

(2008) 10 DEL CK 0059
In the Delhi High Court
Case No : CS (OS) 800 of 1990

Smt. Mohinder Kaur Chhatwal and Another	APPELLANT
Vs	
Sardar Sarwan Singh Banda and Others	RESPONDENT

Date of Decision : 23-10-2008

Acts Referred:

Hindu Succession Act, 1956 — Section 14(2)

Citation : (2009) 2 ILR Delhi 631

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Ashok Chhabra, for the Appellant; K.K. Bhuchar, for Def. 1 and Parvinder Singh, for Def. 2, for the Respondent

Judgement

S. Ravindra Bhat, J.—The plaintiffs seek a decree for partition of immovable property B-42 Defence Colony, New Delhi and a decree for rendition of accounts against defendants for the rents realized by the first defendant from various tenants from 1982. To effectuate these reliefs, appointment of Commissioners, are also sought for.

2. The plaint averments are that the first plaintiff's husband, (also the second plaintiff's father, Sardar Surjeet Singh Chatwal), was the son of Major (Dr.) Balwant Singh Banda. The first and the second defendants were his other sons. Major (Dr.) Balwant Singh Banda's was married to Sardarni Onkar Kaur; the suit property was his self-acquired asset, upon which he constructed a residential building. He died on 14.02.1979. Before his death, he executed a Will dated 11.10.1974, which was registered on 01.11.1974, by the Sub-Registrar, Delhi. According to the bequest, the property was to devolve upon his three sons namely the Sardar Surjit Singh Chatwal, and the defendants. The testator also granted a share to his widow Sardarni Onkar Kaur with the specific condition that after her death her share would devolve in equal shares upon the other heirs, the sons. The Will also explicitly precluded any interest in the property devolving upon the testator's daughters. The Will desired division of suit property in the

following manner:

I. One share built on the Ground Floor excluding the garrage.

II. Second share will consist of whole of the First Floor.

III. Third share comprises of the Garrage with 3 rooms built above and the open courtyard in front of the garage on the Ground Floor, Terrace on the First Floor with the right to carry out construction on the Terrace. Two latrine-cum-bathroom attached with two rooms built above the garrage.

3. The plaintiffs claim was that though the testator desired division of the property, he did not specify which share would devolve on whom. The plaintiffs claim that the first floor of the premises were let out during the lifetime of the testator and even after his death rents were realized and paid to his widow. She expired on 19.6.1982, and after her death the property devolved jointly on the plaintiffs and the defendants, in proportion of 1/3 share each. It is claimed that the first plaintiff's husband (second plaintiff's father Surjeet Singh Chhatwal) died on 11.12.1981 and they survived him as his legal heirs and were entitled to his share in the suit property. It is alleged that they have equal shares with the defendants. The plaintiffs seek partition and separate possession of their share in the suit property. It is alleged that the first defendant has not displayed willingness to do so. The plaintiffs also claim that except for the ground floor the remaining portion of the suit property, was lying vacant and from 1982 to October 1988 the defendants realized rents of approximately Rs. 5000/- per month and have failed to give any share of it to the plaintiffs. The cause of action for instituting the suit, according to the plaintiffs arose in 1981 when Surjeet Singh Chhatwal, husband of first plaintiff and his father died and thereafter in 1982 when his mother i.e. the widow of testator, Major Banda died. It is also claimed that cause of action later arose in May 1986 and in October 1988 when the first defendant refused to adhere to the terms of a proposed deed of settlement.

4. The second defendant has supported the plaintiffs stand and averred that the Will of Major (Dr.) Balwant Singh Banda is genuine and binding on all the parties; he also avers to the entitlement of 1/3 share of the two defendants and one such 1/3 share to the plaintiffs. The second defendant also affirms that settlement efforts were made by one Lt. General Joginder Singh, who intervened to resolve the disputes amicably and his (the second defendant's) willingness to adhere to such terms.

5. The factual assertions regarding the relationship of the parties, death of Major (Dr.) Balwant Singh Banda, subsequently of his son i.e. Surjeet Singh Chhatwal and his wife Sardarni Onkar Kaur have not been denied by the first defendant in the written statement. However, he alleged in the written statement that the suit property was a joint Hindu family asset, the HUF comprising of Major (Dr.) Balwant Singh Banda and three co-parceners; i.e. the first defendant, the second defendant and the late Surjeet Singh Chhatwal. It is therefore averred that the

testator could not have bequeathed the property or the extent of shares indicated in the registered Will since he did not have exclusive ownership rights.

