

(2005) 02 DEL CK 0115
In the Delhi High Court
Case No : CS (OS) 2721 of 1987

Shri Rajiv Oberoi and Others

APPELLANT

Vs

Sh. Santosh Kumar Oberoi and Others

RESPONDENT

Date of Decision : 04-02-2005

Acts Referred:

Citation : (2005) 80 DRJ 120

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : Rekha Palli, for the Appellant; H.L.Raina, for the Respondent

Judgement

Pradeep Nandrajog, J.—This is a suit for partition, rendition of accounts and declaration. plaintiff's claim 9/24th share in property bearing No.E-231, East of Kailash. Partition of said property is prayed for. Declaration sought is for nullification of mutation obtained by defendants 1 to 5 in their favor in records of DDA. Rendition of accounts is sought against defendants 1 to 5.

2. Recorded owner of the suit property was late Shri Amolak Ram. Wife of late Shri Amolak Ram had pre-deceased him, having died in the year 1947 (a fact stated by counsel for the parties at the bar). Shri Amolak Ram was blessed with two sons named Shri Raj Kumar Oberoi and Shri Santosh Kumar Oberoi (Defendant No.1). He had six daughters. Defendants 6 to 11 are the daughters of late Shri Amolak Ram. Defendant No.1, Shri Santosh Oberoi is the son of late Shri Amolak Ram. Defendant No.2 is the wife of defendant No.1. Defendants 3 to 5 are the children of defendants1 and 2. plaintiff No.1 is the son of late Shri Raj Kumar Oberoi, the other son of late Shri Amolak Ram. plaintiff No.2 and 3 are the wife and daughter, respectively, of later Shri Raj Kumar Oberoi.

3. Case of the plaintiffs is that late Shri Gopi Chand, father of late Shri Amolak Ram, had inherited ancestral properties in Pakistan which he left behind on account of partition. Gopi Chand lodged a claim with the Rehabilitation Department of Union of India for compensation in respect of the ancestral

properties left behind in Pakistan. After verification, Rehabilitation Department held that Shri Gopi Chand was entitled to be compensated as a displaced person for properties left by him in Pakistan. Before claim could be distributed, Shri Gopi Chand died on 1.7.1954 leaving behind 9 legal heirs, one of whom was Shri Amolak Ram. Compensation assessed in favor of Shri Gopi Chand was accordingly apportioned amongst the 9 legal heirs. 1/9th being apportioned in favor of Shri Amolak Ram. In stead of receiving cash, Shri Amolak Ram got the compensation adjusted by purchase of agricultural land in Village Kherera and allotment of property bearing No.B/253-255, West Patel Nagar in association with one Shri Mulkh Raj. Shri Amolak Ram sold his share in the property at West Patel Nagar. Land at village Kherera was acquired and as per policy of Government of India, alternative residential plot, being E-231 East of Kailash New Delhi was allotted to him. Prt premium was paid by him from out of the compensation received by him in respect of the acquired lands in Village Kherera, balance premium was paid by him i.e. Shri Amolak Ram. Late Shri Amolak Ram constructed a house on the plot. Accordingly plaintiffs claim that property No.E-231, East of Kailash is ancestral property.

4. Shri Raj Oberoi, one of the two sons of late Shri Amolak Ram died on 9.12.1983. Shri Amolak Ram died on 8.8.1984. Being the wife, son and daughter of late Shri Raj Oberoi, plaintiffs claim that since property was ancestral, 1/3rd share each would be long to Shri Raj Oberoi, Shri Amolak Ram and Shri Santosh Kumar Oberoi. On death of Late Shri Amolak Ram, his 1/3rd share would fall to the share of the plaintiffs, defendant No.1 and defendants 6 to 11. In this manner, plaintiffs claim 9/24th share in the property.

5. defense of the defendants 1 to 5 as also defendants 6 and 7 is that the suit property was the self-acquired property of late Shri Amolak Ram. He bequeathed the same in favor of defendant No.1 by and under a will dated 27.12.1983. defense of defendants 9 and 10 is that later Shri Amolak Ram died intestate. Said defendants have admitted that the plot in question was allotted to Shri Amolak Ram as per policy when his agricultural lands were acquired, which agricultural land were allotted by way of compensation for immovable properties left in Pakistan. However, said defendants have specifically stated that they neither admit nor deny that property bearing No.E-231, East of Kailash was ancestral. Defendant No.8 and 11 supports the case set up by defendants 1 to 5.

