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

Reserved on: 02.08.2024
Pronounced on: 25.10.2024

\+ **CS(OS) 2167/1993**

SH. AJIT SINGH ..... Plaintiff

Through: Mr.Manav Gupta, Ms.Gauri Rishi, Mr.Sahil Garg, Mr.Abhinav Jain, Mr.Ankit Gupta, Ms.Samiksha Jain, Ms.Srishti Juneja, Ms.Monika Madaan, Mr.Mithil Malhotra, Advs.

versus

SMT.ADARSH KAUR GILL & ORS ..... Defendants

Through: Mr.C.A.Sundaram, Sr. Adv. with Mr.Sumit Bansal, Mr.Ravi Kapoor, Mr.Udaibir Kochar, Mr.Zafar Inayat, Mr.Rishav, Ms.Aditi Singhal, Ms.Shreya Kunwar, Ms.Tulna Rampal, Mr.Aditya Bakshi, Mr.Arjun Bhatia, Advs. for D-1 & D-2.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

1. The present Suit has been filed by the original plaintiff, late Sh. Ajit Singh (hereinafter referred to as the 'plaintiff'), praying for the following reliefs:

> "*(a) pass a preliminary decree of partition of the property bearing No.3, south end Road, New Delhi, more particularly shown ion the plan, and, thereafter, pass a final decree partitioning the said property by metes and bounds and put each of the parties to the suit in actual physical possession of the portion of the property allotted to him/her. If the partition of the property by metes and bounds is not feasible, then the property may ordered to be sold by public auction through Court and proceeds thereof be divided between the*

parties to the suit in accordance with their share and entitlement;

(b) Pass a preliminary decree for partition of the movable assets belonging to the estate of Smt. Abnash Kaur, as mentioned in the Schedule to the plaint and, thereafter, pass a final decree and give to each of the party to the suit his/her share of the said property. In case it is not feasible to distribute the movable assets belonging to the estate of Smt. Abnash Kaur in the hands of defendants Nos.1 & 2 to each of the beneficiaries, as per the share and entitlement, then the said movable assets may be ordered to be sold by public auction through this Hon'ble Court and the proceeds thereto may be divided amongst the parties, as per their share and entitlement;

(c) Pass a decree for rendition of accounts and enquiry into the same with respect to the rental income of the property received by defendant No.1 from the tenant of property bearing No.3, south End Road, New Delhi, w.e.f. 1.1.1980 to 30.11.1990;

(d) Pass a decree for rendition of accounts and enquiry into the same with respect to the profits made by defendant Nos.1 and 2 from the business which they have been carrying on by investing the funds from the estate of Smt. Abnash Kaur;

(e) Pass a decree for declaration that there has been no lease deed executed by Smt. Abnash Kaur in favour of Defendant No.1 and that defendant No.1 is not a lessee in the property, 3, South End Road, New Delhi, and she is not entitled to give the said property to any person on sub-lease basis;

(f) Pass a decree of declaration to the effect that defendant No.1 is not a subrogatee of the mortgage deeds executed by late Smt. Abnash Kaur with respect to the property in favour of Smt. Sushila Daphtary and her son Mr. Anil Daphtary said mortgage deeds have been redeemed out of the estate left by Smt. Abnash Kaur

(g) Pass a decree of declaration to the effect that defendants Nos. 1 and 2 have dis-entitled themselves from getting any share in the estate left by Smt. Abnash Kaur and that the plaintiff and defendants Nos.3,4 and 5 are the only beneficiaries under the Will of Smt. Abnash Kaur and are entitled to get the entire estate left by Smt. Abnash Kaur divided and partitioned in four equal shares;
(h) Pass a decree for permanent injunction against Defendant No.1 restraining her permanently from transferring, alienating, letting out or parting with the possession of the property, 3 South End Road, New Delhi, or any part thereof and from making any additions and alterations in the same in any manner whatsoever.
(i) Any relief which this Hon'ble Court may deem fit and proper in the circumstances of the case may also be granted to the plaintiff and other beneficiaries under the Will of smt.Abnush Kaur, and
(j) Cost of the Suit may also be awarded against defendants Nos.1 and 2."

2. Once the final hearing of the Suit began and the counsel for the plaintiff had made his submissions, the learned senior counsel for the defendant nos. 1 and 2 pointed out that no submissions had been made by the learned counsel for the plaintiff on some of the prayers, while for some of the prayers, there had been a shift in the stand of the plaintiff.

3. On the objection being raised, the learned counsel for the plaintiff clarified the plaintiff's stand on the prayers being pressed in the Suit, as is recorded in the Order dated 09.05.2023, which is reproduced herein below:

"1. The learned counsel appearing for the plaintiff submits that the plaintiff has not pressed and is not pressing prayer (b) and (d) made in the Suit.

2. As far as prayer (f) is concerned, the 'estate left by Smt.AbnashKaur' mentioned in the prayer is restricted to the rental received by the defendant no.1 for the property bearing no.3, South End Road, New Delhi (hereinafter referred to as the 'Suit Property') after the death of Smt. Abnash Kaur in 1976 and till the date of redemption of the mortgage in May 1981, and no other estate.

3. The above statement of the learned counsel for the plaintiff was necessary to be recorded as in the plaint, various prayers and averments have been made, on which no submissions were made in the opening by the learned counsel for the plaintiff. While the learned senior counsel for the defendant no.1 was making submissions, it was noticed that the submissions were being made on pleas that had not been pressed by the learned counsel for the plaintiff. It is only to clarify the position, that this statement of the learned counsel for the plaintiff has been recorded and, therefore, the plaintiff shall be bound by this order and the statement of the learned counsel for the plaintiff.

4. Needless to state that the above statements by the learned counsel for the plaintiff are without prejudice to the rights and contentions of the defendants.

5. The learned senior counsel for the defendant no.1 points out that there is a Schedule attached to the plaint, which mentions other properties purportedly as 'estate left behind by the deceased late Smt. Abnash Kaur'. In relation to this Schedule also, no submission was made by the learned counsel for the plaintiff in the opening.

6. The learned counsel for the plaintiff prays for time to seek instructions if the plaintiff is still pressing the reliefs sought in respect of the other properties, movable and immovable,

apart from the suit property. He also prays for time to seek instructions on prayer (g) made in the plaint."

4. By a subsequent Order dated 19.07.2023, the statement of the learned counsel for the plaintiff was recorded as under:

> *"1. Pursuant to the order dated 09.05.2023, the learned counsel for the plaintiff, on instructions, submits that the plaintiff, in the present suit, is pressing only prayer (a), (c), (e), (f) (as restricted in terms of paragraph 2 of the order dated 09.05.2023), (h), (i) and (j), and would not press prayer (b), (d) and (g) made in the plaint.*
> *2. He further submits that as far as the schedule of properties attached to the plaint is concerned, the plaintiff restricts the claim only to the property bearing no. 3, South End Road, New Delhi, and gives up all claims against the other moveable and immoveable properties mentioned in the Schedule, and does not seek partition of these properties.*
> *3. The plaintiff shall file an affidavit in the above respect, within a week."*

5. The present plaintiff, Mr.Gurnir Singh Gill, filed an affidavit dated 26.07.2023, clarifying his restricted claim in the Suit. The relevant portions of the same are reproduced as under:

> *"7. That accordingly, I state that the Deponent/Plaintiff shall be only pressing prayer (a), (c), (e), (f), (h), (i) and (j), and would not be pressing prayer (b), (d) and (g) made in the plaint.*
> *8. I further state that as far as the Schedule of Properties attached to the Plaint is concerned, the Deponent/Plaintiff restricts the claim only to the property bearing no. 3, South End Road, New Delhi and rental/profits earned therefrom, and is therefore, relinquishing all the claims against the other moveable and*

immoveable properties mentioned in the Schedule and does not seek partition of these properties.

9. I further state that as far as prayer (f) is concerned, the 'estate left behind by Smt. Abnash Kaur" mentioned in the prayer is restricted to rent received / profits earned by the Defendant No.1. for the Property bearing No. 3, South End Road, New Delhi [hereinafter referred to as the Suit property] after the death of Smt. Abnash Kaur in 1976 and till the date of redemption of mortgage in May 1981, and no other estate."

6. This Court, therefore, proceeded to hear the submissions of the parties on these modified prayers and restricted claims of the plaintiff.

Case of the plaintiff:

7. It is the case of the plaintiff that late Smt.Abnash Kaur was the elder sister of the plaintiff, the defendant no.1, and the defendant no.3; mother of the defendant no.5; and aunt of the defendant no.2 and the defendant no.4. She was married to late Seth Shiv Prasad on 27.06.1953, and the defendant no.5 was born out of the said wedlock on 11.05.1955. This was the second marriage of late Seth Shiv Prasad, who had been blessed with seven sons from his first wife.

8. The plaintiff asserts that out of the amounts gifted by late Seth Shiv Prasad to late Smt. Abnash Kaur, she purchased a property bearing No.3, South End Road, New Delhi (hereinafter referred to as the 'Suit Property') for a total sale consideration of Rs.2,50,000/- *vide* Sale Deed dated 18.01.1956 registered as Document No.215 in Additional Book No.1, Volume No.354 on Pages 117 to 138 on

30.01.1957 in the Office of the Sub-Registrar, New Delhi (**Ex. PW-4/1**), thereby becoming the absolute owner of the Suit Property.

