

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(OS) 1168/2004 (with IA Nos. 1319/2005, I.A. 2106/2007 & I.A. 850/2007)

Reserved on : March 24, 2008

Pronounced on : March 31st, 2008

ROMESH CHOPRA Plaintiff

Through Mr. Arun Bhardwaj , Sr. Advocate
with Mr. Vishal Malhotra for plaintiff/Romesh Chopra.

versus

ANISH CHOPRA AND ANOTHER CF+ Defendants

Through Mr. Amit S. Chadha, Sr. Advocate with
Mr. Dharmesh Misra, Advocate for D- No.2.
Mr. Anish Chopra, Defendant No.1 present in person.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

- | | | |
|-----------|--|-------------|
| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. | To be referred to the Reporter or not? | Yes. |
| 3. | Whether the judgment should be reported in the Digest? | Yes. |

Mr. Justice S. Ravindra Bhat

IA Nos. 1319/2005, I.A. 2106/2007 (under O. XII R.6 CPC) &

I.A. 850/2007 (under O. VII R.11 CPC)

1. The plaintiff claims the following reliefs in the Suit:

(i) pass/issue a decree of declaration/mandatory/permanent injunction in favour of the plaintiff and against the defendants directing that by virtue of provisions as contained under the Hindu Succession Act and even otherwise in view of the facts and circumstances of the present case the plaintiff has a preferential right to acquire/purchase the said portion (as shown in blue colour in the site plan) of the family property bearing No. 25, Palam Marg, Vasant Vihar, New Delhi from the defendant No. 1 to the exclusion of defendant No.2 or any body else;

(ii) pass a decree of possession in respect of the suit premises in favour of the plaintiff and against the defendants directing that the possession of the suit premises be handed over to the plaintiff, his assigns, attorneys etc.;

(iii) pass a decree of permanent injunction in favour of the plaintiff and against the defendants restraining them for creating any third party interest in any manner whatsoever.”

2. According to the plaint averments, the plaintiff and the defendant No. 1 are brothers; the second defendant is a builder allegedly in illegal possession of suit property which belongs to the first defendant. The plaintiff and first defendant are the sons of Late Sh. I.S. Chopra and Smt. Santosh Chopra. The plaintiff alleges that by a Perpetual Sub-lease Deed dated 20.9.1968, the Government Servants Co-operative House Building Society Ltd. sub-leased a plot of land measuring 1980 sq. yards to late Sh. I. S. Chopra and his wife Smt. Santosh Chopra, the deceased parents of the plaintiff and the first defendant. The Sub-lease is a registered document.

3. It is further claimed that the Sub-lessees constructed a residential house on the plot and

subsequently obtained completion and occupancy certificates. Smt. Santosh Chopra died on 25.2.1984 and Sh. I.S. Chopra died on 27.5.1988. It is also alleged that the suit property is ancestral and after death of the said sub-lessees it, devolved on the plaintiff and the first defendant.

4. The plaint averments alleged inter alia as follows:

"2.9 That in 1992 the Plaintiff and Defendant No.1 felt it necessary and expedient to have separate and exclusive rights to the construction and structure raised on the said leasehold plot, and at the instance of friends and well-wishers, the Plaintiff and Defendant No.1 mutually agreed to divide amongst themselves, on a just and equitable basis, the construction and structure on the said leasehold plot. In order to avoid future disputes/differences/contentions the plaintiff and Defendant No.1 executed a Family Settlement dated 12.11.1992 outlining the terms and conditions of the mutual agreement arrived at for the use of the construction and structure on the said leasehold plot. The Deed of Family Settlement comprised of a total of 18 pages, out of which pages 1 to 15 contained recitals, terms and conditions and Pages 16 to 18 contained site and architectural plans signed by both the brothers, the Plaintiff and Defendant No.1. The said Deed of Family Settlement was registered with the Registrar as Document No. 8802, Additional Book No. 1, Volume No. 7625 from Pages 58 to 105 dated 12.11.1992.

2.10 That after the division of the construction and structure the Plaintiff assumed possession of the portion, which was earmarked for him under the settlement and which has been marked with red colour in the site plan filed along with the List of Documents."