6. The first defendant further avers that upon the death of Major Banda, no rights devolved on Surjeet Singh Chatwal, the first plaintiff's husband. He alleges having become the Karta of the HUF. He also denies that the plaintiffs were only the heirs and legal representatives of Surjeet Singh Chhatwal when he died in 1981. It is averred that at that stage, his mother i.e. Sardarni Onkar Kaur was alive and was therefore entitled to a share in his assets.

7. The first defendant submits that Surjeet Singh Chhatwal could have claimed only 1/4 share in the suit property and that upon his death, that share had to be divided amongst the plaintiff's and Sardarni Onkar Kaur; since she died, her share has to be equally divided amongst her heirs, which include the defendants.

8. The first defendant alleges that Surjeet Singh Chhatwal left behind considerable properties including Plot No. 562, Guruharkishan Nagar, Delhi as well as one plot in Baroda and another plot of land at Mehsana. Upon his demise his properties devolved upon his heirs including Sardarni Onkar Kaur. Upon her demise, her share in those properties (of Surjeet Singh Chhatwal) devolve upon her heirs. He further alleges that some other properties including 1517, Sector 7, Faridabad, 8-G Dadabari Kota were purchased in the name of defendant No. 2 for the benefit of Joint Hindu Family and that all such properties form part of the common pool of HUF property which too have to be partitioned.

9. During the pendency of the proceedings, sometime in the year 2002, the first plaintiff died. She was survived by the second plaintiff. An application being IA 621/2003 was filed under Order 32 Rules 1 and 4 seeking appointment of Guardian ad-litem to prosecute the proceedings on behalf of second plaintiff. This Court, by its order dated 09.09.2003 considered the application. The plaintiff No. 2 was present in Court on that day; he was questioned to ascertain his ability to prosecute the proceedings. The Court concluded that he was not in a position to protect his interest and prosecute the suit of his own. After hearing the counsel for the parties, on 29.05.2003, Shri Arvind Nigam, a learned Counsel, practicing in this Court, was with the consent of all the parties, appointed as Guardian Ad litem for plaintiff No. 2 for prosecuting the suit.

10. The plaintiffs have relied upon the Will of Major (Dr.) Balwant Singh Banda, Ex. PW 1/D-1, to prove their bequest in favour of Surjeet Singh Chhatwal and their consequent entitlement to his share. Ex PW-1/D-2 is a certified copy of the application for eviction of a tenant, residing in B-562 Guruharkishan Nagar; which was filed by the plaintiffs. Ex. PW1/D-3 is a certified copy of the counter affidavit filed in such eviction proceedings. PW 3/1, 3/2, 3/3, 3/4, 3/5, 3/6, 3/7, 3/8, 3/9 and 3/10 are copies of assessment orders by the Municipal Corporation of Delhi (MCD), in respect of the suit property. The rateable value in the last of these documents mentioned was Rs. 11,980/ (Ex. PW 3/10).

11. The plaintiffs rely upon a letter written by the first defendant to Land and

Development Officer, for mutation of the share of deceased mother (Sardarni Onkar Kaur) on 25.06.1996. In this letter the first defendant stated that in terms of the Will of Major Banda, Onkar Kaur's share had to devolve in equal shares to his sons or son's heirs. He also intimated about the death of Surjeet Singh Chhatwal on 11.12.1981, death of Smt. Kulwant Kaur Tandon, daughter of Major (Dr.) Balwant Singh Banda on 15.10.1993 and mentioned about his heirs. According to this letter the affidavits of Mrs. Mohinder Kaur Bedi, daughter of Sardarni Onkar Kaur and late Dr. Major Balwant Singh Banda as well as the affidavit of Ms. Amarjaut kaur, Jagdeep Kaur Arora and Shri Puneet Singh Tandon, all children of the said deceased Smt. Kulwant kaur Tandon (daughter of Dr. Balwant Singh Banda) adverting to mutation of the property in favour of second plaintiff and the defendants, is relied upon.

12. The plaintiffs also relied upon letters (Ex. PW 2/B, dated 26.05.1989, PW 2/C dated 21.09.1989, PW 2/D 29.11.1989, PW 2/A dated 12.04.1989) which were addressed to Land and Development officer in connection with the mutation. These reminders state that the daughters of Dr. Major Balwant Singh Banda had no share in the property in view of the Will in terms of Section 14(2) of the Hindu Succession Act and that only the second plaintiff and defendants were entitled to such property.