9. The plaintiff asserts that by her last Will dated 06.02.1973 (in short, 'Will') (**Ex. PW-4/2**), late Smt. Abnash Kaur bequeathed the Suit Property and all other movable and immovable assets in favour of the plaintiff and the defendants, with each having 1/6th share in the same. The original plaintiff, Sh.Ajit Singh, was appointed as the Executor of the said Will by late Smt. Abnash Kaur.

10. The plaintiff further asserted that on the death of late Seth Shiv Prasad, who passed away on 24.05.1957, disputes arose between late Smt. Abnash Kaur and her step-sons (sons from the first marriage of late Seth Shiv Prasad). There was also an Order of Attachment dated 07.07.1960 of the Suit Property passed by the Collector, Delhi (**Ex. PW-4/7**) for recovering the tax payable by 'Seth Shiv Prasad HUF'. In order to save her property from her step-sons and also from attachment, late Smt. Abnash Kaur entered into a fictitious lease of the Suit Property with the defendant no.1 *vide* Lease Agreement dated 18.11.1958. The plaintiff asserts that this Lease Agreement was fictitious and was never acted upon; the possession of the Suit Property was never delivered to the defendant no.1, and late Smt. Abnash Kaur remained in possession thereof.

11. The plaintiff asserts that in February 1961, late Smt. Abnash Kaur let out the Suit Property to the Vietnam Embassy, though in the name of the defendant no.1, on leave and license basis, and late Smt. Abnash Kaur was receiving the rent for the same from the said Embassy. Later, she let out the Suit Property on leave and licence

basis with effect from 01.01.1964 to the trade representative of the German Democratic Republic (hereinafter referred to as 'G.D.R. Embassy'), though again in the name of defendant no.1. The plaintiff asserts that the last leave and licence agreement with the G.D.R. Embassy, entered in November, 1974 for the period from 01.01.1975 to 31.12.1979 at Rs.11,000/- per month was executed by him as the General Attorney of the defendant no.1, on instructions from late Smt. Abnash Kaur. The plaintiff asserts that the G.D.R. Embassy made the full and final payment of the rentals for the said period of 5 years, in advance, in the name of defendant no.1 to the plaintiff, as was desired by late Smt. Abnash Kaur, and the said amount was later paid by the plaintiff to late Smt. Abnash Kaur.

12. The plaintiff further asserts that late Smt. Abnash Kaur had also taken a loan of an amount of Rs.1,98,000/- against the Suit Property by mortgaging the same in favour of Smt. Sushila Daphtary and Mr.Anil Daphtary (in short, 'Daphtarys') *vide* Mortgage Deeds dated 19.01.1959 (**Ex. DW-1/42**) and 24.01.1959 (**Ex. DW-1/43**). As late Smt. Abnash Kaur was unable to repay the said loan and interest accrued thereon, the Daphtarys filed a Suit, being Suit No. 282/1967, titled '***Shrimati Sushila Daphtary & Anr. v. Shrimati Abnash Kaur & Ors.***', seeking recovery of the said loan amount and foreclosure of the mortgage. A Preliminary Decree dated 29.01.1971 was passed in favour of Daphtarys and against late Smt. Abnash Kaur, thereby directing late Smt.Abnash Kaur to pay a sum of Rs.1,98,000/- as principal amount and interest @ 7.5% per annum thereon from the date of the mortgage till the date of its realisation. The same was

challenged in an appeal, being RFA(OS) 11/1971, titled ***Smt. Abnash Kaur through LRs. v. Smt. Sushila Daphtary and Anr***. During the pendency of the said appeal, late Smt. Abnash Kaur passed away on 10.06.1976. On the basis of her Will, the parties to the present Suit were substituted against her in the appeal.

13. During the pendency of the said appeal, the parties entered into a compromise on 20.02.1978, and a Compromise Decree dated 20.02.1978 (**Ex. PW-4/DX8**) was passed. Based on the said Compromise Decree, *vide* Order dated 08.05.1981 (**Ex. DW-1/45**), an application, being C.M. No. 323/1981 (**Ex. PW-4/DX9**), filed by the parties under Order XXI Rule 2 of the Code of Civil Procedure, 1908 (in short, 'CPC') was allowed; the satisfaction of the decree was recorded; and the mortgage deeds and other title documents were released in favour of the defendant no.1. It was also recorded that the applicant therein, that is, the defendant no.1, will be subrogated to the rights of the mortgagees in accordance with the terms of the said Compromise Decree.

14. The plaintiff asserts that on 04.05.1983, he addressed a notice to Sh. G.C. Mittal, Advocate, who, he claims, was advising and looking after the interest of late Smt. Abnash Kaur, thereby calling upon him to disclose the documents of settlement/lease that had been executed by the defendant no.1 with the G.D.R. Embassy with respect to the Suit Property. The plaintiff claims that the defendant no.1, however, refused to render the account of the rent received from the G.D.R. Embassy, and started claiming that she alone was entitled to receive the rent.

15. The plaintiff claims to have issued a notice even to the G.D.R. Embassy, asking the Embassy to pay the rent to him instead of to the defendant no.1. He, however, claims that the Embassy refused to comply with the same. The G.D.R. Embassy is claimed to have vacated the Suit Property on 01.11.1990.

16. The plaintiff asserts that, in fact, after discussions and meetings between the plaintiff and the defendant no.1, the parties to the present Suit arrived at a settlement, the terms whereof were circulated by the defendant no.1 to the plaintiff *vide* Letter dated 12.02.1991 (**Ex. PW-4/27**). However, soon thereafter, the defendant no.1 herself refused to adhere to the terms of the said settlement.

17. The plaintiff claims that the defendant no.1 had invested the rental income from the Suit Property in other businesses and, therefore, is liable to account for the same.

Case of the defendant nos.1 and 2:

18. The defendant no.1 filed her written statement wherein she denied the contents of the plaint, and claimed that the Suit is barred by limitation.

19. The defendant no.1 further claimed that by redeeming the mortgage, she had become the subrogate mortgagee in possession of the Suit Property and was entitled to keep the possession thereof. She further claimed her rights as a lessee.

20. The defendant no.1 also denied sending the Letter dated 12.02.1991 **(Ex. PW-4/27)**, which, according to the plaintiff, recorded the terms of the settlement arrived at between the parties.

21. The defendant no.2 has adopted the written statement filed by the defendant no.1.

Proceedings in the Suit:

22. The original plaintiff, late Sh. Ajit Singh, passed away on 12.10.2000. Thereafter, the defendant no.3, late Smt. Surjit Kaur Gill, filed an application, being I.A. No.12533/2000, praying for her to be transposed as a plaintiff on the basis of an alleged Will dated 21.07.1997 of late Sh. Ajit Singh (**Ex. PW-2/1**), wherein she was appointed as an Administrator and Executor of his Will.

23. This Court, *vide* Order dated 04.12.2000, allowed the defendant no.3, late Smt. Surjit Kaur Gill, to be transposed as a plaintiff. This Court further recorded as under:

> "*.....Learned counsel for Defendants No.1 and 2 has no objection if this application is allowed. In case the Will is found to be not a genuine one, Defendants No.1 and 2 are at liberty to agitate the matter before this Court."*

24. The original defendant no.5, Mr.Kamal Kishore Bindal, passed away on or about 15.12.1995. This Court, v*ide* Order dated 25.07.2000 passed in I.A. No.2816/1996, deleted the defendant no. 5 from the array of the parties recording that the LRs of Mr.Kamal Kishore Bindal are already on record.

25. The issues framed by this Court *vide* Order dated 01.02.2005 are as under:

> "*1. Whether the suit is barred by limitation? OPD-1*
> *2. Whether the plaint has been valued correctly for purposes of court fee and Jurisdiction. If not, to what effect? OPD*

3. Whether redemption of the mortgage by defendant no. 1 entitles defendant no.1 to retain possession of property bearing No.3, South End Road, New Delhi? OPD-1
4. Whether the lease deed dated 18.11.1958 is a sham document as alleged by the plaintiff in paras 20 to 23 of the plaint and as explained in subsequent paragraphs thereof? OPP
(It Is clarified that issue No.3 above would take care of the pleadings of the plaintiff in the plaint where it is pleaded that the lessee under the lease deed afore-noted was acting as a benamidar of the lessor).
5. If issue no.4 is held in favour of the plaintiff, what would be the legal consequences thereof?
6. Whether late Smt.Abnash Kaur left behind any moveable properties as asserted by the plaintiff? OPP
7. What is the share of the plaintiffs and the defendants in the estate left behind by late Smt.Abnash Kaur?
8. Whether the plaintiff is entitled to a preliminary decree of partition in respect of property bearing No.3, South End Road, New Delhi? OPP
9. Whether the plaintiff is entitled to a decree for rendition of accounts against defendant No. 1? OPP
10. Whether the plaintiff is entitled to a decree of declaration as prayed in clauses (e), (f), (g)? OPP
11. Whether the plaintiff is entitled to a decree of permanent injunction as per clause (h) of the prayer clause? OPP
12. Relief."

26. Late Smt. Surjit Kaur Gill also unfortunately passed away on 03.01.2020, and the present plaintiff, namely, Shri Gurnir Singh Gill, claimed that Smt. Surjit Kaur Gill had left behind a Will dated 20.02.2003. He was accordingly substituted as her legal heir, *vide* Order dated 12.02.2020.

Submissions of the learned counsel for the plaintiff:

27. Mr. Manav Gupta, the learned counsel for the plaintiff, submits that the purported Lease Deed dated 18.11.1958 was a sham document executed by late Smt. Abnash Kaur only to protect the Suit Property from any claim raised by her step-sons and also to avoid the attachment of the same towards the recovery of the Income Tax dues and the Order of Attachment dated 07.07.1960 **(Ex.PW4/7)** passed by the Income Tax Authorities. He submits that in the year 1958, the defendant no.1 was a minor, aged only 16 years.