5. The plaintiff claims to be distressed that the first defendant was dispossessed by the

second defendant of the portion of the suit property earmarked for his enjoyment through the family settlement deed dated 12.11.1992 and that the second defendant is enjoying the premises without paying rents to the first defendant. It is also alleged that since the first defendant did not initiate legal proceedings, the plaintiff is filing a suit to take back possession of that portion of the property to save it from going to the hands of the outsider. In these circumstances, the plaintiff invokes his alleged preferential rights under Section 22 of the Hindu Succession Act to acquire the first defendant's entire interest in the property in case he desires of transferring it to their party/outsider.

6. As far as the cause of action concerned, the plaintiff avers as follows:

"11. That the cause of action for instituting the present suit arose on 9th December, 2003 when the Defendant No.1 was not allowed to enter the said portion. When the Hon'ble Mr. Justice C.K. Mahajan visited the suit property for inspection the doors/main gate of the said portion was not opened by the Defendant No.2. The cause of action further arose on 21st May, 2004 when during chamber hearing before Hon'ble Mr. Justice C.K. Mahajan the Defendant No.1 informed that Defendant No. 2 is in possession of the said portion of the suit property."

7. The first defendant filed an application I.A. 850/2007 for rejection of plaint under Order VII Rule 11. Similarly, the second defendant has filed I.A. 1319/2005 under Order XII Rule 6 for decree of admissions by dismissal of the suit on the basis of material on record. The plaintiff has filed IA 2106/2007 for a decree on admissions.

8. It is averred that the suit is liable to be rejected because the plaintiff concealed material fact i.e. on 25th October, 2000 he had entered into collaboration agreement with a stranger and sold 52% of the portion in his exclusive occupation which is fallen to his share in the family settlement and that such collaboration agreement granted absolute right of alienation to third parties. In these circumstances, it is alleged that the plaintiff cannot assert any preferential right under Section 22. The applicant defendant No.1 also relies upon an order dated 17th April, 2002 in Suit No. 832/2002 whereby the unauthorized construction of the plaintiff was, directed to be removed.

10. It is alleged that in the facts and circumstances of the case, after absolute division/partition of the ancestral property in exclusive possession of the legal heirs, the estate stood divided and partitioned as between the plaintiff and defendant No.1; therefore, the plaintiff's claim for a decree to enforce his rights under Section 22 of the Hindu Succession Act does survive.

10. The Defendant No.2 has filed an application I.A. 1319/2005 seeking pronouncement of judgment on the basis of alleged admissions of plaintiff and dismissal of the Suit. In this application, it is averred that the plaintiff has no valid or legal right to seek injunction and enforcement of preferential rights. The averments in para 2.9 in the plaint are relied upon and the contents of the deed of family settlement dated 12th November, 1992 (placed on the record)

are also relied on for this purpose. The applicant states that the admitted deed of family settlement reflects that the intention that property bearing No. 25, Palam Marg, Vasant Vihar, New Delhi stood partitioned into equal shares between the plaintiff and the first defendant. It is also averred that the assets falling to their respective shares were taken possession of by the parties thus leading to complete partition and division of interest. The applicant also avers that the further contents of the plaint plainly disclose that the partition pursuant to the said deed was given effect to. It is, therefore, claimed that the plaintiff also entered into an agreement to sell/collaboration agreement dated 25th October, 2000 with one Mr. B.K. Uppal in respect of his portion of the plot, (according to the partition) which was approved by the competent authority under the then existing Section 269 UL of the Income Tax. It is consequently alleged that the suit property lost its character as a joint family property. Therefore, the plaintiff cannot seek the reliefs claimed in the Suit.

11. Mr. Anish Chopra, the first defendant argued his application and contended that the recital in the family settlement deed placed on the record by the plaintiff clearly demonstrates that the parties intended to partition and settle their shares and thus divide the joint family properties. It was also contended that the said applicant has not ever sold the front of the property falling to his share to anyone so as to attract the provisions of Section 22. In any event, with the parties having acted upon the family settlement deed, the property lost its joint status.