6. Vide order dated 5.9.1990 following issues were framed:-

""1. Whether the property bearing No. E-231, East of Kailash including the leasehold rights of the plot underneath were ancestral/Joint Hindu Family property in the hands of late Amolak Ram?

2. Whether Amolak Ram left a valid Will dated 27.12.1983?

3. Whether Delhi Development Authority is a necessary or even a proper party in these proceedings?

4. Whether the suit has not been properly valued for purposes of jurisdiction and court fee?

5. Whether any contribution was made by the first defendant (since deceased and as represented by defendants 2 to 5) on the construction of any portion of the property in question, and if so, to what effect?

6. What is the effect of defendant No.1 (since deceased) not disclosing to the Delhi Development Authority, the plaintiffs as heirs of Amolak Ram and on the basis of the will getting the leasehold rights in the land mutated in the name of H.U.F. of defendant No.1?

7. If the above issues are held in favor of the plaintiffs, and in case of passing of preliminary decree, what directions are to be given to the Local Commissioner?

8. Relief.'''

7. Parties have led evidence. Arguments were heard on 24th, 25th and 27th January, 2005.

ISSUE NO.1

8. PW.1, Shri Surender Singh, Clerk from the Rehabilitation Department of Government of India proved documents PW.1/1 to PW.1/8. Ex.PW.1/4 is the statement of late Shri Gopi Chand, father of Shri Amolakh Ram recorded on 23.7.1951. In the statement, Shri Gopi Chand stated as under:-

''The property to which the claim relates is my ancestral property. In 1932 a part of it was acquired by me by partition with my brother vide copy of partition deed C-I. According to C-I I got one Haveli. I was already in possession of two other Haveli of which the boundaries are given in C-I.....''

9. Ex.PW.1/5 is another statement of late Shri Gopi Chand recorded by the Rehabilitation Department on 27.9.1951. Inter alia, following is the statement of Shri Gopi Chand:-

''I inherited the house No.D-144/A, situated in Sewa Ram Street from my father who died in 1913.....''

10. Ex.PW.1/6 is the order dated 27.9.1951 passed by the claims officer allowing claim in sum of Rs.18,000/- in favor of Gopi Chand in respect of some properties left behind in Pakistan. The said order records that compensation was being assessed in favor of Shri Gopi Chand pertaining to two properties, being the ones reference where to was made late Shri Gopi Chand in his statement Ex.PW.1/4 and the statement Ex.PW.1/5.

11. Ex.PW.1/8 is an order dated 26.6.1956 passed by the Settlement Commissioner. Order records that Gopi Chand died on 1.7.1954. Order records that Shri Gopi Chand was assessed as being entitled to Rs.1,41,000/- on verification of his claim for properties left behind in Pakistan. Order records that Shri Gopi Chand was survived by his wife, Smt. Vasheshran Devi and 8 sons.

Order records that all had agreed to be entitled to 1/9th share in the compensation assessed. Order records that the wife and 8 sons of Shri Gopi Chand were substituted as the beneficiaries to the verified claim, each having 1/9th share.

12. Ex.PW.1/1 being the letter dated 17.10.1985 addressed by the Rehabilitation Department of the Government of India to plaintiff No.2 records that compensation apportioned in favor of late Shri Amolak Ram was got adjusted towards the purchase value of land in Village Kherera and for half share in House No.B/253-255, West Patel Nagar, New Delhi; which house was acquired by Shri Amolak Ram in association with Shri Mulkh Raj. Ex.PW.1/2 being the recovery schedule corroborates Ex.PW.1/1, in that, the document records that part value of compensation assessed and apportioned in favor of Shri Amolak Ram was adjusted towards purchase of land in Village Kherera. Ex.PW.1/3 further corroborates Ex.PW.1/1 in as much as said document, being recovery schedule records that part compensation assessed and apportioned was adjusted towards half purchase value of House No.B/253-255, West Patel Nagar in the name of Sh. Amolak Ram in association with Shri Mulkh Raj.