28. He submits that the purported Lease Deed dated 18.11.1958 has not been filed on record by the defendant no.1.

29. He submits that the defendant no.1 had also issued a Certificate dated 27.09.1963 **(Ex.PW4/10)**, admitting that she has no right, title or interest in the Suit Property either as a tenant or as a lessee. He submits that it was also admitted by the defendant no.1 that the Suit Property had been leased out to the Vietnam Embassy by late Smt.Abnash Kaur to protect the same from attachment by the Income Tax Department and the false claim of her step-sons.

30. On the denial by defendant no.1 of the Certificate dated 27.09.1963 **(Ex.PW4/10)** and the Letter dated 12.02.1991 (**Ex.PW-4/27**), the learned counsel submits that the only evidence led by the defendant no.1 in this regard was in the form of a private handwriting expert, Mr.Deepak Jain (**DW-3**), whose evidence cannot be relied upon. He submits that Mr.Deepak Jain is not an expert in the field of

comparison of signatures and has also been commented against adversely by this Court in its Judgment in ***M/s. Amir Chand Jagdish Kumar (Exports) Ltd. v. M/s. Hindustan Hing Supplying Co.,*** (2010) SCC OnLine Del 4146. He submits that the report being relied upon was a procured report and, therefore, no credence can be given to it.

31. He submits that late Smt.Abnash Kaur had also entered into an Agreement to Sell dated 02.10.1963 **(Ex.PW4/11)** for the Suit Property with one Sh. Jaswant Rai, wherein again, there was no mention of any lease deed having been executed by late Smt.Abnash Kaur in favour of the defendant no.1.

32. He submits that the defendant no.1 had executed a General Power of Attorney dated 27.06.1966 **(Ex.PW4/12),** appointing the original plaintiff, late Sh.Ajit Singh, as an Attorney *inter alia* to look after the interest of the Suit Property. In discharge of the same, late Sh. Ajit Singh had been entering into the lease documents with the Embassy, though in the name of the defendant no.1.

33. Drawing reference of this Court to an Affidavit dated 12.02.1982 **(Ex.PW4/13)** executed by the defendant no.1, he submits that in the said affidavit, the defendant no.1 had admitted that she had no income between the Assessment Years 1966-1967 to 1978-1979. He submits that, therefore, the redemption of the Suit Property under the Compromise Decree dated 20.02.1978 (**Ex. PW-4/DX8**) was from the funds generated by the defendant no.1 from the Suit Property and not from her own funds. He submits that since the property was redeemed from the estate of late Smt. Abnash Kaur, therefore, it was for the benefit of all her legal heirs.

34. He submits that, in any case, the defendant no.1 is only entitled to receive, from the other five family members, their proportionate share, based on each family member's ownership share in the Suit Property, of the money which she paid to redeem the mortgage from the original mortgagees, that is, the Daphtarys; she cannot claim any exclusive right in the said property.

35. Further, on the claim of the defendant no.1 that she is the subrogate mortgagee of the Suit Property, the learned counsel for the plaintiff, by placing reliance on the Judgment of the Supreme Court in ***Krishna Pillai Rajasekharan Nair (dead) by LRs. v. Padmanabha Pillai (dead) by LRs. & Ors.,*** (2004) 12 SCC 754, submits that the mortgage was redeemed by defendant no.1 for and on behalf of, and for the benefit of, the other legal heirs of late Smt. Abnash Kaur, including the plaintiff. The only right of the redeeming family member is to seek contribution from the other family members and, at best, to hold possession of the property until the said contribution is made. He submits that the same is also recorded in the Compromise Decree dated 20.02.1978 (**Ex.PW-4/DX8**) and also in the Order dated 08.05.1981 (**Ex.DW-1/45)** passed by this Court.

36. He submits that though it is the case of the plaintiff that the defendant no.1 had redeemed the Suit Property from the estate of late Smt. Abnash Kaur, through the rentals received by the defendant no.1, without prejudice, the plaintiff is willing to contribute towards the redemption amount in terms of the Judgment and Compromise Decree dated 20.02.1978 (**Ex. PW-4/DX8**) for its proportionate share of 61.11% in the Suit Property.

37. He submits that the defendant no.1, by way of an application filed under Order VI Rule 17 of the CPC, being I.A. 8144/2008, also sought to take a plea of adverse possession of the Suit Property. The said application was, however, dismissed by this Court, *vide* Order dated 03.11.2009; the appeal thereagainst was dismissed by a Division Bench of this Court, *vide* Order dated 15.01.2010; and the Special Leave Petition filed by the defendant no.1 against the order of Division Bench was also dismissed by the Supreme Court, *vide* Order dated 26.03.2010. He submits that the defendant no.1 also filed an application under Order VII Rule 11 of the CPC, being I.A. 1604/1999, seeking rejection of the plaint on the ground of it being barred by limitation, which was dismissed by this Court, *vide* Order dated 07.04.2008. The Division Bench of this Court, by its Judgment dated 27.01.2009 passed in FAO(OS) 290/2008, partially set aside the order of the learned Single Judge of this Court, however, the appeal against the order of the Division Bench, being Civil Appeal No.8221/2011, was allowed by the Supreme Court *vide* Judgment and Order dated 30.01.2014. The learned counsel for the plaintiff submits that, therefore, the plea of the defendant no.1 that this Suit is barred by limitation, cannot be accepted.

38. He further submits that the limitation for the present Suit shall be governed by Article 65 of the Schedule to the Limitation Act, 1963 (in short, 'Limitation Act'). He submits that since the Suit seeks partition and has been filed by one of the co-sharers, the possession of the defendant no.1 shall be deemed to be a constructive possession of the plaintiff. He submits that the cause of action for seeking partition

is a recurring cause of action, therefore, the Suit has been filed within the period of limitation. In support, he places reliance on the Judgment of the Supreme Court in ***Vidya Devi alias Vidya Vati (dead) by LRs v. Prem Prakash & Ors.,*** (1995) 4 SCC 496; and of this Court in ***Aishani Chandna Mehra v. Rajesh Chandna & Ors.,*** 2019 SCC OnLine Del 6718.

39. The learned counsel for the plaintiff further submits that the claim of the defendant no.1 that the defendant no.5 sold his interest in the Suit Property to the defendant no.1 *vide* three Agreements to Sell dated 08.04.1993 (**Ex.DW-1/33-35)**, also cannot be accepted as the factum of such sale was not pleaded by the defendant no.1 in her written statement. He submits that there is also no proof of any payment being made against the alleged Agreements to Sell.

40. In response to the submission of the learned senior counsel for the defendant no.1 that the Suit is liable to be dismissed as it claims partial partition, the learned counsel for the plaintiff submits that this plea has been raised by the defendant no.1 only in the oral submissions and does not form a part of the pleaded case of the defendant no.1. He submits that the defendant no.1 cannot be allowed to agitate a plea beyond the pleadings.

41. He submits that, in any case, the principle of bar against partial partition is applicable only to Joint Hindu Family/coparcenary properties and not to the properties which are co-owned by two or more persons.

42. He submits that even otherwise, there is no complete bar on seeking partial partition as the same would depend on the facts of each

case and whether or not the other properties are, in fact, capable of being partitioned. He submits that in the present case, the right of late Smt. Abnash Kaur in the other properties is being denied by her step-sons. In fact, even the defendant no.1 in her written statement has contended that late Smt. Abnash Kaur had not left behind any other asset/estate. He submits that, therefore, the bar against partial partition would not be applicable to the facts of the present case.

43. In support of his above submission, he places reliance on the Judgments of the Supreme Court in ***B.R. Patil v. Tulsa Y. Sawkar & Ors.,*** 2022 SCC OnLine SC 240 and ***Radhey Shyam Bagla (Since Deceased) thr. LRs v. Smt. Ratni Devi Kahnani (Since Deceased) through Legal Representatives***, 2014 SCC OnLine Del 7103; and of this Court in ***Harish Chander Sharma & Ors. v. Deep Chand Ram Dass and Sons & Ors.,*** 2008 SCC OnLine Del 1253; ***Sardar Jarnail Singh & Anr. v. Sardar Amarjit Singh & Ors.,*** 2016 SCC OnLine Del 6666; ***Adarsh Pal Singh Randhawa & Anr. v. Amrit Bolaria & Anr.,*** 2020 SCC OnLine Del 2223; ***Tarun K. Vohra v. Pravir K. Vohra & Ors.,*** 2023 SCC OnLine Del 5662; and, ***Sh. Ved Parkash v. Sh. Naresh Kumar & Ors.,*** NC 2023:DHC:327.

44. In answer to the submission of the learned senior counsel for the defendant no.1 that the defendant no.1 is also a protected tenant under the Delhi Rent Control Act, 1958 (in short, 'DRC Act'), the learned counsel for the plaintiff submits that admittedly the Suit Property was sub-leased for a rent of more than Rs.3,500/- per month and, therefore, in terms of Section 3(1)(c) of the DRC Act, it would not be a protected tenancy. He further submits that this Suit itself will

act as an adequate notice for eviction, and that the defendant no.1 is not entitled to any protection from eviction. In support, he places reliance on the Judgments of this Court in ***P.S. Jain Co. Ltd. v. Atma Ram Properties (P) Ltd.,*** 1996 SCC OnLine Del 875 and ***Mir Abdul Hai & Anr. v. Sanjeev Verma & Ors.,*** 2017 SCC OnLine Del 11488.