The Court cannot, therefore enforce the alleged rights of the plaintiff under Section 22.

12. The applicant also urged that the plaintiff's action in filing the Suit is not only ill advised but *mala fide*. The plaintiff wilfully did not disclose that he entered into a collaboration agreement with another party in respect of his portion in the year 2000 which led to unauthorized construction. That is the subject matter of another injunction suit filed by the applicant in which this Court has directed removal of the unauthorized construction by the Municipal Corporation of Delhi. It was submitted that the present suit was in retaliation against the plaintiff.

13. Mr. Amit Chadha, learned senior counsel appearing on behalf of the second defendant—applicant in I.A. 1319/2005 reiterated the submissions made in the application. According to him, taken together the averments in the plaint itself preclude maintainability of the present suit. He relied upon paras 2.8, 2.9 and 2.10 of the plaint as well as Para 10 and submitted that the plaintiff's own case is premised upon the family settlement deed which clearly earmarked distinct and separate shares of the suit property. The parties have taken charge of their respective shares absolutely and acted upon the family settlement deed. In these circumstances, Section 22 of the Hindu Succession Act is not attracted and is inapplicable.

14. Learned counsel for the said defendant No.2 relied upon the judgment reported as *Dhobei Rout v. Pahali Rout*, AIR 1998 Orissa 74 in support of the submissions that the preferential right under Section 22 does not subsist after partitioning of the property and allotment of shares to co-

heirs. Learned counsel also relied upon the judgment *Indofil Chemicals Co. v. Om Carrying Corporation*, AIR 2001 Del 106 to submit that the provisions of Order XXII Rule 6 are available for dismissal of the suit.

15. It was next contended that the law is well settled that a *bona fide* family settlement which resolves family disputes and rival claims through an equitable division of property, if acted upon, would bind the parties even if it is recorded in an unregistered document. He relied upon the judgment reported as *Amarjeet Lal Suri vs. Moti Sagar Suri & Ors.* 119 (2005) DLT 295 in support of this submission. It was contended that having regard to the state of land laws in Delhi and the nature of the interest in the suit property being leasehold, it was not practicable for the parties to sub-divide the plot as that was impermissible in terms of the Lease Deed. Therefore, the parties effectuated their family settlement and partitioned the structure and also assigned possession in respect of distinct portions. These were acted upon. The portions were not only described in the family settlement deed but also earmarked in the sketch map annexed to it. Counsel urged that this course has been recognized as a valid partition in a judgment of this court reported as *Inderjit Singh etc. vs. Tarlochan Singh etc.*, 1991 Rajdhani Law Reporter 239.

16. Mr. Arun Bhardwaj, learned senior counsel for the non-applicant plaintiff urged that both the application of the first defendant—for rejection of the plaint and the second defendant—for dismissal of the suit under Order XII Rule 6, should be rejected. He submitted that the Court

has to broadly satisfy itself that the plaint discloses a cause of action and the suit is not barred by any provision of law. Counsel relied upon the averments relating to existence of cause of action in the suit and submitted that such pleadings have to be taken in the face value.

17. As far as the contention that the suit is not maintainable due to stipulations in the family settlement, learned counsel contended that the family settlement though a part of the record cannot be seen by the Court to determine the relative strengths of the parties. In an application under Order VII Rule 11 all that the Court would do is to consider the averments in the plaint and determine whether reasonably the cause of action is discernible. It was further contended that even otherwise an overall reading of the family settlement would show that the intention of the parties was only to enter into a living arrangement whereby for the enjoyment of the property, separate portions were earmarked. That, however, did not imply a complete partition; on the contrary the joint and impartable rights, of both parties, in the leasehold rights subsists even today. Learned counsel relied upon the family settlement deed for that purpose.

18. It was contended that the relative merits of the case cannot be adjudicated in interlocutory proceedings much less in an application under Order VII Rule 11 as that would foreclose the right of the party approaching the Court i.e. the plaintiff for a trial and determination of his entitlement on the basis of procedure mandated by law. It was, therefore, submitted that the applications filed by the defendants should not be entertained and ought to be rejected.