13. PW.4 Shri Prahlad Singh, Assistant, Lease Administration Branch, Delhi Administration proved documents PW.4/1 to PW.4/11. Ex.PW.4/11, being the letter dated 15.11.1965 addressed by the Land and Building Department of Delhi Administration to DDA records that agricultural land of 30 persons, names whereof are to be found in Annexure-B to the said letter, was acquired and said 30 persons were found entitled to be allotted a residential plot as per ""Large Scale Acquisition, Development and Disposal of Land in Delhi"" Scheme. Name of Shri Amolak Ram is at Serial No.6 in Annexure B. Recommendation is that he be allotted a plot admeasuring 700 sq. yards. Ex.PW.1/1A is the link which establishes that recommendation for being allotted a residential plot on acquisition of agricultural land pertained to the agricultural land in Village Kherera in the name of Shri Amolak Ram. Ex.PW.4/1A is the letter dated 23.10.1969 addressed by Shri Amolak Ram to the Vice Chairman DDA, in which he has stated that pursuant to acquisition of agricultural lands in Village Kherera he was entitled to a residential plot. On the said letter, there is a note by officers of DDA to the effect:-

""Discussed with VC. Please let me know if any other plot of 700 sq. yards is available.""

14. Ex.PW.4/3 is the letter dated 3.12.1969 addressed by DDA to late Shri Amolak Ram. Said letter informs Shri Amolak Ram that in response to his representation dated 23.10.1969 (Ex.PW.4/1A), plot No.E-231, East of Kailash was being allotted to him. Letter records that the premium payable was Rs.33,030.90. Enhanced compensation payable was in sum of Rs.1,348.20. Letter records that Rs.8,100/- was already received. Letter records that 75% of the premium and enhanced compensation minus amount already deposited had to be paid. Letter demands Rs.11/- as lease deed preparation charges. Demand

raised is in sum of Rs.17,695.33.

15. DW.3, Shri R.S. Punia, assistant from DDA stated, as per record that payment was received in Installments toward premium from Amolak Ram.

16. PW.3 Shri T.C.Dureja, Clerk from the Mortgage Department of LIC proved Ex.PW.3/1. The witness deposed that late Shri Amolak Ram took a loan of Rs.25,000/- from LIC in 1973. As collateral security he mortgaged plot No.E-231, East of Kailash. He deposed that 2 guarantees were furnished by late Shri Amolak Ram, being the guarantees of his sons Shri R.K.Oberoi and Shri S.K.Oberoi. He deposed that Shri S.K.Oberoi had assigned his policy No.6236025 in sum of Rs.25,000/-. Witness deposed that the loan as repaid in the year 1976. Ex.PW.3/1 is the application form submitted by Shri Amolak Ram while applying for loan from LIC. In the said form, against column requiring Shri Amolak Ram to state the source of income from which land was purchased and source from which balance amount would be spent on construction, following stands recorded by Shri Amolak Ram:-

Please state the source of income with which the applicant has purchased the land and source from which balance amount is to be spent on construction?

Personal savings, gratuity, bonus from Indian Railways and HSL, sale of house at Drug, sale of shares and some household effects and compensation received from land which government acquired.

17. In the application form, requiring to disclose source of income from which the loan is proposed to be repaid, Shri Amolak Ram recorded the following:-

""It is proposed to let out the house for the first year or two. Shortfall if any will be made good by guarantors who are my sons and for whom this house is actually intended.""

18. Against the column requiring Shri Amolak Ram to state by which personal law he was governed, Shri Amolak Ram recorded:- ""MITAKSHARA"".