45. He submits that even otherwise, since the defendant no.1 is claiming title to the Suit Property, in terms of Section 116 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') read with Section 111(g) of the Transfer of Property Act, 1882 (in short, 'TP Act'), the defendant no.1 is liable to be evicted from the Suit Property and she can no longer claim tenancy rights. In support, he places reliance on the Judgments of this Court in ***S. Makhan Singh v. Smt. Amarjeet Bali,*** 2008 SCC OnLine Del 1188; ***Naeem Ahmed v. Yash Pal Malhotra (deceased) Through Lr's &Anr.,*** 2012 SCC OnLine Del 1189; and, ***Swarn Lata Agarwal & Anr. v. M/s. Narang Medicine Co.***, 2015 SCC OnLine Del 13575.

46. In counter to the submission of the learned senior counsel for the defendant no.1 that the Suit has abated as the plaintiff has not proved the Will dated 21.07.1997 (**Ex. PW-2/1**) of late Sh. Ajit Singh, the original plaintiff, the learned counsel for the plaintiff submits that this plea is again beyond the pleadings of the defendant no.1. He submits that late Sh. Ajit Singh had passed away on or before 12.10.2000. Thereafter, the plaintiff filed an amended plaint, to which the written statement was filed by the defendant no.1, however, no such plea or objection was taken by the defendant no.1 in the said written statement. He submits that the defendant no. 1, therefore,

cannot be permitted to raise a defence not pleaded in the written statement.

47. He further submits that in any case, the present plaintiff, admittedly, has 1/6th share in the Suit Property in his own independent right. In a Suit for partition, the defendants and the plaintiffs are all considered to be plaintiffs. In terms of Order XXII Rule 2 read with Order XXII Rule 4 of the CPC, as the right to sue survives in the present plaintiff, the Suit cannot abate.

48. He submits that even otherwise, till date, there has been no objection filed against the genuineness of the Will dated 21.07.1997 left behind by late Sh. Ajit Singh (**Ex. PW-2/1**). In Delhi, since it is not mandatory to obtain probate of a Will, therefore, in absence of any challenge to the said Will, it was not necessary for the plaintiff to lead further evidence on the genuineness of the Will. He submits that even the sons of late Sh. Ajit Singh have not challenged the Will and one of them has, in fact, appeared as a witness in the Suit in support of the plaintiff. In support, he places reliance on the Judgment of Supreme Court in ***Kanta Yadav v. Om Prakash Yadav & Ors.,*** (2020) 14 SCC 102, and of this Court in ***Kamla Nijhawan v. Sushil Kumar Nijhawan & Ors.,*** 2014 SCC OnLine Del 2667 and, ***Sh. Harminder Khullar v. Mrs. Swaran Kanta Juneja & Ors.,*** 2013 SCC OnLine Del 2676.

49. In response to the submission of the learned senior counsel for the defendant no.1 that the plaintiff has failed to bring on record the legal heirs of the defendant no.5, Mr.Kamal Kishore Bindal, the learned counsel for the plaintiff reiterates that no such plea was taken by the defendant no.1 in her written statement. He submits that even

otherwise, the step-sons of late Smt. Abnash Kaur have not claimed any rights in the Suit Property. He submits that the Suit cannot be dismissed on this ground at this belated stage, and in case this Court deems it necessary for the Legal Representatives of the defendant no.5, Mr.Kamal Kishore Bindal, to be impleaded, it can direct the same or allow the plaintiff to implead them as parties. In support, he places reliance on the Judgments of the Supreme Court in ***Daya Ram & Ors. v. Shyam Sundari & Ors.***, (1965) 1 SCR 231; ***Dolai Maliko (Dead) Represented by his Legal Representatives & Ors. v. Krushna Chandra Patnaik & Ors.***, (1966) Supp SCR 22; ***Harihar Prasad Singh & Ors. v. Balmiki Prasad Singh & Ors.***, (1975) 1 SCC 212; ***Sardar Amarjit Singh Kalra (dead) by LRs. & Ors. v. Pramod Gupta (Smt) (Dead) by LRs. & Ors.***, (2003) 3 SCC 272; and ***Delhi Development Authority v. Diwan Chand Anand & Ors.***, (2022) 10 SCC 428.

Submissions of the learned senior counsel for the defendant nos.1 and 2:

50. Mr.Sundaram, the learned senior counsel for the defendant nos.1 and 2, submits that the present Suit is liable to be dismissed for non-joinder of the necessary and proper parties to the Suit. He submits that the original defendant no.5, Mr.Kamal Kishore Bindal, who unfortunately passed away on or about 15.12.1995, was unmarried. He submits that in terms of Section 9 of the Hindu Succession Act, 1956 (in short, 'HSA'), his half-brothers, falling under Serial No. II of Class II Legal heirs in the Schedule to the HSA, would have precedence in

succession over the brothers and sisters of his mother, late Smt. Abnash Kaur, who would fall under Serial No. IX of Class II Legal heirs in the Schedule to the HSA. He submits that despite the same, in I.A. 2816/1996, which was filed for the impleadment of the legal heirs of the late Sh.Kamal Kishore Bindal, the plaintiff represented to the Court that all the legal heirs of late Sh.Kamal Kishore Bindal are already on record, and based on this assertion, late Sh.Kamal Kishore Bindal was deleted from the array of the parties to the Suit. He submits that in absence of all the legal heirs of late Sh.Kamal Kishore Bindal, the Suit cannot proceed and is liable to be dismissed.

51. He submits that even on the death of Sh. Ajit Singh, the original plaintiff, who unfortunately passed away on 12.10.2000, an application, being I.A.12533/2000, was filed by Smt.Surjeet Kaur Gill, the then defendant no.3, seeking her transposition as the plaintiff. In the said application, she herself disclosed that late Sh.Ajit Singh had left behind two adopted sons namely, Sh.Sanjay Singh and Sh.Jasjeet Singh, as his legal heirs. However, she claimed her rights under the purported Will dated 21.07.1997 of Sh. Ajit Singh (**Ex. PW-2/1**). This Court, *vide* its Order dated 04.12.2000, while allowing the said application, also observed that in case the said Will of Sh.Ajit Singh is found to be not genuine, the defendant nos.1 and 2 shall be at liberty to agitate the matter before the Court. He submits that though the present plaintiff named the attesting witnesses to the alleged Will dated 21.07.1997 of late Sh. Ajit Singh (**Ex. PW-2/1**) in his list of witnesses, however, he did not produce them in evidence. He submits that, therefore, the plaintiff has failed to prove the said Will in terms

of Section 63 of the Indian Succession Act, 1925 (in short, 'ISA'), and Section 68 of the Evidence Act, and, therefore, in absence of the sons of late Shri Ajit Singh being impleaded, the Suit must fail. He places reliance on the Judgments of the Supreme Court in ***H.VenktachalaAyengar v. B.T. Thimmajamma,*** (1958) SCC OnLine SC 31; ***Janki Narayan Bhoir v. Narayan Namdeo Kadam,*** (2003) 2 SCC 91, and, ***Murthy v. C.Saradambal,*** (2022) 3 SCC 209.

52. He submits that even otherwise, by way of the said Will of late Sh. Ajit Singh, Sh. Ajit Singh has bequeathed his estate to other persons as well, and these persons were also necessary parties to the Suit but have not been impleaded. Placing reliance on the Judgment of the Supreme Court in ***Kenchegowda v. Siddegowda,*** (1994) 4 SCC 294 and of this Court in ***Hari Om Sharma v. Ghan Shyam Dass Sharma,*** 2018 SCC OnLine Del 7239, he submits that in absence of all the co-sharers, a decree of partition cannot be passed.

53. The learned senior counsel for the defendant nos.1 and 2 also submits that it was the own case of the plaintiff that late Smt. Abnash Kaur had left behind several properties, which are mentioned in the schedule attached to the plaint. The plaintiff, however, has confined his claim of partition only to the Suit Property, as is recorded in the orders dated 09.05.2023 and 19.07.2023 of this Court read with the affidavit dated 26.07.2023 of the present plaintiff. Placing reliance on the Judgment of the Supreme Court in ***Kenchegowda*** (supra), he submits that a Suit for partial partition is not maintainable in law and is liable to be dismissed. He submits that the Judgment of ***B.R. Patil*** (supra), has carved out an exception to the above rule, however, the

same is not applicable to the facts of the present case as the plaintiff has not referred to the said exception while deleting his claim of partition for the other properties.

54. He further submits that the distinction being drawn by the plaintiff that the above rules are applicable only to Joint Hindu Family/coparcenary properties, is also incorrect. He submits that where the succession is testamentary, Section 19 of the HSA shall not apply, as it applies to a case where two or more heirs succeed together to the property of an intestate, and in which case alone, they take the said property as tenants-in-common and not as joint tenants. He submits that the plaint is based on the averment that the plaintiff has a unity of title, unity of commencement of title, unity of interest, unity of equal share, and unity of possession and right of survivorship with the defendants. Therefore, based on this averment of the plaintiff, this would be a case of joint tenancy and not tenancy-in-common. In support, he places reliance on the Judgment of the Supreme Court in ***Suresh Kumar Kohli v. Rakesh Jain & Anr.***, (2018) 6 SCC 708.