13. The other documents relied upon are affidavits of Ms. Mohinder Kaur Bedi (PW 2/D-2 dated 03.04.1986), Mrs. Govinder Kaur (PW 2/D-3 dated 27.02.1996), Ms. Amarjot Kaur, daughter of Late Smt. Kulwant Kaur Tandon (PW 2/D4 dated 02.05.1996), Ms. Jagdeep Kaur, daughter of Late Smt. Kulwant Kaur Tandon (Ex PW 2/D-5 dated 07.05.1996) and Shri Puneet Singh Tandon, son of Ms. Kulwant Kaur Tandon (Ex PW 2/D-6 dated 13.05.1996).

14. In all these - PW 2/D-2 to PW 2/D-6, the deponents conceded to the genuineness of Major (Dr.) Balwant Singh Banda's Will and their no objection to the residential house being mutated in the names of second plaintiff and the defendants. The deponents also stated that the said property "stood substituted in the books of L and DO" in the names of Dr. Balwant Singh Banda's three sons in terms of the Will.

15. The plaintiffs rely on the testimony of PW-1, Shri Harkanwar Pal Singh, brother of Mohinder Kaur Chatwal, deceased first plaintiff. His affidavit dated 21.07.2004 was marked as Ex.PW1/A. He generally supported the averments made in the suit. He identifies the signature of Late Bakshi Man Singh, Senior Counsel who had attested the Will as also that of Shri Dewan Chand. Both the said attesting witnesses had died before the evidence was recorded. PW-1 stated that the plaintiff being joint owner of the property is entitled to 1/3 share as well as 1/3 of the rent realized by the first defendant and that the market value of the suit property was approximately Rs. 40 lakhs. In the cross-examination he mentioned that the property at 562, Guruharkishan Nagar, was in the name of his sister, it is about 400 square yards; he also volunteered that the construction of that property was after the death of Shri Surjeet Singh Chatwal and was not

aware whether it was purchased by him. He also mentioned about the dimensions of the said property. PW-1 deposed that one Dr. Indu Sethi was residing at Guruharkishan Nagar but vacated it under the orders of Court on the ground of non-payment of rent. He stated that the deceased first plaintiff was a working lady, employed with ONGC and also that the second plaintiff is now-a-days residing in a Gurudwara in Asrana near Panipat. He denied a suggestion that his concern M/s Wembley Plastic of which he is a partner owed Rs. 13 lakhs to Shri Surjeet Singh Chhatwal at the time of its closure. Initially he expressed ignorance as to whether house No. 562 Guruharkishan Nagar was built after the death of Shri Surjeet Singh Chhatwal but later volunteered that his father gave money for construction to his sister and that his father was a businessman manufacturing adhesives and other products. He denied the suggestion that at the time of death, Mr. Surjeet Singh Chhatwal has left behind Rs. 15 lakhs in different bank accounts. He deposed in the cross-examination about visiting the suit property, at the time of death of Shri Surjeet Singh Chhatwal.

16. PW-2 Inder Pal Singh, LDC from the office of L and DO, affirmed about receipt of letter dated 12.04.1989 being ex PW 2/A as well as another letter dated 26.05.1989 Ex. PW 2/B and letter dated 21.09.1989 PW 2/C and 29.11.1989 PW 2/D. He testified as to the correctness of receipt of letters Ex PW2/D-1 and affidavits Ex PW 2/D-2 to Ex PW 2/D-6. PW - 3, Head Clerk from MCD, Property Tax Department, deposed about the correctness of the certified copies marked Ex PW 3/1 to PW 3/10.

17. The two daughters of Major Banda, Ms. Mohinder Kaur Bedi and Mrs. Govinder Kaur and the heirs of his deceased daughter, (Late Smt. Kulwant Kaur Tandon), mentioned previously in Para 11 of this judgment had, after the evidence in this case had been recorded, and the matter listed for hearing in the final hearing list, applied for being impleaded. The court, after considering their pleas, and the highly belated move to participate in the proceeding, permitted them to be impleaded, but on certain conditions, such as payment of costs. The said applicant/ newly added defendants also got statements recorded by the court, that they would not file written statement, and were adopting the pleas of the first defendant, and that they did not wish to adduce any evidence, but would only press for their shares, in the light of the submissions of the first defendant. They also desired that no fresh issue had to be led.