19. From the evidence on record it stands clearly established that late Shri Gopi Chand, father of late Shri Amolak Ram was the owner of properties left behind in Pakistan, which properties were inherited by late Shri Gopi Chand from his father. While as assessing compensation claim, late Shri Gopi Chand was entitled to receive compensation from the Rehabilitation Department of Government of India in respect of ancestral properties in Pakistan. Before he could receive the benefit of compensation assessed, Gopi Chand died. His wife and 8 sons agreed to received benefit of 1/9 share each in the compensation assessed. Shri Amolak Ram, one of the 8 sons of Shri Gopi Chand got adjustment of his share in the compensation towards sale price of agricultural land in Village Kherera. Said land was acquired. One of the benefit of acquisition was entitlement to an alternative residential plot as per Large Scale Acquisition Scheme of Government of India. Plot No.E-231, East of Kailash was allotted in name of Shri Amolak Ram under the said scheme. Part premium for the land was paid by him out of the

compensation received when land in Village Kherera was acquired, part premium was paid by him from his own funds. Shri Amolak Ram constructed a house after taking loan from LIC. There is no evidence on record to show the source from which Shri Amolak Ram repaid the loan. However, it has to be noted there is no evidence on record that defendant No.1 paid any amount for repayment of loan. There is no evidence on record that defendant No.1 surrendered the benefit of his insurance policy to LIC towards adjustment of the loan taken by late Shri Amolak Ram. DW.3 only gave particulars of the Installments paid by Shri Amolak Ram. His evidence does not even remotely suggest, much less proves that defendant No.1 contributed any sum.

20. It has to be noted that Shri Amolak Ram had two sons, being defendant No.1 and Shri Raj Kumar Oberoi. While applying for loan to LIC for constructing the house in question, he recorded that the house was for benefit of his sons.

21. Evidence on record clearly establishes that part premium for acquiring leasehold right in plot No.E-231, East of Kailash was paid by late Shri Amolak Ram from out of the compensation received by him on acquisition of agricultural land in Village Kherera, which land was allotted to him and consideration was by adjustment of part compensation assessed and apportioned in favor of Shri Amolak Ram pertaining to ancestral properties of late Shri Gopi Chand left behind in Pakistan. Evidence on record further establishes that Shri Amolak Ram was employed in the Indian Railways and was earning monthly salary.

22. It is evident that Shri Amolak Ram put in the hotchpot of his ancestral properties his self earned funds. The conclusion is inevitable. Suit property is impregnated with the character of being an ancestral property in the hands of Shri Amolak Ram. Defendants 1 to 5 have failed to prove that any amount was contributed by defendant No.1. Defendant No.2, wife of defendant No.1 who appeared as DW.2 in her examination-in-chief, stated that her husband had been contributing money for construction of the house but on being cross-examined on the issue, she failed to furnish any proof. In cross-examination, she admitted that her statement to this effect in examination-in-chief was based on what defendant No.1 had told her. Issue No.1 is accordingly decided in favor of the plaintiffs and against the defendants. It is held that property bearing No.E-231, East of Kailash is ancestral property in the hands of Amolak Ram.

ISSUE NO.2

23. Following preliminary data be noted as it would be helpful in deciding the issue:-

""(i) Date of Will of Amolak Ram 27.12.1983 (ii) Date of death of Raj Oberoi 19.12.1983 (iii) Date of discharge of Amolak Ram from hospital 25.12.1983

24. As per defendants No.1 to 5, late Shri Amolak Ram had executed the will on 27.12.1983 and the same was got registered in the office of the Sub-Registrar on

the same date. It may be noted that defendants No.1 to 5 have not summoned any witness from the office of the Sub-Registrar to prove that the will was registered in the office of the Sub-Registrar, Delhi.

25. The will Ex.P.1 has been witnessed by Shri Anil Sehgal, Chartered Accountant by profession and one Mehar Chand, a driver by profession. Defendants No.1 to 5, to prove the will have tendered Mr.Anil Sehgal as DW-1. Besides evidence of Mr.Anil Sehgal, defendant No.2 appeared as a witness being DW-2. Mrs.Indu Bala (daughter of Amolak Ram) also gave evidence as witness of defendants No.1 to 5. Inadvertently, while recording her evidence, witness number has not been assigned to her. I may also note that Indu Bala is defendant No.11.

26. plaintiffs have examined Shri Jalal Mashi, Medical Board Officer, Holy Family Hospital as PW-6, Dr.Raj Kumar, son-in-law of late Shri Amolak Ram as PW-7, Mrs.Manorma Titus and Mrs.Anjana Chopra, both daughters of late Amolak Ram as PW-8 and PW-9 as also Shri Kamal Kant Khandelwal, a handwriting expert to disprove the Will, besides, plaintiff No.2 as PW-10.