55. On the merits of the case, the learned senior counsel for the defendant nos.1 and 2 submits that in terms of the Compromise Decree dated 20.02.1978 (**Ex. PW-4/DX8**), the defendant no.1 was subrogated to the rights of the original mortgagees, that is, the Daphtary's, hence, the defendant no.1 was entitled to the delivery of the mortgage deed and other title documents and was also entitled to recover the decreetal amount from the other legal heirs of late Smt. Abnash Kaur. He submits that the said Decree has now attained finality and cannot be challenged. He submits that, therefore, the

submission of the plaintiff that no mortgage is created in favour of the defendant no.1, is contrary to the said Decree. He submits that, that Decree cannot be challenged in this Suit. He places reliance on the Judgments of the Supreme Court in ***Mohanlal Goenka v. Benoy Kishna Mukherjee,*** (1952) 2 SCC 648; ***Narayana Prabhu Venkateswara Praphu v. Narayana Prabhu Krishana Prabhu (Dead) by Lrs.,*** (1977) 2 SCC 181; and, ***Kalinga Mining Corpn. v. UOI & Ors.,*** (2013) 5 SCC 252, and on Order XXIII Rule 3A of the CPC.

56. The learned senior counsel for the defendant nos.1 and 2 further submits that the claim of the plaintiff that the mortgage was redeemed by the defendant no.1 from the rent received from the Suit Property from 1976 till the date of the redemption in 1981, is also false. Apart from there being no pleadings in this respect, it is the own case of the plaintiff in the plaint that the rent from 1975 to 1979 was received by late Sh.Ajit Singh (the original plaintiff) and was handed over to late Smt.Abnash Kaur. He submits that the original plaintiff had also asserted that till the death of late Smt. Abnash Kaur on 10.06.1976, the entire rental from the Suit Property was being received by late Smt. Abnash Kaur herself. He submits that as the mortgage was redeemed in 1981, as recorded in the order dated 08.05.1981 passed by this Court (**Ex. DW-1/45)**, it could not have been redeemed from the rentals of the Suit Property and, therefore, the plea taken by the plaintiff is false and liable to be rejected.

57. He submits that the original plaint had stated that the mortgage was redeemed from the income derived from the estate of late

Smt.Abnash Kaur, which is contradictory to the case that has now been contended by the plaintiff that the mortgage was redeemed from the rent received from the Suit Property.

58. The learned senior counsel for the defendant nos.1 and 2 submits that in his cross-examination, the present plaintiff (**PW-4**) has admitted that neither he nor Sh. Ajit Singh took any steps to redeem the mortgage or to pay the sum due to the defendant no.1. The only remedy now available to them is to file a suit for redemption of the mortgage along with the consequential relief of possession. However, since the same has not been filed till date, it is now barred by the law of limitation.

59. He further submits that under Article 58 of the Limitation Act, the right to obtain the declaration begins when the right to sue first accrues, which, in this case, was when the order dated 08.05.1981 was passed by the Division Bench of this Court in RFA(OS) No. 11/1971, titled ***Smt. Abnash Kaur through LRs. v. Smt. Sushila Daphtary and Anr.***, (**Ex. DW-1/45)**. He submits that this is not a case of usufructuary mortgages and the period of limitation as provided under Article 61 of the Limitation Act has, therefore, expired. In support, he places reliance on the Judgment of the Supreme Court in ***Singh Ram v. Sheo Ram,*** (2014) 9 SCC 185.

60. The learned senior counsel for the defendant nos.1 and 2 further submits that the plaintiff has also sought to impugn the status of the defendant no.1 as a lessee of the Suit Property. He submits that the Will dated 06.02.1973 (**Ex. PW-4/2**) left behind by late Smt. Abnash Kaur, which is the basis of the claim and the *locus* of the plaintiff to

sue, itself admits to the tenancy in favour of the defendant no.1. He submits that the plaintiff, while attempting to derive benefit from the said Will, cannot assert that the lease, which has been acknowledged therein, was a sham.

61. He submits that even otherwise, there have been several proceedings in which not only late Smt. Abnash Kaur, but also Sh. Ajit Singh, the original plaintiff, had admitted to the lease in favour of the defendant no.1.

62. He submits that even though the lease was admittedly in the knowledge of the original plaintiff, he did not file a Suit within the period of limitation to challenge the same. The Suit is, therefore, barred by limitation.

63. The learned senior counsel further submits that in terms of the Lease Deed dated 18.11.1958, the defendant no.1 is a statutory tenant under the DRC Act. He submits that since the present Suit is not based on the termination of the said Lease Deed, therefore, the case of eviction, which is now being setup by the plaintiff only during the arguments, cannot be accepted.

64. The learned senior counsel for the defendant nos.1 and 2 further submits that the reliance of the plaintiff on the alleged Certificate dated 27.09.1963 **(Ex.PW4/10),** to contend that the defendant no.1 had admitted that the said Lease Deed was a sham document, cannot be accepted. He submits that the defendant no.1 had denied executing the same and had even produced a Handwriting Expert, Sh. Deepak Jain (**DW-3**), who had opined that the said document does not bear the

signatures of the defendant no.1, whereas the plaintiff did not produce any evidence to prove the said document.

65. He submits that similarly, reliance cannot be placed on the terms and conditions of the alleged settlement dated 12.02.1991 (**Ex. PW-4/27**), alleged to have been addressed by the defendant no.1 to the original plaintiff, Sh.Ajit Singh. He submits that as Smt. Surjeet Kaur Gill did not enter the witness box despite repeated opportunities and her evidence was finally closed *vide* Order dated 20.08.2014, the said document, therefore, remained unproved by the plaintiff. On the other hand, the defendant no.1, through the evidence of Sh. Deepak Jain (**DW-3**), who opined that the signatures were not written by the defendant no.1, has proved that the said document was not executed by the defendant no.1.

66. The learned senior counsel also submits that the only evidence led by the plaintiff is that of the present plaintiff, Sh.Gurnir Singh Gill (**PW-2**), whose testimony is only hearsay.

67. He further submits that the plaintiff has not affixed proper court fee on the Suit. He submits that while the plaintiff has valued the movable and immovable assets of late Smt. Abnash Kaur at Rs.75 crores, he has affixed the Court Fee of only Rs.19.50. He submits that the claim of the plaintiff to be in constructive possession of the Suit Property, also cannot be accepted.

Analysis and findings:

68. I have considered the submissions made by the learned counsels for the parties.

69. As the Suit is based on the registered Will dated 06.02.1973 of late Smt. Abnash Kaur (**Ex. PW-4/2**), and since the said Will is not in dispute in the present Suit, at the outset, the contents thereof deserve to be noticed.

70. In the said Will, late Smt. Abnash Kaur states that she owns in her name, and in the name of her *benamidars*, several movable and immovable properties. Then, she goes on to refer to her shares in the Lord Krishna Sugar Mills Limited and also mentions the dispute with respect to the said shares. She also mentions inheriting 1/9th share of the estate of her late husband, Seth Shiv Prasad, and the dispute that she has with her step-sons regarding the same.

71. She then mentions the Suit Property, and states that the possession thereof is with the defendant no.1, who is her tenant under the Agreement/Lease Deed dated 18.11.1958 and is paying a rent of Rs.1,500/- per month *vide* the Amended Agreement dated 12.01.1964. She also mentions a charge created in favour of the defendant no.1 under the Agreement dated 18.11.1958, whereby she is liable to pay 50% of the amount spent by the defendant no.1 on the renovation of the said Suit Property, as and when the defendant no.1 vacates the premises.

72. She also mentions about her jewellery and also about a loan extended by her to M/s Srichand Vishandass.

73. She then bequeaths all her properties in favour of her son, Mr.Kamal Kishore; her brother, who was the original plaintiff, Sh.Ajit Singh; her two sisters, Smt.Adarsh Kaur Gill, the defendant no.1, and Smt.Surjit Kaur Gill, (the original defendant no.3 who was transposed

as a plaintiff *vide* Order dated 04.12.2000); her niece, the defendant no.2, Ms.Noorien Kaur Gill; and her nephew, who is the present plaintiff, Sh.Gurnir Singh Gill, in equal shares, with each having a 1/6th share in her estate.

74. She appointed the original plaintiff- Sh.Ajit Singh as the sole Executor and Administrator of her Will.

75. At this point, it is apposite to note that she had expressly stated that the Executor will first divide the properties that are not in litigation and thereafter, shall divide the properties against which litigation is pending, on the conclusion of such litigations.

76. As noted hereinabove, the original plaintiff- Sh.Ajit Singh had filed the present Suit as the Executor of the said Will of Smt.Abnash Kaur, and also in his position as a beneficiary thereunder, *inter alia* claiming a decree of partition of the estate of late Smt. Abnash Kaur.

77. In the present Suit, Sh.Ajit Singh has *inter alia* pleaded that the defendant no.1 had invested huge amounts, which came in her hands from the estate of late Smt. Abnash Kaur, in the business started by her. He has further pleaded that the defendant no.1 also invested the rental income from the Suit Property in the said business. He has claimed that one of the companies which had been started by the defendant no.1 in Delhi in or about 1985 is known as M/s Nina Garments (Pvt.) Ltd. He has claimed that the defendant no.1 has floated other companies as well by using the income from the estate of late Smt. Abnash Kaur. He has given the details of such estate in the form of a schedule annexed to the plaint by making following averments:

"63. That the entire estate of Smt. Abnash Kaur, which is in the hands of defendant Nos.1 and 2, or in the name of their nominees, is liable for partition as per the Will of Smt. Abnash Kaur. A Schedule of such properties in India (movable and immovable), as per the knowledge of the plaintiff is being fil the plaint.

