotchpotch only whereafter mutual adjustment of rights took place between the parties. Moreover, persons who were not even co-owners earlier were vested with rights and became parties to the family settlement. This aspect clearly distinguishes the present case from that of Mahip Singh (supra). Thus the argument of the counsel for the defendants that Mahip Singh's case (supra) gives a "unique interpretation" to

family arrangements and holds that in such a case the Document is to be charged with the lower of the duties, is in the teeth of Section 6. If the argument founded upon Mahip Singh's (supra) advanced by Mr. Banerjee were to be accepted and applied, then every partition deed would also be classified as a release under Article 55 to the Schedule of the Stamp Act. Such an interpretation would render Article 45 of Schedule 1 of the Stamp Act redundant as every partition amongst the co-owners is also a "mutual release". Pertinently even this Court in the subsequent decisions in B.S. Goel (supra) and Nitin Jain (supra) have not construed Mahip Singh (supra) in the manner as suggested by Mr. Banerjee. Therefore, I am of the view that Mahip Singh (supra) does not support the case of the defendants.

93. To get out of the aforesaid situation, Mr. Banerjee in the course of his submissions submitted that to the extent of transfer of the 50 Sq. Yd. property in Samalkha, which was agreed to be transferred to the plaintiffs i.e. Mangat Ram and his wife by the Defendants i.e. Ram Narain and his wife, the instrument may be treated as an instrument of partition and be stamped accordingly. I cannot appreciate how a single transaction can be broken up in parts and stamp duty levied on the different components of the transaction differently. Section 5 permits that several distinct matters comprised in one instrument shall be chargeable with the aggregate amount of duty with which separate instruments each comprising or relating to one of such matters would be chargeable under the Act. However, by no stretch of reasoning the MOFS can be said to contain separate and distinct matters merely because separate and distinct properties are involved in the one and only transaction of a family settlement. Pertinently, this is not even argued before me by Mr. Banerjee. In any event, even the rest of the transaction pertaining to the Shalimar Bagh property had not been completed before the parties drew up the MOFS and sought a decree from the court in terms thereof. Therefore the instrument as a whole/the decree passed by the court in terms thereof would be liable to bear stamp duty for the transaction/family settlement, which is indivisible.

94. As for the third contention of Mr. Kapoor, which is that where a decree is sought to be drawn in terms of a compromise, in contradistinction to a case where the suit is merely dismissed in view of a compromise, payment of stamp duty cannot be avoided, I accept the same in the light of the following pronouncements.

95. In *R. Thiruvengadathan Aiya v. R. Mangayya* (supra) the Court has held:

The decree in the present case recites a razinamah executed by the parties and is made by consent of parties, and decretal portion allots specific properties to the several parties and directs other parties to deliver up possession, and also provides for the execution of a sale-deed and lease of certain immovable property.

In my opinion the decree effects an actual partition of the property among the

parties, and is, therefore, the final order is the suit effecting a partition, and is accordingly chargeable with duty as an instrument of partitions see Balaram Budharam Marvadi v. Ramkrishna.

96. In *Fazal Rasul Khan v. Mohd-ul-Nisa* AIR 1944 Lahore 394 the court observed:

An order such as "decree passed in terms of the compromise" would be utterly incomprehensible without reference to the compromise and therefore the compromise could be regarded as embodied in the decree. But as stated "the parties have compromised and the suit is therefore dismissed" is quite comprehensible and intelligible without reference to any particular form of compromise and that being so the particular compromise which led to the dismissal cannot be said to have been in any way embodied in the decree. In the present case, the order really means that because the parties had settled, the suit had to be dismissed. It did not mean that the suit was dismissed on the particular terms arrived at between the parties by their compromise.

97. In *Y. Laxmi Prasannam Vs. Y. Narasayya and Another*, the Court relied on the earlier decision in *(sic)erusu Venkaiah and others Vs. Veera venkamma and others*, . In my view, it lays down the correct position in law. It was held that:

...In deciding a case involving the question of the applicability or otherwise of the Section (Section 2(15) and Section 6 and Schedule I, Article 45 of the Stamp Act) the test is not whether originally the right of each of the parties was recognised to a part of the property but the basis upon which they settled to partition the property. It is only by recognising the antecedent title of one another that the agreement to divide it in a particular mode is reached. It is not the language of document alone that will determine the issue. It is not what purports outwardly that matters, but it is the real character of the document that should furnish the basis for the decision.