27. Let me begin with the witnesses of the defendants No.1 to 5 on this issue. DW-1, Anil Sehgal, star witness of defendants No.1 to 5, being the attesting witness to the will, in examination-in-chief deposed that the will dated 27.12.1983 was prepared and drafted by him under instructions of Amolak Ram. It was typed in his office. Late Shri Amolak Ram saw the documents before he signed the same. He deposed that he was familiar with the signatures of Shri Amolak Ram as he was filing income tax return of late Shri Amolak Ram. He deposed that the other attesting witness, Mr.Meher Chand was the driver of late Shri Amolak Ram. He deposed that the other attesting witness signed in his presence. He deposed that the will was registered in the office of he Sub-Registrar at Asaf Ali Road and he was present when the document was registered. He deposed that late Shri Amolak Ram was mentally sound and alert.

28. In cross-examination, DW-1 contradicted himself on the issue of his being associated with late Shri Amolak Ram inasmuch as he stated that he knew the deceased three to four months prior his death. It has to be noted that late Shri Amolak Ram died on 8.8.1984 and the Will in question is dated 27.12.1983. Witness further contradicted himself when he stated in cross-examination that the deceased contacted him as he used to send circulars to residents of the colony and in response to one such circular, late Shri Amolak Ram contacted him. He categorically stated in cross-examination: ""I knew him only through this source"". In cross-examination, DW-1 categorically stated: ""I met Mr.A.R.Oberoi for the first time in 1983, three to four months prior to his death. I had gone to his residence.""

29. In response to the question whether he visits the house of a person at the first call, DW-1 stated: ""It may be possible on certain occasions"". In response to the question why did he go to the house of Amolak Ram on a mere telephone call and that too when it was the first call, witness deposed: ""To have more

clients''''.

30. It is clear that DW-1 wrongly stated in his examination-in-chief that he knew late Shri Amolak Ram and was familiar with his signatures because he had been filing the income tax returns of the deceased.

31. In cross-examination, DW-1 stated that barring one occasion when he saw late Shri Amolak Ram walking with a helper he would see him walking on foot without any crutches or wheel chair. He stated that he was not aware of any sickness of the deceased. When cross-examined as to who accompanied Amolak Ram for registration of the will, DW-1 stated that Shri Santosh Oberoi and Ms.Sanjogita, son and daughter accompanied Amolak Ram. He further stated that Mr.Amolak Ram's driver drove the car. In cross-examination, DW-1 admitted that he was rendering services for Indian Hotels where Santosh Oberoi was employed. He admitted in cross-examination that Santosh Oberoi took his help while submitting papers to DDA for mutation of the property after death of the deceased. Interestingly, DW-1 went on to contradict himself when further cross-examined as to how he knew Santosh Oberoi when he stated that he knew Santosh Oberoi through one Mr.Kapoor who lives in defense Colony. He further contradicted himself when he stated that he never did any work for any company in which Santosh Oberoi had an interest. He further contradicted himself when he stated that he did not remember whether Santosh Oberoi had accompanied them to the office of the Sub-Registrar. When cross-examined as to what happened in the office of the Sub-Registrar, he stated that he did not remember whether Amolak Ram went up to the office of the Registrar for registration or whether the Registrar came down for purposes of registration. He, however admitted that there was a flight of steps leading to the office of the Sub-Registrar. DW-1 went on to contradict himself pertaining to the identity of the other attesting witness Shri Mehar Chand, when on cross-examination he stated that he was not aware as to in whose employment Shri Mehar Chand was. On being cross-examined as to what procedure was followed for registration in the office of the Sub-Registrar, he stated that he was not aware as to what happened. He did not remember whether Amolak Ram went to the table of the Sub-Registrar or whether the Sub-Registrar came down to the car.

32. I will deal with further testimony of this witness during cross-examination a little later on issue of mutation of the suit property in the record of the DDA after death of late Shri Amolak Ram, as it would be relevant to deal with the testimony of some of the witnesses of the plaintiff on this issue.

33. Amolak Ram was discharged from Holy Family Hospital on 25.12.1983 and the will in question is dated 27.12.1983. It may also be kept in mind that Amolak Ram had lost his son, Raj Oberoi on 19.12.1983.