18. Initially the Court had framed issues by order dated 25.01.1994. They were, however, re-cast with consent of parties at the stage of hearing. The said issues are as follows:

1. To what shareholding are the plaintiffs entitled to, in the suit for partition?

OPP.

2. Is the property being M-562, Guru Harkishan Nagar, Paschim Vihar, liable to be partitioned, as asserted by the defendants? OPD.

3. In case the answer to the above issues is in the affirmative, the extent of shares?

OPD.

4. Is the defendant No. 1 liable to render accounts, if so, to what extent, for what period and for what amount? OPP.

5. Relief.

Issue No. 1

19. Mr. Ashok Chhabra, learned Counsel, contended that there can now be no dispute about the nature of the property. Having first maintained that the suit property was ancestral and HUF, and alleged repeatedly that it could not be subject matter of the will of Major Banda, the first defendant, in his evidence has taken a diametrically opposite position, and admitted unreservedly to the will. In these circumstances, the court, it is urged should decree the suit as claimed, and declare that the plaintiffs have a one third share in the property. Counsel also relied on the affidavit evidence, and the deposition of the first defendant, to say that he agreed to the dispositions in the will and therefore, the plaintiffs are entitled to 1/3rd share. Learned Counsel contended that defendant No. 1 has committed criminal contempt of the Court by willfully and deliberately raising frivolous pleas in the written statement and thereby delaying the trial of the case while on the other hand, the communication sent by him to the Department of L and DO, a contrary stand has been set up.

20. Learned Counsel submitted, by relying on Ex. PW-2/C (letter dated 21.09.1989) PW-2/D (letter dated 29.11.1989 from defendant No. 1 to L and DO). PW 2/A letter dated 12.04.1989 from defendant No. 1 to L and DO; Letter dated 25.06.1996 (PW 2/D-1 from defendant No. 1 to L and DO) and affidavits Ex. PW 2/D-2, PW-2/D3, PW-2/D4, PW-2/D5 and PW 2/D6 to submit that these documents contain unambiguous admissions that the surviving plaintiff is owner of 1/3rd share in the suit property. These documents estop the defendants, including the newly added defendants, from asserting that the second plaintiff is entitled to less than 1/3rd share in the said suit property.

21. Learned Counsel for the defendants (except second defendant) on the other hand, submitted that while there is no dispute now that the dispositions in the will were valid and binding, the plaintiffs' share is not 1/3rd of the suit property, but less. It was urged that when Major Banda died, the suit property vested in three shares, upon Shri Surjit Singh Chhatwal, and his brothers, i.e. the defendants. On his death, on 11.12.1981, his 1/3rd share in the said property developed as follows:

1) Mahinder Kaur Chhatwal (widow) $\frac{1}{3}$ rd of $\frac{1}{3}$ = $\frac{1}{9}$

2) Son (Manpreet Singh) $\frac{1}{3}$ rd of $\frac{1}{3}$ rd = $\frac{1}{9}$

3) Mother (Smt. Onkar Kaur) $\frac{1}{3}$ rd of $\frac{1}{3}$ rd = $\frac{1}{9}$

Thus, the plaintiffs' share was not $\frac{1}{3}$ rd, but two $\frac{1}{9}$ th share of the entire property. It was also submitted that on the demise of mother (Smt. Onkar Kaur) intestate, on 19.06.1982 leaving behind two living sons, three living daughters and widow and son of her pre-deceased son Shri Surjit Singh Chhatwal, her share has to be divided amongst six shareholders. The share-holding, according to the defendant, was as follows:

1) Sarwan Singh Banda (first defendant) $\frac{1}{6}$ of $\frac{1}{9}$ = $\frac{1}{54}$

2) Amrit Mohan Singh Banda (second defendant)

$\frac{1}{6}$ of $\frac{1}{9}$ = $\frac{1}{54}$

3) Mohinder Kaur Chhatwal and

her son (the plaintiffs) together get $\frac{1}{6}$ of $\frac{1}{9}$ = $\frac{1}{54}$

D-1 gets $\frac{1}{6}$ th of $\frac{1}{9}$ th = $\frac{1}{54}$

D-2 gets $\frac{1}{6}$ th of $\frac{1}{9}$ th = $\frac{1}{54}$

D-3 gets $\frac{1}{6}$ th of $\frac{1}{9}$ th = $\frac{1}{54}$

Therefore, the first and second defendants got $\frac{1}{3}$ plus $\frac{1}{54}$ = $\frac{19}{54}$ share each; the three newly added defendants were entitled to $\frac{1}{54}$ th share each, and the plaintiffs, together were entitled to $\frac{13}{54}$ th share in the property.