19. Before proceeding further, it would be necessary for the Court to extract relevant parts of the Deed of Family Settlement dated 12th November, 1992. A copy of the said document is on the record. After reciting allotment of leasehold rights to deceased Sh. I.S. Chopra and his wife, steps taken by him to construct upon the plot, their death and mutation of the plaintiff and the defendant No.1 as joint owners, the deed further records as follows:

“AND WHEREAS it was felt necessary and expedient between the parties to these presents to have separate exclusive rights in the construction and structures raised on the Plot No. 25, Palam Marg, Vasant Vihar, New Delhi.

AND WHEREAS at the instance of friends and well wishers, the parties to these presents have amicably and mutually agreed to divide amongst themselves on a just and equitable basis the construction raised/constructed on the said plot Plot No. 25, Palam Marg, Vasant Vihar, New Delhi.

AND WHEREAS to avoid any future dispute/differences/contentions the parties have resolved to execute this document evidencing the partition of the structures only raised on the said plot of land being No. Plot No. 25, Palam Marg, Vasant Vihar, New Delhi.

AND WHEREAS it has been agreed that ROMESH shall have the custody of the ORIGINAL document and shall keep and preserve the same in good order and condition without being destroyed/obliterated in any manner. Romesh shall, at the request of Anish produce the ORIGINAL document for his inspection at all reasonable times on prior notice.

NOW THIS DEED OF SETTLEMENT WITNESSETH AS UNDER:

- 1. That on and from 1.11.1992 the property being jointly owned by the parties hereto shall stand equally divided between Romesh and Anish subject to any adjustments that may be necessary as more particularly provided for hereinafter.*

2. *That on and from 1.11.1992 Romesh and Anish shall separately and exclusively own of the assets falling to their respective shares and shall be entitled to peacefully enjoy the same without any act or hindrance from the other.*
3. *That the assets forming part of I.S. Chopra, HUF have been simultaneously partitioned by way of a separate partition deed, which shall form as integral part of the family settlement.*
4. *That the property and assets shall be divided as under:*

i) That property situated at 25 Palam Marg, Vasant Vihar, New Delhi as at present consists of two dwelling units for the sake of convenience called the Front Portion and the back portion. The lease deed from the Vasant vihar Cooperative Housing Society dated 20.09.1968 permits that holding of the land equally and jointly by Romesh and Anish. The Front House as defined in clause 4-ii,iii, v and vi shall belong to and henceforth exclusively vest in Anish as full and absolute owner and with full power of enjoyment and privacy thereof without let or hindrance from Romesh. Similarly the Back House shall belong to and hereafter exclusively vest in Romesh as full and absolute owner and with full power of enjoyment and privacy thereof without let or hindrance from Anish. The parties hereby agrees thereby in the event the law permits the divisions of the ownership of the land such division shall take place to form two separate and individual properties with the Front House and land apartment thereto vesting in Anish and the Back House and land apartment thereto vesting in Romesh, with division as defined in Clauses 4-ii and vi.

ii) As a result of the agreement between the parties:

- a) *The Front House built on the land marked as A-1, A-2, A-3, C-2, C-1 and A-4 in Plan No. 1 attached will be in the possession and ownership of Anish.*
- b) *The Back House built on the land marked as B-1, B-2, A-3, C-2, C-1*

and A-4 will be in the possession and ownership of Romesh.

iii) It is further agreed between the parties that until either property is redeveloped that:

a) The servants quarters on the second floor as defined in plan No. 3 attached bu E-1,E-4, C-2, C-1, E-5 will be for the exclusive usage of the Front House.

b) The area marked D-1, D-2, C-2, C-1 on the Ground Floor in Plan No.1 will be for the exclusive usage of the Back House.

c) The staircase shown in the First Floor plan No.2 attached marked as D-1, D-2, C-2, C-1 belongs the Front House; however, emergency and reasonable access to water tanks and storage on the roof will be available to the Back House.