34. Testimony of PW-6 proves the medical record of Holy Family Hospital. Entire medical record maintained by Holy Family Hospital was proved by this witness as Ex.PW.6/1 (Colly.) running into 304 pages. Further medical record was proved as

Ex.PW.6/2 (Colly.) and Ex.PW6/3 (Colly.).

35. Ex.PW.6/1 (Colly.) establishes that late Shri Amolak Ram was admitted to Holy Family Hospital on 16.11.1983 and was discharged on 25.12.1983. He could not even attend the funeral of his deceased son who died on 19.12.1983. This is indicative of the physical health of Shri Amolak Ram. PW.6/1 (Colly.), PW.6/2 (Colly.) and PW.6/3(Colly.) would show that late Shri Amolak Ram was repeatedly hospitalized during 1983 and 1984. Ex.PW.6/1 (Colly.) would reveal that Shri Amolak Ram remained hospitalized for 39 days and underwent hip surgery. Medical record, during the period of hospitalization of 39 days, shows that on various dates, doctor/sister-in-charge recorded that the patient was talking incoherently. It stands repeatedly recorded that the patient was not oriented. On various dates, it was being recorded that the patient could not sleep properly and had to be given injection of Compose. On certain dates, sister-in-charge recorded that the patient was talking excessively but incoherently. Speech was slurred and was difficult to understand.

36. It is difficult for a reasonable person to believe that such a person who was discharged from hospital on 25.12.1983 after hip surgery and had remained in hospital for 39 days would be in a proper state of mind or in such a mental state that he could knowingly or consciously execute a will two days thereafter on 27.12.1983.

37. Dr.Raj Kumar, PW.7, son-in-law of Amolak Ram, in his deposition stated that he was working as Chief Surgeon in Holy Family Hospital. He stated that after the year 1976, there was deterioration in the health of Shri Amolak Ram and his physical activities got curtailed due to progression of cardiac ailment. Shri Amolak Ram was hospitalized for cardiac ailment at National Heart Institute besides being admitted in Holy Family Hospital. Towards the end of 1983, Shri Amolak Ram suffered hip injury due to fall in the house and had to undergo surgery for putting together the fractured hip bone. The injury compounded the heart ailment and as a result Shri Amolak Ram could hardly move himself. After discharge from the hospital, Shri Amolak Ram could not have walked on his own. He was looked after by his daughters. PW.7 further deposed that being a doctor he would visit Shri Amolak Ram after he was discharged from the hospital and for about 2 months from the date of discharge he was unable to walk and even thereafter he could walk with the help of a walker and that too for going from one room to another. PW.7 deposed that Shri Amolak Ram was using bed pan in his house. He categorically deposed that health of Shri Amolak Ram deteriorated because his younger son, Shri Raj Kumar was suffering from cancer. PW.7 categorically deposed that Shri Amolak Ram could not have moved out of the bed.

38. PW.7 was subjected to cross-examination. Save and except suggestions that he was deposing incorrectly, nothing has been brought on record to discredit PW.7.

39. PW.8 Manorama Titus and PW.9 Anjana Chopra daughters of deceased have corroborated the testimony of PW.7.

40. PW.10, Leela Oberoi (plaintiff No.2) has also deposed on similar line pertaining to sickness of Shri Amolak Ram and his immobility on 27.12.1983.

41. At this stage, it would be useful to refer back to the testimony of DW.1 Anil Sehgal, star witness of defendants 1 to 5.

42. In cross-examination he admitted having helped defendants 1 to 5 in effecting mutation of the suit property in their names in the record of DDA (Mutation is in name of Santosh Oberoi HUF).

43. Two witnesses from DDA Lease Administration Department were examined. Shri Prahlad Singh appeared as PW.4 and Shri R.S.Punia appeared as DW.3. DW.3 stated that mutation applications and supporting documents were Ex.DW.3/5 and the mutation letter was Ex.DW.1/1.