22. The above discussion would show that the first defendant had disputed, in more than one place, the testamentary capacity of Major Banda, to bequeath the entire suit property, in terms of the dispositions made in the will, he gave up that position, at the stage of recording evidence. In the written statement, he contended that the suit property was joint family property, and that he had contributed for its construction; therefore, the testator could not have dealt with it beyond the extent of $\frac{1}{4}$ th share. However, later, in the trial, and at the stage of final hearing, this plea was abandoned; the first defendant, and the others concede to the genuineness of the will as well as the binding nature of its disposition. Their plea, however is that since Surjit Singh Chhatwal predeceased his mother, Onkar Kaur, widow of the testator, she, as his heir was entitled to $\frac{1}{3}$ share in his share in that property. After her death, that share, according to them, devolved equally on the defendants, and the plaintiffs, as the heirs of Onkar Kaur.

23. The plaintiffs however, counter the argument on behalf of the defendants, and rely on documents, being letters and affidavits, of the defendants, to say that at all material times, when the question of mutation of names and transfer of property in the official records was in issue, the defendants spoke in one voice, and stated that the plaintiffs had one third share. The defendants also, according to the plaintiffs, relied on the stipulation in the will that one third of the property was to vest with the sons, and that daughters were not entitled to any share. This is in turn refuted by the defendants, who urge that letters written

for recording changes in revenue or for mutation purposes cannot be regarded as foreclosing a claim for title, as it is well known that revenue documents do not evidence, or confer title to immovable property.

24. It would be relevant here to examine the documents in question. Relevant portions of the same are extracted as follows:

(1) Ex. Pw-2/C, the letter dated 21.09.1989 written by Defendant No. 1 to the L and DO, inter alia, is as follows:

Thirdly, the reading of the Will of Sh. B.S. Banda as a whole will show that there was no intention on his part to convey to her widow absolute rights over the property. On page 2 of the Will, Shri B.S. Banda had stated in clear terms that "after the demise of Smt. Onkar Kaur, my wife, her share in the property will devolve in equal shares to my three sons. None of my daughters will have any claim in any of my properties.

(2) PW-2/D dated 29.11.1989 from first defendant inter alia, records that:

It is necessary that the mutation of the property should be effected in the names of three sons of the deceased in accordance with the Will left by Shri B.S. Banda.

(3) PW 2/A, a letter dated 12.04.1989 of defendant No. 1 to L and DO, reads as follows:

As per Will referred to above, after the death of Smt. Onkar Kaur, her share in the property has to be transferred in favour of the remaining three sons of the deceased mentioned above.

The Will having already acted upon by your office it is requested that the share of Smt. Onkar Kaur in the property bearing No. VB-42 Defence Colony, New Delhi, may kindly be mutated in favour of the remaining three persons namely (1) Shri Sarwan Singh Banda, (2) Shri Surjeet Singh Chhatwal and (3) Amrit Mohan Singh Banda.

(4). The Letter dated 25.06.1996 PW 2/D-1 is from defendant No. 1 to L and DO. The relevant portion of this document is as follows:

That Smt. Onkar Kaur, widow of Late Major (Dr.) Balwant Singh Banda, died on 19.06.1982. As per terms of the Will referred to above, after the demise of Mrs. Onkar Kaur, her share in the above said property has to devolve in equal share to her sons only or the sons heirs. Death certificate of Mrs. Onkar Kaur has already been placed on record.

That one of the son of Late Major (Dr.) Balwant Singh Banda namely Shri Surjeet Singh Chhatwal died on 11.12.1981, during the life time of his mother Smt. Onkar Kaur, leaving behind a son Shri Manpreet Singh and Mrs. Mohinder Kaur Chhatwal, mother of Shri Manpreet Singh. His death certificate is also on record.

(5) Affidavits Ex. PW 2/D-2, PW-2/D3, PW-2/D4, PW-2/D5 and PW 2/D6, are by The two daughters of Major Banda, Ms. Mohinder Kaur Bedi and Mrs. Govinder

Kaur and the heirs of his deceased daughter, (Late Smt. Kulwant Kaur Tandon). The relevant paragraph 8, in these affidavits reads as follows:

That the deponent has no objection if the residential house No. B-42, Defence Colony, new Delhi is mutated in the names of my brothers Sarwan Singh Banda, Amrit Mohan Singh Banda along with my nephew Manpreet Singh, son of my late brother S. Surjit Singh Chhatwal.