98. The Court scrutinized the relevant provision of the Act. It observed:

18. A plain reading of the above definition shows that the requisite of an instrument of partition is that co-owners of any property should by that document, divide or agree to divide such property in severally. A final order for effecting a partition passed either by a Revenue authority or by a Civil Court and an award passed by an arbitrator directing partition, are also included in the definition of an "instrument of partition."

99. The Court further observed:

A final order is one which effects a partition of property owned or claimed to be owned by more than one person and allots specific portions in severally to the others. If, by the order of the Court, possession of the property, after effecting a partition, is delivered in accordance therewith, it would, certainly, amount to a final order. An order would not cease to be a "final order" if, by the deed, the properties are divided and allotted to the parties but the possession of the same has to be taken in execution of the decree.

100. In *Renu Devi Vs. Mahendra Singh and Others*, the Supreme Court cited with approval the following passage from the decision of the Patna High Court in *Raghubir Sahu Vs. Ajodhya Sahu and Others*,

In the present case, the decree was passed on compromise. It was admitted that by the compromise, the properties allotted to the share of each party were clearly specified and schedules of properties allotted to each were appended to the compromise petition. Therefore, no further inquiry was at all necessary. In such circumstances, the decree did not merely declare the rights of the several parties interested in the properties but also allotted the properties according to the respective shares of each party. Therefore, it was not a preliminary decree but it was the final decree in the suit. A compromise decree in a partition suit allotting specific parcels to the parties is a final order for effecting partition: 9 Luck 270. There being already a final decree, the only thing that remained to be done was to engross it on a stamped paper under Article 45, Stamp Act, 1899. The decree to be engrossed on the stamp will bear the date of the decree, 17th December, 1921, and will declare the position of the parties in respect of the properties on that date. There is no time limit prescribed by the statute for the engrossment of a partition decree on stamp of requisite value. In fact no date was fixed by the Court for the purpose. Therefore, mere engrossment of the decree on stamped paper of the requisite value will not in any way affect the interest of the parties in respect of the properties though, changes may have taken place in regard to the properties since the decree was made on 17th December, 1921. The only effect of engrossment of the decree on stamped paper would be that it will be rendered legally effective which it is not until so engrossed.

101. The Supreme Court accepted the above view and also concurred with the view taken by Madras High Court in *R. Thiruvengadathan Aiya* (supra) and by the Chief Court of Oudh in AIR 1933 562 (Oudh)

102. In *Sumintabai Ramkrishna Jadhav Vs. Rakhmabai Ramkrishna Jadhav and Others*, the court found that the plaintiff's own contention was that she executed the compromise decree and got the possession during the execution of that decree. She made this averment in her plaint and she also made statement to that effect in her deposition. The court held that if the document was only a memorandum it was difficult to understand how the plaintiff could have got possession by executing the decree on the basis of the memorandum. Moreover, a plain reading of the said decree also militated against such contention. The decree provided that the rights of the parties in the previous suit were created from the decree and they flowed from the decree. Therefore, it was held to be an instrument required to be stamped.

103. In *B.S. Goel and Ors.* (supra) the Court was dealing with a joint application filed under Order XXIII Rule 3 read with Section 151 of the CPC in terms of which the compromise had been recorded. In the said application, the parties stated that an oral family settlement was arrived at on 2nd October, 2002, qua the

Hindu joint family properties. The said oral family settlement was reduced into writing on 31st October, 2002 as a memorandum of family settlement. However, by way of the compromise application, the parties submitted that the aforesaid memorandum of family settlement dated 31st October, 2002 recording the oral family settlement arrived at between the parties on 2nd October, 2002 stood modified in terms of the application and the final compromise as arrived at between the parties and was stated in sub-paras (1) to (14) of para 3 of the application.

104. The Court after referring to various statutory provisions and case law on the subject observed:

8. All the aforementioned judgments reiterate the proposition that only such of the decrees are required to be drawn on a stamp paper, which allot and vest particular share in each co-sharer as it affects partition of a property and hence requires to be stamped. Such a division of property has the effect of creation of an exclusive right of a person in that portion of the property, which falls to his share and extinguishes his right, title or interest in those portions, which fall to the exclusive shares of the others. Such a decree shall be covered by the definition of instrument of partition as defined in Clause (15) of Section 2 of the Act. In such a case, the provisions of Article 45 of Schedule 1 would be attracted and stamp duty would be livable and as a result, the decree shall have to be drawn up on a stamp paper of adequate value.