iv) In the event of there being any increase in the Ground coverage Plinth Area (GCPA) allowable to the entire plot as a result of alteration of the existing laws, the first 1000 Sq. ft. shall be for the exclusive use of the Front House. Any further increase in GCPA over and above 100 Sq. ft. shall be equally divided for use between the Front House and Back House.

v) If at the time of redevelopment of either the Front House or Back House, the said increase in GCPA is below 500 Sq. ft. then clause 4-iii-b is conceled and the Ground Floor area marked D-1, D-2, C-2, C-1 in the plan No.1 reverts to the Front House.

vi) If tat the time of redevelopment of either the Front House or Back House the said increase in GCPA allowable is 500 Sq. ft. or more, whether utilized or not, the line dividing the properties shall become A-3, D-2, D-1, A-4, and the servants quarters defined in Cloause 4-iii-a and shown in Plan No. 3 by E-1, E-4, E-3, C-2, C-1, E-5 shall revert to the Back House.

vii) On the basis of existing regulations and the existing constructions as

defined in clause 4-4 I, the Front House has 2590 Sq. ft. of GCPA and the Back House as 3350 Sq. ft. of GCPA. These areas may not be exceeded by either party except as provided for in clause 4-iv above.

5. viii) *In addition, the permitted Floor area of the plot under FAR Regulations shall be equally divided between the Front house and Back House and neither party shall exceed their respective lawful area. Further, the permitted number of dwelling units shall be divided equally between the parties.*

ix) *The parties agree that the said property has been equitably adjust and either shall have any claim on the above save as provided herein.*

6. *The parties agree and undertake that after the date of this agreement if any authority shall require the signatures and consent of either Romesh or Anish pertaining to or in relation to that portion that vests in the other, the same shall not be unreasonably withheld and accorded within a reasonable time not exceeding 45 days failing which it shall be open to the affected party to claim for consequential loss or damage. Each party undertakes to make provision to carry out this clause by appointing a Power of Attorney, if necessary.*
7. *The parties undertake to keep and maintain the existing sewage and electricity lines in good order and repair as the same are common facilities to both the Front and the Back House. If either party wishes to allot the same it shall be open to him to do so at his own cost provided that his so doing will not unreasonably dislocate or cause inconvenience to the other. Emergency and reasonable access shall be provided.*
8. *The parties undertake to jointly and in equal proportions look after the common facilities till such time as the same may be separated.*
9. *Till 1.11.1992 the parties shall jointly and in equal share be responsible for all tax liabilities but on and from the said date the liabilities shall be to each parties individual account. If however, any liability is raised in the future*

towards tax or by way of penalty or otherwise but allocable or pertaining to the period upto 1.11.1992 both parties undertake to clear the same in equal proportions. Any delay or default by either party will enable the other to recover the quantum so additionally levied from the default together with Bank rates of interest thereon."

20. It is undoubtedly true that when the Court is moved under Order VII Rule 11, the averments in the plaint have to be read as a whole. What has to be determined is whether the allegations in the suit disclose a cause of action and whether such a suit is maintainable in the sense that it is not barred in law having regard to the averments made. The truth or otherwise of the pleadings cannot, however, be gauged by the Court as it does not have the benefit of a trial on the merits. Similarly, the Court cannot hold that some parts of the cause of action are not maintainable or barred in law as the law does not permit rejection of the suit in parts.

21. In a recent decision reported as *Liverpool London S.B. vs. M.V. Sea Success*, 2004 (9) SCC 142 the Supreme Court held (in para 152 of the judgment) that while deciding an application under Order VII Rule 11 the averments in the plaint should be taken as a whole and that documents filed in support of the suit including documents presented under Order VII Rule 14, should be considered. On an application of this rule, it would be necessary for the Court to consider the maintainability of the plaintiff's preferential claim under Section 22 of the Hindu Succession Act, only on the basis of the plaint averments and the documents filed with the suit.