25. The unequivocal intent of these letters is that the suit property belonged to the second plaintiff, and the first two defendants, who were entitled to it, in accordance with the bequest of Major Banda. The two reasons urged, by the first defendant, were, firstly the intention of the testator that no daughter was to get a share, and secondly, that the wife was given only a life interest. These letters also urged that the share of Onkar Kaur only being a life interest, the intention of the testator was clearly that she should not have any interest in the property. The three persons entitled to share the property, in terms of the letters, were (1) Shri Sarwan Singh Banda, (2) Shri Surjeet Singh Chhatwal and (3) Amrit Mohan Singh Banda. Interestingly, the first three letters were written in 1989; however, the last letter was written in 1996, after this suit was filed. Likewise, all the affidavits of the newly added defendants, unequivocally and without reservation, record their no objection to the mutation of the suit property in favour of the said three persons.

26. Estoppel by representation of fact is a term coined by Spencer Bower. This species of estoppel is also referred to as "common law estoppel by representation" in Halsbury's Laws of England, Vol. 16(2), 2003 Reissue. In The Law relating to Estoppel by Representation, 4th edition, 2004, Para 1.2.2, Spencer Bower defines estoppel by representation of fact as follows:

where one person ("the representor ") has made a representation of fact to another person ("the representee") in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in proper manner, objects thereto.

Wilken and Villiers, in The Law of Waiver, Variation and Estoppel, 2nd ed, Oxford: 2003, at para 9.02 says that:

An estoppel by representation [of fact] will arise between A and B if the following elements are made out. First, A makes a false representation of fact to B or to a group of which B was a member. [It is not necessary to demonstrate A knew that the representation was untrue.] Second, in making the representation, A intended or [in the alternatively,] knew that it was likely to be acted upon. Third,

B, believing the representation, acts to its detriment in reliance on the representation. [It must have been reasonable to rely on the representation.] Fourth, A subsequently seeks to deny the truth of the representation. Fifth, no defence to the estoppel can be raised by A.

27. Representation can be through statement or conduct. Although the representation must be clear and unambiguous, it can be inferred from silence where there is a duty to speak or from negligence where a duty of care arises. In *Inwards v. Baker* [1965] 1 All ER 446 An indulgent father had encouraged his son to build a bungalow on his, the father's, land. The son had done so in the expectation, encouraged by the father, that he, the son, would be permitted to remain in occupation. The court formulated the principle of "equitable estoppel" on the footing that where a person has expended money on the land of another with the expectation, induced or encouraged by the owner of the land, that he would be allowed to remain in occupation, an equity is created such that the court would protect his occupation of the land; and that the court has power to determine in what way the equity so arising would be satisfied. The court therefore refused the plaintiff an order for possession of the bungalow which his son had built on the land, and held that the son was entitled to stay there as long as he wanted. It was held even if the property in which the right is claimed has not been precisely identified, such absence would not be fatal to a claim for estoppel.

26. Waiver, on the other hand, connotes a wider concept, where the person, in full knowledge of his legal rights and entitlements, "waives" its insistence or enforcement, thus conferring a legal right upon another. In *Krishna Bahadur Vs. Purna Theatre and Others*, the Supreme Court held that:

9. The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.

In *Supdt. of Taxes, Dhubri and Others Vs. Onkarmal Nathmal Trust and Others*, proceedings were not stayed pursuant to an undertaking or representation made by the claimant. The order of interim injunction was passed whereby the claimants enjoyed certain benefits and in that fact situation the plea of waiver was raised. The Constitution Bench observed:

23. The third contention of the Solicitor General is that the respondents waived

service of a notice within two years of the expiry of the return period by reason of the order of injunction obtained by them. Waiver is either a form of estoppel or an election. The doctrine of estoppel by conduct means that where one by words or conduct wilfully causes another to believe in the existence of certain state of things and induces him to act on that belief, or to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at that time. The fundamental requirement as to estoppel by conduct is that the estoppel must concern an existing state of facts. There is no common law estoppel founded on a statement of future intention. The doctrine of promissory estoppel is applied to cases where a promisor has been estopped from acting inconsistently with a promise not to enforce an existing legal obligation. This doctrine differs from estoppel properly so called in that the presentation relied upon need not be one of present fact. The second requirement of an estoppel by conduct is that it should be unambiguous. Finally, an estoppel cannot be relied on if the result of giving effect to it would be something that is prohibited by law. Estoppel is only a rule of evidence. One cannot found an action upon estoppel. Estoppel is important as a step towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said.