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SCHEDULE

DETAILS 0F IMMOVABLE AND MOVABLE PROPERTIES BELONGING TO THE ESTATE OF SMT ABNASH KAUR OF WHICH THE PLAINTIFF IS PRESENTLY AWARE OF

(1) Bungalow No. 3, South End Road, New Delhi measuring 1.336 acresincluding all movable items fixed in the premises or lying therein;
(2) Private Limited Company known as "Nina Garments Pvt.Ltd. 194-A, Ramesh Market, Garhi, Amar Colony, New Delhi-110065" with all its immovable andmovable assets and the amounts lying in the banks, including the amounts lying in deposit in the said company in the names of defendants Nos 1 &2;
(3) Cash amounts lying in Saving Bank Account No.85057, Current Account (Number not known) and in N.R.I. Account in the name of defendant No.1 with Grindlays Bank, New Delhi and the amounts lying in deposit in the name of Nina Garments Pvt. Ltd. and of defendants Nos 1 & 2, including the amounts lying in Saving or Current Account of defendant No.1 (Account number not known) with Corporation Bank (Regional Branch), Connaught Place, New Delhi, including the amounts lying in accounts in the Saving and Current account of defendants Nos 1 & 2 (Accounts Numbers not known) in the United

Commercial Bank, Parliament Street, New Delhi;

(4) All jewellery lying in 3, South End Road, New Delhi, and in Lockers Nos 32-A, 99-A and 924-A in the name of defendant No.1 in United Commercial Bank, Parliament Street, New Delhi and in Lockers in other Banks hired by defendants Nos 1 & 2 (Lockers Numbers not known), including the precious jewellery lying in the said lockers;

(5) Apartment No. D-27, Green Park, New Delhi;

(6) Other movable and immovable properties purchased by defendants Nos 1 & 2 in India (particulars presently not known);

(7) All amounts lying in credit in the name of defendant No.1 in the account books of the Company "Sss International Pvt Ltd, Masjid Road, Bhogal, New Delhi", including shares standing in the name of defendantsNos 1 & 2, if any;

(8) Precious jewellery and other valuable items belonging to the estate of SmtAbnash Kaur, including the precious jewellery declared by defendant No.1 in her Wealth-Tax Returns under Amnesty Scheme in the asst years 1982-83 to 1986-87, and in her Wealth-Tax Returns in subsequent years."

Partial Partition:

78. Based on the contents of the Will dated 06.02.1973 of late Smt. Abnash Kaur, the pleadings in the plaint, the subsequent stand of the plaintiff as recorded in the Orders dated 09.05.2023 and 19.07.2023 of this Court and the Affidavit of the plaintiff dated 26.07.2023, the learned senior counsel for the defendant nos.1 and 2 has contended that by giving up the claims on the other properties left behind by late Smt. Abnash Kaur, which were forming part of her estate, as is claimed by the plaintiff, the present Suit now seeks only a partial

partition of the estate of late Smt.Abnash Kaur and, therefore, is not maintainable. As noted hereinabove, he has placed reliance on the Judgment of the Supreme Court in ***Kenchegowda*** (supra).

79. In ***Kenchegowda*** (supra), the Supreme Court has held that a Suit for partial partition, in absence of the inclusion of other joint family properties and impleadment of the other co-sharers, was not warranted in law. While reiterating the said principle, in ***B.R. Patil*** (supra), the Supreme Court has held that though the law looks with disfavour upon properties being partitioned partially, the principle that there cannot be a partial partition at all is not an absolute one. Placing reliance on *Mayne's 'Treatise on Hindu Law & Usage' 17th Edition, paragraph 487*, the Supreme Court has held that the rule against partial partition is not an inelastic rule, and a suit for partition may be confined to division of property which is available at the time for actual division and not merely for division of status. The exception to the rule would be where the property that has been omitted is not in possession of the coparceners and may consequently be deemed to be not really available for partition, or where a property is not admitted to be a joint property by all the parties to the Suit, and it is contended by some of them that the property belongs to an outsider. I may quote from the Judgment as under:

> *"**10.** This is the state of the pleading and evidence in support of the existence of the property other than what has been scheduled by the plaintiffs and for which partition is sought. It is true that the law looks with disfavor upon properties being partitioned partially. The principle that there cannot be a partial partition is not an absolute one. It*

admits of exceptions. In Mayne's 'Treatise on Hindu Law & Usage' 17th Edition, Paragraph 487, reads as follows:

> *"487. Partition suit should embrace all property - Every suit for a partition should ordinarily embrace all joint properties. But this is not an inelastic rule which admits circumstances of a particular case or the interests of justice so require. Such a suit, however, may be confined to a division of property which is available at the time for an actual division and not merely for a division of status. Ordinarily a suit for partial partition does not lie. But, a suit for partial partition will lie when the portion omitted is not in the possession of coparceners and may consequently be deemed not to be really available for partition, as for instance, where part of the family property is in in the possession of a mortgagee or lessee, or is an impartible Zamindari, or held jointly with strangers to the family who have no interest in the family partition. So also, partial partition by suit is allowed where different portions of property lie in different jurisdictions, or are out of British India. When an item of property is not admitted by all the parties to the suit to be their joint property and it is contended by some of them that it belongs to an outsider, then a suit for partition of joint property excluding such item does not become legally incompetent of any rule against partial partition."*

11. *In the facts of this case having noticed the state of the pleadings and the evidence, we are of the view that the interest of justice lies in rejecting the appellant's contention. The appellant has not been able to clearly establish the exact extent or identity of the property available by way of ancestral property. Despite claiming to having*

> *documents relating to the properties and admitting to having no difficulty to produce them, he does not produce them. He is unable to even give the boundaries. It is obvious that he does not claim to be in possession of the said properties even if it be as a co-owner on the basis that it is ancestral property. His evidence discloses that in reality and on the ground these properties could not be said to be actually available for the parties to the present suit to lay claims over them. Properties not in the possession of co-sharers/coparceners being omitted cannot result in a suit for the partition of the properties which are in their possession being rejected."*

80. The above exception was also noticed by a Division Bench of this Court in ***Radhey Shyam Bagla (Since Deceased) thr. LRs*** (supra), wherein it was further held that the bar against partial partition would not apply where the properties are not established to be joint in nature, that is, HUF or coparcenary assets, but are disputed or otherwise held commonly, and the exclusion of such properties would not be fatal to the maintainability of the proceedings.

81. A learned Single Judge of this Court applied the ratio of the above Judgment in ***Sardar Jarnail Singh & Anr.*** (supra), by holding as under:

> *"**7.** A Division Bench of this Court recently in Radhey Shyam Bagla v. Ratni Devi Kahnan, also faced with a plea of the suit for partition being bad for the reason of being for partial partition, held (i) that subject to exceptional circumstances, a suit instituted for partition should include all the joint family properties; (ii) the general principle is that a cosharer filing a suit for partition against the other co-sharers has to bring all the joint properties into the hotchpot, failing which a suit may be*

dismissed on the ground of partial partition as the proper equity in a suit for partition will not be possible if all joint properties are not brought into the hotchpot; (iii) the normal rule governing suits for partition is that it has to incorporate all partible coparcenary property and should implead all those entitled to a share; (iv) however this rule is not a rigid and an inflexible one; reliance was placed on Mst. HatesharKuer v. Sakaldeo Singh laying down that the rule aims for preventing multiplicity of legal proceedings which results if separate suits were to be instituted in respect of fragments of joint estates and that normally it is more convenient to institute one suit for partition of all the joint properties for equitable distribution and adjustment of accounts-however this being a rule dictated by consideration of practical convenience and equity, may justifiably be ignored when in a given case there are cogent grounds for departing from it; (v) however the said rule applies primarily to coparcenary property - where the parties are not coparceners but tenants in common, it makes a substantial difference in the applicability of the rule as no coparcener has a share in any particular property but there is no such basis for application of the rule to property which is held in common; (vi) a distinction has to be made between jointly or commonly held property and coparcenary property; and, vii) a suit for partition of a common property as distinct from joint property is not liable to dismissal on the ground that all the joint property in respect of which partition may have been sought have not been included.

8. *Applying the aforesaid law, I am of the opinion that the present suit for partition of property acquired by the parties hereto vide sale- deeds, in their own name is not bad for being for partial partition as the other properties which have not been included have been acquired by the parties to this suit, not by*

> *acquisition directly in their name, but by inheritance, jointly with others and which others have nothing to do with the property to which this suit pertains."*

82. From the above, it is evident that the rule against maintainability of a suit for partial partition applies only when partition is sought for HUF or coparcenary properties, and not where the parties claim their right as tenants-in-common, because while all coparcenary properties form a part of the common hotchpot and no coparcener has a share in any particular joint family property, however, for commonly held properties there is no such basis of application of the rule barring partial partition. At this point, it would be apposite to ascertain the status of parties to the present Suit. The learned senior counsel for the defendant nos. 1 and 2 has contended that the parties to the present Suit have acquired the interest in the Suit Property as joint tenants and not tenants-in-common.