44. PW.4 deposed that Ex.PW.4/8 was a letter dated 21.9.1984 received under the signatures of Mr.Santosh Oberoi requesting for mutation of property No.E-231, East of Kailash in his name. On coming to know of the application, plaintiff No.2 protested and pointed out that she and her children were also the legal heirs of the deceased. Since Santosh Oberoi had relied upon the will in question, on 14.4.1987 vide PW.4/2, DDA informed Santosh Oberoi that since the will was in dispute, he should obtain a probate before DDA could act under the will. Surprisingly, in spite thereof, DDA mutated the property in the names of defendants 1 to 5, on the basis of an affidavit Ex.DW.4/9 subsequently submitted to DDA by Santosh Oberoi and Ex.DW.4/10 an Indemnity Bond furnished by Santosh Oberoi. Both documents do not disclose that Amolak Ram had another son who had died and plaintiffs were his legal heirs.

45. DW.1 Anil Sehgal, in cross-examination admitted: ""It is correct that late Shri S.K. Oberoi took my help/ guidance while submitting his papers to the DDA regarding the mutation of the property for which I may have charged an amount which I do not remember.""

46. It is obvious that DW.1 had been manipulating with Mr.Santosh Oberoi.

47. Learned counsel for the defendants stated that Ms.Indu Bala, daughter of Shri Amolak Ram had supported the case of defendants 1 to 5. Posing the question why should she depose to facts which would harm her cause? counsel urged that if the will failed, Ms.Indu Bala Nihal would get a share in the property.

48. Testimony of Ms.Indu Bala shows that she has supported the version of defendants 1 to 5, but in view of the material contradictions noted above and further contradictions in testimony of DW.2. There is every possibility of Ms.Indu Bala being bought over by defendants 1 to 5.

49. DW.2, Ms.Nirmal Oberoi wife of Mr.Santosh Kumar in her examination-in-chief stated that Meher Chand the second attesting witness of the will was a

driver employed by Shri Amolak Ram. On being cross-examine she initially denied the suggestion that Mr. Meher Chand was appointed as a driver with Chef Air. However, on being grilled on the issue she admitted that Mr.Meher Chand was working as a driver in the same company in which her husband was employed. She further admitted that Chef Air was a part of Hotel Corporation of India, the company where her husband was employed. She further admitted that Mr.Meher Chand was a driver in the organization where her husband was working at the time when he witnessed the will.

50. It is obvious that Mr.Meher Chand was recorded as an attesting witness as he was under the control of defendant No.1.

51. Totality of the evidence on record and in particular the medical record of Shri Amolak Ram when viewed in light of the fact that Shri Amolak Ram was discharged after hip surgery on 25.12.1983, discredits the version of the defendants 1 to 5 that two days letter he executed the will dated 27.12.1983. It has also to be kept in mind that on 19.12.1983 Shri Amolak Ram had lost his son Mr.Raj Oberoi. Preponderance of probabilities lean against the case set up by defendants 1 to 5. DW.1 has not only made material contradictions but in my opinion is otherwise a discredited person in as much as he had contrived with defendants 1 to 5 in bye-passing the requirements of DDA and having the property mutated in the name of defendants 1 to 5 notwithstanding the act that initially attempt was made to seek mutation on the basis of the will and on DDA insisting that the will be probated, he managed mutation de-hors the will. I may also note that PW.9, handwriting expert has given an opinion which goes against the defendants.

52. Issue No.2 is accordingly held in favor of the plaintiffs and against defendants 1 to 5. It is held that the will dated 27.12.1983 is not proved.

ISSUE No.3

53. Admittedly, DDA is the Lesser of plot No.E-231, East of Kailash, New Delhi. Admittedly, DDA has effected mutation in favor of Santosh Oberoi HUF, on demise of Amolak Ram. Admittedly, DDA required Will dated 27.12.1983 to be got probated. Admittedly, DDA effected mutation ignoring the Will. Admittedly, DDA was in receipt of objections from plaintiff No.2. Since acts of DDA are under scrutiny, DDA is a necessary party. It may be noted that prayer "C" in the plaint is for a decree declaring the mutation as illegal. Issue No.3 is held in favor of the plaintiffs and against the defendants.

ISSUE NO.4

54. Issue has been framed due to objection taken in the written statement of defendants 1 to 5 that since plaintiffs are not in possession of the suit property, they have to pay court fee on the value of the property falling to their share as per claim.