28. Both estoppel and waiver, though varying in content, have a similar preclusive effect in litigation between parties. The representee can successfully use them to prevent the representor from insisting upon the enforcement of his legal rights. In the case of estoppel, apart from unambiguous representation, the element of alteration of the representee's position is a necessary ingredient; however, applicability of waiver is unconstrained by such consideration. Similarly, the Supreme Court judgments in Polammarasetti Varana Venka Satyanarayana Vs. Suddha Apparao Naidu (dead) and others, Ram Swaroop and Another Vs. Mahindru and Others, and Tara Chand v. Sagar Bai Appeal (civil) No. 2411 of 2007, decided on 9-5-2007 and the judgment of this Court in Sh. Amarjeet Lal Suri Vs. Sh. Moti Sagar Suri and Others, are authorities for the proposition that wherever parties act upon understandings evidenced by written deeds, or documents, a species of estoppel binds them; they cannot contend to the contrary.

29. In this case, the clear nature of the understanding, and the express request of the first defendant, to the L and DO, that the shares in the suit property are confined to the plaintiffs, and the first two defendants, including the letter written after the filing of this suit, preclude him from asserting that they do not have any share less than 1/3rd in the suit property. Likewise, the statements in the affidavits, deposed to by the newly added defendants, bind them. All the defendants are therefore, precluded from asserting the plaintiffs have a different share, or that they have a share which includes a portion of the late Surjit Singh Chhatwal's 1/3 share in the suit property. As regards the contention that the letters cannot be said to confer title, since they pertain to revenue or mutation requests are concerned, the plea does not detract from applicability of estoppel

by representation, or proprietary estoppel, or waiver. One cannot be unmindful of the fact that the dispute pertains to a family, where parties often arrive at understandings, both oral and documentary, whereby, for the sake of family peace and harmony, strict legal entitlements are not insisted upon. These letters are to be seen in such perspective. Further, the letters were written, after disputes had arisen. Nothing prevented the defendants from expressing that such "no objection" or stand was without prejudice to their rights to claim their "rightful" share and entitlement, in accordance with law, or in the legal proceedings. Therefore, the defendants' plea that the documents were never intended to create rights in favour of the plaintiffs, is rejected as untenable. It is accordingly, held that the plaintiff and first two defendants are entitled to one third share each in the suit property, i.e. B-42, Defence Colony. The other defendants are disentitled to any share, in view of the clear recital in the will of Major Banda, that they are not entitled to any share in the said suit property. This issue is answered accordingly.

Issue Nos. 2 and 3

30. This issue is based on the assertion of the first defendant (later adopted by the newly added defendants) that the property at 562, Guru Harkrishan Nagar is joint family property, owned by Surjit Singh Chhatwal who died intestate. The argument is that on his demise the property devolved as follows:

Mohinder Kaur Chhatwal (widow, deceased first plaintiff) $\frac{1}{3}$

The present plaintiff (son) $\frac{1}{3}$

Onkar Kaur (Mother) $\frac{1}{3}$

It is further argued that on the mother's demise (Onkar Kaur) Sarwan Singh Banda (first defendant) and Amrit Mohan Singh (second defendant) each got $\frac{1}{6}$ of $\frac{1}{3} = \frac{1}{18}$. Similarly, the defendants argue that the three daughters of Onkar Kaur became entitled to one identical share of $\frac{1}{18}$ th, thus leaving the plaintiffs the right to $\frac{13}{18}$ th share.

31. The plaintiffs counter this contention with the plea that the property was not HUF property; according to them, apart from pleading that this belonged to Major Banda, the defendants have been unable to establish anything in support of the stand. Limitation, too, was urged as a plea. The plaintiffs contend that the documents on record show that the property was that of the first plaintiff, who also built on the plot, after the demise of Surjit Singh Chhatwal.

32. The first defendant is the only party who has set up a case about the entitlement to the Guru Harkrishan Nagar property, and its being a joint family, or HUF property. No evidence, or material, documentary or oral, has been brought to the notice of the court, in support of this claim. Even as regards the claim to share in this property on the ground of Onkar Kaur being entitled to $\frac{1}{3}$ share in, as a class I heir of her predeceased son, Surjit Singh Chhatwal, is concerned, the defendants cannot succeed for more reasons than one.