105. The Court went on to hold that stamp duty was chargeable and that the decree was required to be engrossed on a stamp paper inasmuch, as a decree was not directed to be drawn up by the learned Single Judge by recognizing the oral family settlement arrived at and reduced into writing by way of a memorandum of family settlement dated 31st October, 2002, but in terms of the compromise arrived at between the parties as contained in the compromise application. By virtue of the said compromise, properties were divided, rights of the parties were created and defined in particular properties/portions of properties and rights also got extinguished in other properties/portions of properties which fell in the share of others.

106. The Court further held that the parties had agreed to divide the immovable property in severalty in terms of the compromise application thus creating rights and extinguishing rights in the immovable properties which compulsorily required a decree to be drawn up on a stamp paper of adequate value.

107. The decree passed by this Court in the present case shows that the same has been passed in terms of the oral family settlement Ex.CX. Apart from that, the statement of the parties praying that a decree in terms of the MOFS be passed has also been recorded by the Court. The decree passed by the Court, therefore, incorporates the MOFS. The effect of the said incorporation is that the parties get vested with the rights in the respective properties, and also get vested with the right to enforce, through the process of execution, their rights to

perfect their title and possession of the respective properties allotted to them under the MOFS. Since a decree has been passed in terms of the MOFS, Ex.CX, and the suit has not merely been dismissed or disposed of on the ground that the parties had already concluded a partition, in my view, the said decree is also an instrument of partition as the same constitutes a final order for effecting the partition passed by a civil Court.

108. Rajender Kumar (supra) relied upon by Mr. Midha is distinguishable on its facts, inasmuch as, in that case the parties after arriving at an oral family partition had acted upon the same and "retained possession of properties which fell to their respective shares". The parties executed and registered a disclaimer agreement. It was only thereafter that the application under Order 23 Rule 3 CPC was filed before the court. It was in these facts that the court came to the conclusion that more duty was not payable as on an instrument of partition, neither on the memorandum recording oral family settlement nor on the decree passed by the court.

109. Lastly, I may deal with Kale (supra) on which strong reliance has been placed by Mr. Banerjee. Kale (supra) was a case where a compromise was arrived at between the family members during the pendency of litigation. A petition was filed before the revenue court informing the court of the said compromise and seeking mutation of certain lands as per the compromise. The revenue court passed the order granting mutation as sought on March 31, 1957. The parties remained in possession in respect of their allotted properties and paid the respective land revenue for the same till 1964, when the respondents started to assert rights in respect of certain lands mutated in the name of the petitioner. As a result mutations were carried out showing the respondents as co-sharers. Consequently the petitioner filed objections. The proceedings reached the Allahbad High Court. The High Court rejected the reliance placed by the petitioner upon the compromise of 1957, on the ground that the same was an instrument of partition which had not been registered under the Registration Act. The Supreme Court reversed the decision of the High Court and held that the document was a mere memorandum recording an oral family partition and the petition filed before the revenue court was merely for information of the court for the purpose of mutation.

110. In the aforesaid background, in para 10 of the judgment in Kale (supra), the Supreme Court, inter alia, held that a family arrangement may be even oral in which case no registration is necessary. It was further held that registration would be necessary only if the terms of the family arrangement are reduced into writing. A distinction was made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. It was held that in such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does

not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registerable.

111. On the nature of the compromise document/petition before it, the Supreme Court observed:

A perusal of this compromise petition which appears at pp. 15 to 18 of the paper-book would clearly show two things - (1) that the petition clearly and explicitly mentioned that a compromise had already been made earlier; and (2) that after the allotment of the khatas to the respective parties the parties shall be permanent owners thereof. The opening words of the petition may be extracted thus:

It is submitted that in the above suit a compromise has been made mutually between the parties....

112. The Supreme Court on the basis of its reading of the petition observed:

This shows that even before the petition was filed before the Assistant Commissioner informing him that a compromise was being made, the parties had a clear compromise or a family arrangement in contemplation for which purpose an adjournment was taken. These facts coupled together unmistakably show that the compromise or family arrangement must have taken place orally before the petition was filed before the Assistant Commissioner for mutation of the names of the parties in pursuance of the compromise. The facts of the present case are therefore clearly covered by the authorities of this Court and the other High Courts which laid down that a document which is in the nature of a memorandum of an earlier family arrangement and which is filed before the court for its information for mutation of names is not compulsorily registerable and therefore can be used in evidence of the family arrangement and is final and binding on the parties.