83. The Supreme Court in ***Suresh Kumar Kohli*** (supra), while explaining the distinction between joint tenancy and tenancy-in-common, has held as under:

> *"14. The issue at hand is what would be the status of the succeeding legal representatives after the death of the statutory tenant. In this regard, it would be worthy to discuss the two capacities, viz. tenancy-in-common and joint tenancy, and the rights that one holds in these two different capacities. Fundamentally, the concepts of joint tenancy and tenancy-in-common are different and distinct in form and substance. The incidents regarding the cotenancy and joint tenancy are different : joint tenants have unity of title, unity of commencement of title, unity of interest, unity*

> *of equal shares in the joint estate, unity of possession and right of survivorship.*
> *15. Tenancy-in-common is a different concept. There is unity of possession but no unity of title, i.e. the interests are differently held and each co-tenant has different shares over the estate. Thus, the tenancy rights, being proprietary rights, by applying the principle of inheritance, the shares of heirs are different and ownership of leasehold rights would be confined to the respective shares of each heir and none will have title to the entire leasehold property. Therefore, the estate shall be divided among the co-tenants and each tenant in common has an estate in the whole of single tenancy. Consequently, the privity exists between the landlord and the tenant in common in respect of such estate."*

84. This distinction was recently highlighted by the Division Bench of this Court in ***Tarun K. Vohra*** (supra), wherein the Division Bench considered the effect of Section 19 and Section 30 of the HSA and held that the property devolving on the heirs of a Hindu, whether or not he/she dies intestate, devolves on the heirs as tenants-in-common and not as joint tenants. The Division Bench also opined that the question as to whether the property devolved on the parties in equal shares by virtue of a Will or on account of the deceased dying intestate is inconsequential to determine the nature of the properties in the hands of the parties. It was held that the rule against partial partition is applicable in respect of joint family properties or coparcenary properties and not where the properties are held by the parties as tenants-in-common. I may quote from the Judgment as under:

> "*18. In the present case, there is no dispute that the Suit Property is a self-acquired property of the parents of the parties. The*

question whether it devolved on the parties in equal shares by virtue of the Will or on account of Late Smt. Primla Vohra dying intestate is inconsequential to determine the nature of the properties in the hands of the parties.

*19. It is relevant to refer to Section 19 and Section 30 of the Hindu Succession Act, 1956 (hereafter '**the Act**'). The same are set out below:*

> *"**19. Mode of succession of two or more heirs**.- If two or more heirs succeed together to the property of an intestate, they shall take the property,-*
> *(a) save as otherwise expressly provided in this Act, per capita and not per stirpes; and*
> *(b) as tenants-in-common and not as joint tenants.*
> ***30. Testamentary succession.**- Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so [disposed of by him or by her], in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus."*

20. A conjoint reading of Sections 19 and 30 of the Act makes it amply clear that the property devolving on the heirs of a Hindu whether he/ she dies intestate, devolves on them as tenants-in-common and not as joint tenants.

21. The question whether the heirs of a deceased tenant inherit the statutory tenancy as tenants-in-common or as joint tenants has been a subject matter of much debate. In H.C. Pandey v. G.C. Paul, the Supreme Court held as under:

> *"4. It is now well settled that on the death of the original tenant, subject to any provision to the contrary either negativing or limiting the succession,*

> *the tenancy rights devolve on the heirs of the deceased tenant. The incidence of the tenancy are the same as those enjoyed by the original tenant. It is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable thereof. That is the position as between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint tenants...."*

22. In a later decision in Mst. Surayya Begum v. Mohd. Usman, the Supreme Court clarified as under:

> *"8. So far as Section 19 of the Hindu Succession Act, 1956, is concerned, when it directs that the heirs of a Hindu dying intestate shall take his property as tenants-in-common, it is dealing with the rights of the heirs inter se amongst them, and not with their relationship with a stranger having a superior or distinctly separate right therein. The relationship between the stranger and the heirs of a deceased tenant is not the subject matter of the section...."*

23. In case of a statutory tenancy, the same devolves on the heirs as a joint tenancy vis-à-vis the landlord. However, as explained by the Supreme Court in Mst. Surayya Begum v. Mohd. Usman inter se the heirs, inherit the property of the predecessor as tenants-in-common. In the present case, since there is no dispute that the Suit Property is a self-acquired property and had devolved on the parties in equal shares, the decision of the learned Single Judge to pass a preliminary decree and set down the matter for passing a final decree on the aforesaid basis cannot be faulted.

24. In ***Kenchegowda (Since Deceased) by LRs v. Siddegowda Alias Motegowda****, the Supreme*

Court had set out the rule in respect of maintainability of suits for partial partition as under:

> *"16....Even otherwise, a suit for partial partition in the absence of the inclusion of other joint family properties and the impleadment of the other co-sharers was not warranted in law."*

25. The aforesaid decision was noted by the Division Bench of this Court in Radhey Shyam Bagla (Since Deceased) through LRs v. Smt. Ratni Devi Kahnani (Since Deceased) through Lrs. In the said case, this Court also noticed the decisions of the Karnataka High Court in Sri Tukaram v. Sri Sambhaji as well as the decision of the Calcutta High Court in Satchidananda Samanta v. Ranjan Kumar Basu wherein, the principle was accepted that, in a suit for partition of shares of members of a joint family, it is necessary to bring all the joint properties into the hotchpot failing which, the suit would be for a partial partition, which is not maintainable. However, it is necessary to note that in Mst. Hateshar Kuer v. Sakaldeo Singh, the Supreme Court had observed as under:

> *"The rule requiring inclusion of the entire joint estate in a suit for partition is not a rigid and in elastic rule which can admit of no exception. This rule aims at preventing multiplicity of legal proceedings which must result if separate suits were to be instituted in respect of fragments of joint estates. Normally speaking, it is more convenient to institute one suit for partition of all the joint properties and implead all the interested co-sharers so that all questions relating to the share of the various co-owners and the equitable distribution and adjustment of accounts can be finally determined. But, this being a rule dictated by consideration of practical*

> *convenience and equity may justifiably be ignored when, in a given case there are cogent grounds for departing from it."*

26. Thus, the suit for partial partition would not be proceeded with unless and until all other joint properties are brought into the hotchpot and all co-sharers are impleaded as parties. However, the said rule is applicable in respect of joint family properties or coparcenary properties and not where the properties are held by the parties as tenants-in-common. This principle was noticed by the Bombay High Court in Sitaram Vinayak Hasabnis v. Narayan ShankarraoHasabnis, where it was held as under:

> *"3. The rule is subject to exceptions arising out of convenience and from other causes. But it applies primarily to coparcenary property. The parties in this case are not coparceners but tenants-in-common; and in our view that may well make a substantial difference in the applicability of the rule.*
>
> *** *** ***
>
> *.....We have not been shown any direct authority, that a suit for partition of common property, not joint property, is liable to dismissal on the ground that all the joint property in respect of which might have been brought, has not been included. Shortly, we have not been shown that the objection, founded on what is usually described as the plea of partial partition is available when a suit for division of common property, not joint property is in question."*

85. Applying the above principles to the facts of the present case, I find no merit in the objection raised by the learned senior counsel for the defendant nos.1 and 2. In the present case, the Suit prays for partition of the Suit Property, which is not HUF or coparcenary in

nature, but rather, is in the nature of separate/self-acquired property of Smt. Abnash Kaur and has been bequeathed by her in favour of the six beneficiaries under her Will dated 06.02.1973 (**Ex. PW-4/2**). The nature of the Suit Property being the separate/self-acquired property of Smt. Abnash Kaur is not disputed by any of the parties to the Suit. Therefore, the rule of bar against partial partition would not be applicable to the facts of this case.

86. As far as the other properties, which have been bequeathed to the parties under the said Will are concerned, the Will itself records that the same are in dispute, particularly with the step-sons of late Smt. Abnash Kaur. Since it is not the case of the defendant nos.1 and 2 that the other properties, apart from the Suit Property, are available for partition, therefore, they cannot claim the rigid application of the rule against partial partition. In the facts of the present case, clearly these other assets are not available to the parties for partition and, therefore, it cannot be said that the present Suit is not maintainable on the ground that it seeks partial partition of the estate of late Smt. Abnash Kaur or that it excludes from actual partition the other assets of late Smt. Abnash Kaur.

87. That apart, the original plaintiff had filed the present Suit claiming therein that the defendant no.1 had started a business from the estate of late Smt. Abnash Kaur, and had also acquired several assets by investing the income from the estate of late Smt. Abnash Kaur. In her written statement, the defendant no.1 denied these assertions of the plaintiff, and contended as under:

"*38. Contents of Paragraph 38 of the plaint are wrong and are denied. Abnash Kaur left no estate except the suit property. All her jewellery and cash had been misappropriated by the Plaintiff who, having become insolvent in 1958-59, basically spent his time frittering away the assets of Abnash Kaur and thereby reducing her to a state of penury. As stated above Abnash Kaur could not pay the agreed rent of 1400/- p.m. and it was got reduced to Rs. 1000/- p.m. from the Court of Rent Controller, Delhi.*

Abnash Kaur eventually became dependent upon answering defendant whose businesses alongwith her sister defendant no.3 herein were flourishing by the this time.

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61. Contents of Paragraph 61 of the plaint are wrong and are denied. There were no positive assets of Abnash Kaur. She died in debt. There were several decrees against her when she died. The Plaintiff had misappropriated all her jewellery, and assets including cash. The assets that the answering defendant holds at present are what she has earned from her businesses. In fact it was she who maintained Abnash Kaur during the latter's life time. This the answering defendant did out of love and affection for her sister.

61A. Contents of Paragraph 61A of the plaint are wrong and are denied. The allegations are vague and incorrect and the legal propositions are unsound and deserve immediate dismissal.

*** *** ***

63. Contents of Paragraph 63 of the Plaint are wrong and are denied. There is no positive estate left by Abnash Kaur as falsely alleged by the Plaintiff. The Estate Duty Return of Abnash Kaur is clear on this point."

88. It is, therefore, the own case of the defendant no.1 that apart from the Suit Property, there is no other asset of late Smt. Abnash

Kaur which is available to be partitioned. She has also denied the schedule attached to the plaint, which contains the list of properties allegedly forming the estate of late Smt. Abnash Kaur. She is now, therefore, estopped from contending that there were other assets left behind by late Smt. Abnash Kaur which deserve to be partitioned, and that in absence of the relief whereof, the present Suit is not maintainable.