Undoubtedly, during her lifetime, Onkar Kaur could have asserted her right to a share in the predeceased son's property, since he died intestate. She, however, did not do so. He died in 1981; the mother died in 1982. The defendants, as heirs of the mother (from whom they claim such 1/18th shares) never sought it, or filed for partition. Now, in the absence of any material to show that the property was HUF property, the court has concluded that it belonged to late Surjit Singh Chhatwal. This is not a claim for partition and possession of shares in the exclusive or self acquired property of Surjit Singh Chhatwal, at the behest of co-sharers, as is sought to be suggested. If indeed the defendants wanted to assert such rights, they should have filed substantive proceedings. Surjit Singh Chhatwal undeniably expired in 1982, ie. 26 years ago. The limitation to assert such claim, too has long passed. Therefore, the court has no hesitation in concluding that the defendants have been unable to prove any entitlement to share in property at 562, Guru Harkrishan Nagar, New Delhi. Issue No. 2 is answered accordingly. As far as the question of shares are concerned, the plaintiffs and defendant Nos. 1 and 2 are entitled to one third share each in the suit property, i.e. at B-42 Defence Colony, New Delhi. The defendants are not entitled to any share in property at Guru Harkishan Nagar. The third issue is answered accordingly.

Issue No. 4

33. The plaintiffs had contended that the first defendant had let out the property, and was also using it. According to their estimation, the rents realized till 1988 were Rs. 5000/- per month, and the first defendant had derived an advantage to the extent of Rs. 2,00,000/-. This was denied by the said defendant, who stated that the rented portion of the property was vacant since 1989, and that he had spent considerable amounts towards its upkeep. According to him, part of the property had been rented out by his father during his lifetime; after his death, the rents were paid to Onkar Kaur, his mother.

34. Besides reiterating the allegations, the plaintiffs did not produce any evidence in support of their claim. In these circumstances, the court is of opinion that since the present suit was filed in 1990, at best the claim for accounts can be gone into for a period of three years prior to that, having regard to the state of pleadings, and the fact that the first defendant disputed the plaintiffs' right all this while, even disputing constructive possession. It is therefore, held that the first defendant is liable to account for the use of the property for the period 1-1-1987 onwards. This issue is answered accordingly.

Issue No. 5

35. In view of the above discussion, a preliminary decree is issued, whereby the plaintiff, and the first two defendants are entitled to one third share in the suit property, i.e. B-42, Defence Colony, New Delhi. A decree for accounts is also passed against the first defendant; he shall be liable to render accounts for the period 1-1-1987, in respect of the use of the property, and advantage as well as

monetary benefits derived from it. Mr. Sandeep Sharma, Advocate, Is appointed as Local Commissioner to report to the court about partitioning the property, and also to go into the accounts. His fee is fixed at Rs. 55,000/ -; it shall be borne by the plaintiffs and the first two defendants, in proportion of 1/3rd share each. The commissioner shall file his report within eight weeks.

36. Ordinarily, in a suit for partition, the court would have been justified in leaving the court to bear their costs. Yet, there are certain remarkable features which cannot be ignored in this case. The plaintiffs' claim for partition was hotly contested by the first defendant, who primarily based his defense on the ground that the property could not have been bequeathed, since it was HUF property. He so maintained this position right through, till he gave it up in evidence; no material was placed on record to support such claim. In the meanwhile, the second plaintiff was orphaned and rendered virtually destitute; this Court had to appoint a counsel to act as his guardian ad-litem, having regard to his mental disabilities. He is now living in a Gurdwara. This sorry state of affairs could easily have been avoided if the honesty displayed by the first defendant had been adopted at the earliest stage, by him. In these circumstances, the first defendant shall bear the costs, quantified at Rs. 1,50,000/ -, to be deposited in the court, within 4 weeks. The registry shall maintain an interest bearing fixed deposit for the amount and disburse the interest amounts accruing on quarterly basis to the guardian ad-litem, appointed, for the benefit of the second plaintiff. The registry shall also ensure that the amounts lying in court, apart from the above amounts are continued in such fixed deposit, and renewed from time to time. The interests accruing on them, too, shall be disbursed every quarter for the benefit of the second plaintiff.

37. The matter shall be listed on 12-1-2009 for consideration of the local commissioner's report. Let decree in the above terms be drawn.