55. plaintiffs have stated in the plaint that property is in their constructive

possession and hence court fee payable is Rs.19.50 as per Article 17(vi) in Schedule II of the Court Fee Act.

56. Defendants 1 to 5 have pleaded ouster in the written statement. It is stated that plaintiffs are not in possession of any part of the property and would, Therefore, be required to pay ad-valorem court fee on the value of their share.

57. A part of the property was admittedly in possession of a tenant when Shri Amolak Ram died. In her examination-in-chief, plaintiff No.2 (PW.10) stated :

""After a few days of my father-in-law's death, late S.K.Oberoi had called me up at Madras and had promised to share the rental income from the house in question. He had stated that there was only one tenant paying Rs.600/- per month for one room and accordingly he had been sending Rs.300/- for a few months.""

58. While cross-examining PW-10, suggestion given to her by defendants 1 to 5 was that defendant No.1 of his own decided to send Rs.300/- per month out of the rental of Rs.600/- per month.

59. It is obvious that defendants 1 to 5 did not join issue with PW-10 on the factum of defendant no.1 sharing half rent with her. Suggestion was that the said share of rent was a gesture of goodwill. It is thus obvious that the plaintiffs were in constructive possession of the suit property/part thereof, through the tenant. Defendant No.1 was sharing the rent.

60. In the decision reported as Prakash Wati Vs. Dayawanti and Others, , taking note of the decision of the Supreme Court reported as Neelavathi and Others Vs. N. Natarajan and Others, , it was held that general principle of law is that in the case of co-owners, possession of one is in law possession of all unless ouster or exclusion is proved.

61. Issue No.4 is accordingly decided in favor of the plaintiffs and against the defendants. It is held that the suit has been properly valued for the purpose of court fee and jurisdiction.

ISSUE NO.5 :

62. In view of the testimony of DW-2 noted in para 22 above which shows that except for a statement that her husband had told her that he had been contributing money for construction of the house, defendants 1 to 5 lead no evidence to prove that the first defendant contributed any amount for construction of the building on the plot. He who asserts a fact must prove the same. Onus was on defendants 1 to 5 to prove the assertion made that defendant No.1 had made contributions for construction of the house. Except for a bald statement of defendant no.2 and that too based on the alleged information provided by her husband, there is no other evidence to establish contribution by defendant No.1 towards construction of the house. The bald statement of defendant no.2 without any proof is of hardly any significance. No

weight attaches thereto.

63. Issue No.5 is accordingly decided in favor of plaintiffs and against defendants 1 to 5. It is held that defendant No.2 has not contributed any amount towards construction of the building on the plot.

ISSUE NO.6 :

64. In view of the observations/findings recorded in para 44 and 51 above, conclusion is inevitable. Since mutation was effected in the record of DDA by and under Ex.DW.4/9 and DW.4/10 wherein names of the plaintiffs were not disclosed, mutation effected by DDA in respect of the leasehold rights qua plot No.E-231, East of Kailash, New Delhi is illegal. Mutation is accordingly quashed. DDA is directed to cancel the mutation.

ISSUE NO.7 :

65. In view of the decision on issues 1 to 6 above and in particular issues 1 and 2, a preliminary decree is passed declaring that share of plaintiffs in property No.E-231, East of Kailash, New Delhi is 9/24. Share of defendants 1 to 5 is 9/24. Share of defendants 6 to 11 is 1/24 each.

66. Since there is one immovable property which requires to be partitioned as also the fact that defendants 1 to 5 have been realizing rent for the property, Local Commissioner is required to be appointed to hear the parties and file a report whether the property is capable of being partitioned by metes and bounds. Defendants 1 to 5 would render accounts to the Local Commissioner. Mr.Sachin Chopra, Advocate is appointed as the Local Commissioner. Defendants 1 to 5 are directed to render accounts to the Local Commissioner in respect of the rent received and expenditure incurred on property No.E-231, East of Kailash, New Delhi. Local Commissioner would, after hearing the parties, file a report whether the property can be partitioned by metes and bounds in view of the shares determined as aforesaid. Fee of the Local Commissioner is fixed at Rs.30,000/- to be paid by defendants 1 to 5 and to be adjusted from the rent of the property.

67. To await the report of the Local Commissioner, renotify on 2.8.2005.