113. The Supreme Court concluded:

44. ...the view of the High Court that the compromise required registration was also wrong in view of the clear fact that the mutation petition filed before the Assistant Commissioner did not embody the terms of the family arrangement but was merely in the nature of a memorandum meant for the information of the court.

114. The decision in *Kale* (supra) therefore proceeded on the basis that the document before it was a mere memorandum recording an already completed family settlement and, therefore, the same did not require registration.

115. The submission of Mr. Banerjee that the Supreme Court had accorded higher sanctity to a family arrangement by observing that they "are governed by a special equity peculiar to themselves, and will be enforced if honestly made", and therefore, even for the purposes of stamp duty the same should be construed so as to relieve the parties to the family arrangement/compromise

from payment of such duty is wholly misplaced. The observations of the Supreme Court have to be understood in the context in which they had been made. Some of the parties were seeking to walk out of a completed family settlement by raising the plea that the same was fraudulent and also by contending that the same could not be relied upon because it was not registered. It was in this background that the Supreme Court held that family arrangements have to be viewed in a different light and that they are governed by special equity peculiar to themselves and that they would be enforced if honestly made. However, so far as the plea with regard to the non-registration of the family arrangement/settlement was concerned, the Supreme Court examined the same and concluded on the basis of the facts before it that the document was in the nature of a memorandum recording a family settlement and that it had been produced before the revenue court merely for information and for the purpose of getting the mutation done in accordance with the compromise/family arrangement.

116. The issue with regard to the exigibility of the document/instrument recording the family arrangement to stamp duty was not even an issue before the Supreme Court in *Kale* (supra). This issue has to be decided on the appreciation of the nature of the instrument and the surrounding circumstances and not because, *inter partes*, the family arrangement is accorded greater sanctity. There is no question of estoppel against the statute. If stamp duty is payable on a document recording a family arrangement as an instrument of partition, the same cannot be avoided by a misplaced reading of *Kale* (supra). The judgment in *Kale* (supra) does not purport to exempt any instrument from payment of the requisite stamp duty. It also does not cast a duty on an authority charged with the responsibility to require the payment of stamp duty to accord any special status to such an instrument. The quantum of stamp duty and/or penalty that the instrument would have to bear cannot be determinative of the issue whether the instrument falls under one classification or the other under the Act. There is no discretion vested in the competent authorities under the Act whether or not to tax the instrument. If it falls within one of the classes of instruments liable to bear stamp duty, it must be taxed accordingly. The decision in *District Registrar and Collector v. Canara Bank* (supra) does not advance the defendants' cause in the facts of this case.

117. The apprehension expressed by Mr. Banerjee is that if the MOFS and the Decree passed by this Court are treated as instruments of partition, the same would invite levy of penalty u/s 35 of the Act, which would be 10 times the amount of stamp duty chargeable on the MOFS/Decree passed by this Court, as an instrument of partition. I do not see any merit in this submission of Mr. Banerjee. At the time of passing of the decree, the court did not impound the MOFS. No duty was paid by the parties on the MOFS at that stage. The issue before me is with regard to the exigibility of the decree to stamp duty. The decree is yet to be drawn up. The aforesaid issue has been raised by the Registry before the decree has been drawn up. Consequently, if the parties pay the requisite stamp duty leviable on the decree as an instrument of partition, there

would be no question of the MOFS/decreed passed by the court being subjected to any penalty. In any event, the issue of levy of penalty on the decree passed by this Court would arise if the decree is drawn up without sufficient stamp, and the same is produced before a person, having by law or by consent of parties, authority to receive evidence. That stage has not yet arisen. Therefore, in my view, the apprehension expressed by Mr. Banerjee is wholly misplaced.

118. For all the aforesaid reasons, I am of the view that the documents in question, namely the memorandum of family settlement dated 24.4.2002, Ex.CX and the decree passed by this Court on 3.5.2002 are instruments of partition as defined in Section 2(15) of the Act. The decree passed by the Court is required to be stamped as such.

119. At this stage, I must record my appreciation for the excellent assistance rendered by the learned amicus in this matter. He has done exhaustive research in the matter and made a very lucid presentation.

120. The parties are directed to file the requisite stamp duty before the Registrar for the decree to be drawn up in terms of the settlement Ex.CX and the decree passed by this Court on 03.05.2002. List the matter before the concerned Joint Registrar for the said purpose on 30th April, 2010.