22. Section 22(1) in a sense enacts a right of preemption in favour of joint owners and co-sharers of coparcenary property. It embodies the Parliamentary intention that if a coparcener of an undivided share in a joint family property wishes to transfer such undivided interest, he should first offer it to the other co-sharers to avoid entry of strangers into the joint family property. Although it is true that such a stranger who acquires title cannot enter possession, merely on the basis of transfer in an undivided interest, however the rights of the other co-sharers in the undivided property are bound to be disturbed and affected, as they are always exposed to civil action for enforcement of such transferee's rights, in terms of Section 44 of the Transfer of Property Act. To minimize this inconvenience, the legislature has enacted Section 22 of the Act engrafting a preemptive right to purchase such undivided interest.

23. Section 22 reads as follows:

“Section 22: Preferential right to acquire property in certain cases.- (1) *Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in Class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.*”

24. It is clear that the above provision confers upon one co-heir a preferential right to purchase the property of the other co-heirs. This right is similar to the right of pre-emption. The expression "one of such heirs proposes to transfer his or her interest" also include transfer of

such interest by way of sale, gift or any other mode. This preferential right cannot be defeated after the transfer of the interest is completed through an instrument of conveyance such as sale deed. In *Karunakar Rout alias Thatei –Vs- Golak Behari Biswal and Anr* AIR 1995 Ori 110 (DB) it was held that:

“Now the other question that arises is that if the plaintiff was entitled to the right of preferential purchase of the share and property inherited by D.3 because of Section 22 of the Hindu Succession Act. Section 22 deals with preferential right to acquire the property in certain cases. Because of the section, if an interest in any immovable property of an intestate, or in any business carried on by him or her. Whether, solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred. The Hon'ble single Judge has disallowed the right of the plaintiff on the ground that under Ext. 1 he had relinquished all his rights in favour of defendant No. 3 as far as the homestead lands are concerned and also relinquished in respect of his property except four annas share in other agricultural lands. Since in the compromise decree, the plaintiff had already relinquished all his rights in respect of homestead and twelve annas share into other land he inherited from his father in favour of D.3 in respect of those properties plaintiff's right of preferential purchase has lost in respect of these properties in view of Section 22 of Hindu Succession Act, 1956. We hold that the view taken by the Hon'ble single Judge holds good in respect of that property, the plaintiff having surrendered all his interest in favour of defendant No. 3 which was under a valid transfer it has been to the D. 3 to deal with properties as she liked as there was no subsisting interest existed in respect of the said homestead land in favour of the plaintiff after the compromise decree in favour of the plaintiff.”

In another decision, *Bhagirathi Chhatoi-Vs- Adikanda Chhatoi and Ors* AIR 1988 Ori 285 the same High Court had held that:

“the right under Section 22(1) is not available to be exercised after partition between the

co-heirs since partition clothes the respective parties with authority to hold their shares independently and absolutely as their separate properties and that it could not be the intention of the legislature to put a clog on the power of alienation of independent owners of properties..”

25. In *Dhobei Rout –vs- Pahali Rout* AIR 1998 Orissa 74, relied upon in these proceedings, it was held that:

“It has already been settled by this Court that the right Under Section 22(1) of the Hindu Succession Act (hereinafter called 'the Act') is available to Class-I co-heir when any of the co-heirs proposes to transfer his or her interest in the joint property or business. Reference may be made to the decisions in Ganesh Chandra Pradhan v. Rukmani Mohanty, reported in AIR 1971 Orissa 65; in Muralidhar Das v. Bansidhar Das, reported in AIR 1986 Orissa 119; and in Karunakar Rout alias Thatei v. Golak Behari Biswal; and reported in AIR 1995 Orissa 110. In Bhagirathi Chhatoi v. Adikanda Chhatoi. reported in AIR 1988 Orissa 285 it has been laid down (at page 288) :

"..... the right under Section 22(1) is not available to be exercised after partition between the coheirs since partition clothes the respective parties with authority to hold their shares independently and absolutely as their separate properties and that it could not be the intention of the legislature to put a clog on the power of alienation of independent owners of properties....."

It thus appears that the preferential right under the Section can be availed of if the interest in the property is joint and a co-heir transfers his or her undivided interest in the joint property. The preferential right evaporates as soon as the concerned property is partitioned and allotted to any of the co-heirs, fn view of such legal position it is to be examined whether there was partition and the suit property was allotted to one of the coheirs.”

26. From the above decisions and the language of the provisions i.e. Section 22 it is apparent that the limited rights of the parties seeking its enforcement are available so long as the property retains an undivided coparcenary character. In the present case, there is no doubt that

till November 1992, the properties of the parties were jointly owned. The facts narrated previously in this judgment show that the late Smt. Chopra died in 1984; her husband died in 1988. As it often happens, the two surviving sons, who are now fighting each other in the law courts could not pull along with each other. They accordingly entered into the family settlement. The question is whether the family settlement partitioned the share absolutely or whether there any subsisting interest jointly owned by both i.e. capable of being dealt with under Section 22.

27. The recitals to the family settlement and the various conditions stipulated clearly brings out the intention of the parties to the document. This is apparent from the use of the terms such as “divide”, “partition”, “separately and exclusively owned” “falling to the respective shares of the plaintiff and defendant No.1 (clause 2)” etc. Clause 3 expressly states that assets forming part of the Late Sh. I.S. Chopra HUF stood simultaneously partitioned through a separate deed which would be an integral part of the family settlement. The intention to divide the immovable property at Palam Marg is brought out from a plain reading of Clause 4 (1) of the Deed which outlines in detail the portions that would belong and henceforth exclusively vest with the plaintiff and the defendants respectively. The parties even used the word “division”. Similarly, clause 4(2) carries the thought further and states that the said defined portions, marked in the plan annexed to the family settlement will be in the possession and ownership of the plaintiff and defendant No.1 (clauses 4 (ii) (a),(b)). The parties further undertook that if any

authority were to require or consent of either of them in relation to portion “vesting” to one or the other parties they would not unreasonably withhold it and would accord such consent within reasonable time.

28. The intention of the parties that the deed result in division, in reality and in law but would be subject to formal effectuation on a later date if sub-division of the property were to become permissible is clear from the following condition in clause 4(1) :-

“The parties hereby agree that in the event the law permits the division of ownership of the land, such division shall take place to form two separate and individual properties with the front house and land apartment thereto vesting in Anish and the back house and land apartment thereto vesting in Romesh with division as defined in Clause 4-ii, vi.”

29. From its tenor, the court is of the opinion that the document acted as a family settlement, dividing the shares of the parties to the properties, once and for all. The document described in detail, the portions falling to the share of the plaintiff and the defendant; it also provided that upon the law enabling division of ownership of the land (that course not being permissible on the date of its execution) the division *“shall take place to form two separate and individual properties with the front house and land apartment (sic) thereto vesting in Anish and the back house and land apartment (sic) thereto vesting in Romesh”*. The courts have recognized the

practicability of such contingency, due to the peculiar nature of land ownership pattern in Delhi, evidenced in the judgments reported as *Inderjit Singh (supra)* and

30. On an overall conspectus of the facts and documents, this court is of the opinion that the plaintiff's description of the cause of action, and the documents relied upon by him to show maintainability of the suit, do not disclose a valid cause of action. He claims a decree based on the preferential right to the property, under Section 22 of the Act. The said right is not available and is barred, as the parties, through the family settlement, partitioned all their rights in the joint family properties. The suit is also barred and not maintainable, for the same reason.

31. The plaintiff and defendants have not disputed the validity of the document, and have both advanced arguments about its true construction. This court, in *Indofil Chemicals* held that provisions of Order XII Rule 6 can be exercised at the behest of any party; thus the second defendant's application for dismissing the suit has to succeed, for the same reasons. In the view taken by the court, the plaintiff's application for decree, on admissions, cannot succeed; it has to be rejected.

32. For the above reasons, IA 850/2007, and IA 1319/2005, have to succeed, and are allowed. I.A. 2106/2007 fails; it is dismissed. The plaint is therefore rejected as not disclosing a

cause of action, and also as barred in law. The suit is also dismissed, in terms of Order XII Rule 6 CPC.

DATE: 31st March, 2008

(S. RAVINDRA BHAT)
JUDGE