The Will of late Sh.Ajit Singh:

89. The learned senior counsel for the defendant nos.1 and 2 has contended that by the Order dated 04.12.2000, Smt.Surjit Kaur Gill was transposed as a plaintiff in place of the original plaintiff- Sh. Ajit Singh, based on a purported Will dated 21.07.1997 (**Ex.PW-2/1**) executed by him, whereunder she had been appointed as an Executor/Administrator. This Court, however, also clarified that if the said Will is found to be not genuine, then the defendant nos.1 and 2 would be at liberty to agitate the matter before this Court. The learned senior counsel for the defendant nos.1 and 2 has, therefore, submitted that as Smt.Surjit Kaur Gill and the present plaintiff- Sh.Gurnir Singh Gill, have not led any evidence to prove the said Will, in terms of Section 63 of the ISA and Section 68 of the Evidence Act, therefore, the Will remains unproved and the Suit is liable to be dismissed.

90. While there is no doubt on the proposition that a Will must be proved in accordance with the above provisions of the ISA and the Evidence Act, and by adducing in evidence at least one attesting witness to the Will, who would not only testify to the valid execution

of the Will but also to the sound and disposing state of mind of the testator, and that the propounder of a Will must also remove any suspicion on the due execution of the Will, however, at the same time, it must also be kept in mind that in Delhi there is no requirement for mandatorily obtaining a Probate/Letter of Administration of a Will. Reference in this regard may be made to the Judgment of the Supreme Court in ***Kanta Yadav*** (supra).

91. In the present case, there is no issue framed by this Court on the genuineness of the Will dated 21.07.1997 (**Ex.PW-2/1**) of late Sh. Ajit Singh. In fact, the learned senior counsel for the defendant nos.1 and 2 has been unable to show to this Court if the Will of late Sh. Ajit Singh was ever disputed by the said defendants.

92. Once there is no dispute raised to the said Will, it cannot be said, at this stage, that the Suit is not maintainable only because the plaintiff failed to lead any evidence to prove the Will dated 21.07.1997 (**Ex.PW-2/1**) of late Sh. Ajit Singh. There was, in fact, no necessity for the plaintiff to have led any such evidence in the facts of the present case.

Non-impleadment of necessary parties:

93. The learned senior counsel for the defendant nos.1 and 2 has further contended that there were other beneficiaries, namely, Sh.Kuldip Singh, Sh.Sanjay Singh, and Sh.Jasjeet Singh under the Will of late Sh.Ajit Singh. He has also contended that Smt.Surjit Kaur Gill, in her application seeking transposition as a plaintiff, being I.A. No.12533/2000, had herself disclosed that Sh.Ajit Singh had left

behind two legal heirs, namely, Sh.Sanjay Singh and Sh.Jasjeet Singh, who were his adopted sons. He also submits that as on the death of late Smt.Surjit Kaur Gill, the present plaintiff, Sh.Gurnir Singh Gill, did not seek his substitution as an Executor of the alleged Will of Sh.Ajit Singh, therefore, on both counts the necessary parties are not on record of the Suit.

94. I again find no merit in the said contention. The Supreme Court in the case of ***Shivshankara & Anr. v. H.P. Vedavyasa Char***, 2023 SCC OnLine SC 358, while considering similar facts, has held that the non-impleadment of all legal representatives would not result in the abatement of the Suit if the estate of the deceased is substantially represented by other parties to the Suit. I may quote from the said Judgment as under:

> *"**35.** As noticed earlier, the appellants have also contended that the suit ought to have been held as abated against all the defendants owing to non-substitution of all the legal representatives of the deceased defendant No. 3 upon his death. This contention is bereft of any basis and merits and was rightly repelled by the courts below. In that regard it is to be noted that the first appellant and deceased second appellant as also their father Hanumaiah were all arrayed in the suit as defendants and they were jointly defending the suit. Upon the death of original third defendant viz., Hanumaiah the original defendants No. 1 and 2, who are sons of the original defendant No. 3 fully and substantially representing the joint interest contested the suit and, thereafter, after suffering an adverse judgment and decree in the suit diligently preferred the appeal before the High Court which ultimately culminated in the impugned judgment and decree. Even*

thereafter, obviously they are diligently prosecuting the joint interest, even if the contention of joint interest is taken as correct, by filing the captioned appeal.

36. *In the contextual situation the following decisions assumes relevance. The decision in Bhurey Khan v. Yaseen Khan (Dead) By LRs.*9 *was referred to in the impugned judgment by the High Court to reject the aforesaid contention of the appellants therein viz. original defendant Nos. 1 and 2. In paragraph 4 of the decision in Bhurey Khan's case, this Court held thus:—*

> *"……the estate of the deceased was thus sufficiently represented. If the appellant would not have filed any application to bring on record the daughters and the widow of the deceased the appeal would not have abated under Order 22 Rule 4 of the Code of Civil Procedure as held by this Court in Mahabir Prasad v. Jage Ram [(1971) 1 SCC 265 : AIR 1971 SC 742]. The position, in our opinion, would not be worse where an application was made for bringing on record other legal representatives but that was dismissed for one or the other reason. Since the estate of the deceased was represented the appeal could not have been abated."*

*37. In the decision in State of Andhra Pradesh through Principal Secretary v. Pratap Karan*10*, this Court held:—*

> *"40. In the instant case, the plaintiffs joined together and filed the suit for rectification of the revenue record by incorporating their names as the owners and possessors in respect of the suit land on the ground inter alia that after the death of their predecessor-in-title, who was admittedly the pattadar and khatadar, the plaintiffs succeeded the estate as sharers being the sons of khatadar. Indisputably, therefore, all the plaintiffs had equal shares in the suit property left by their predecessors.*

Hence, in the event of death of any of the plaintiffs, the estate is fully and substantially represented by the other sharers as owners of the suit property. Therefore, by reason of non-substitution of the legal representative(s) of the deceased plaintiffs, who died during the pendency of the appeal in the High Court, entire appeal shall not stand abated. Remaining sharers, having definite shares in the estate of the deceased, shall be entitled to proceed with the appeal without the appeal having been abated. We, therefore, do not find any reason to agree with the submission made by the learned counsel appearing for the appellants."

38. <u>We are of the considered view that the same analogy is applicable in a case where even in the event of death of one of the defendants, when the estate/interest was being fully and substantially represented in the suit jointly by the other defendants along with deceased defendant and when they are also his legal representatives. In such cases, by reason of non-impleadment of all other legal heirs consequential to the death of the said defendant, the defendants could not be heard to contend that the suit should stand abated on account of non-substitution of all the other legal representatives of the deceased defendant.</u> *In this case, it is to be noted that along with the deceased 3rd defendant the original defendant Nos. 1 and 2 were jointly defending their joint interest. Hence, applying the ratio of the aforesaid decision and taking into account the fact that the appellants/the original defendants No. 1 and 2 despite the death of original defendant No. 3 defended the suit and preferred and prosecuted the first appeal. Upon the death of the second appellant the joint interest is being fully and substantially taken forward in this proceeding as well by the first appellant along with the substituted legal representatives of the*

> *deceased second appellant, we do not find any reason to disagree with the conclusions and findings of the courts below for rejecting the contention that suit ought to have held abated owing to the non-substitution of all the legal heirs of deceased third defendant against all defendants. For the same reason, the contention that the suit was bad for non-joinder of necessary parties of all his legal heirs/representatives also has to fail."*
>
> *(Emphasis Supplied)*

95. In the present case, in his Will dated 21.07.1997 (**Ex.PW-2/1**), late Sh.Ajit Singh had appointed Smt.Surjit Kaur Gill, and in the event of her demise, Sh.Gurnir Singh Gill, as the Executor and Administrator of his Will. Though, there were other beneficiaries under the said Will, late Smt.Surjit Kaur Gill and Sh.Gurnir Singh Gill were to act as the Executor of the said Will. Furthermore, the interests of Smt.Surjit Kaur Gill and Sh.Gurnir Singh Gill were not adverse to that of late Sh.Ajit Singh, and the estate of late Sh.Ajit Singh was adequately represented by Smt.Surjit Kaur Gill and Sh.Gurnir Singh Gill, being the executors of his Will. Therefore, the Suit cannot abate merely for non-impleadment of all legal heirs of late Sh.Ajit Singh.

96. Therefore, I find no merit in the objection raised by the learned senior counsel for the defendant nos.1 and 2 based on the non-impleadment of all the legal heirs of late Sh.Ajit Singh on his demise.

Non-impleadment of the legal heirs of late Sh.Kamal Kishore Bindal (original defendant no.5):

97. The learned senior counsel for the defendant nos.1 and 2 submits that, admittedly, as per the Will dated 06.02.1973 (**Ex.PW-**

4/2), Sh.Kamal Kishore Bindal had 1/6th share in the Suit Property. Sh.Kamal Kishore Bindal passed away intestate on 15.12.1995. Placing reliance on Section 8(b) read with Section 9 read with Class II of the Schedule to the HSA, he states that Sh.Kamal Kishore Bindal did not have any Class I legal heirs, and as his half-brothers would fall under Serial II of the Class II heirs, therefore, they will inheret his estate in precedence over the brothers and sisters of his mother, who are the parties in the present Suit, and who fall under Serial IX of the Class II heirs in the Schedule to the HSA. Relying on Section 3(1)(e)(ii), he submits that the half-brothers would not be related to Sh.Kamal Kishore Bindal by uterine blood as they are not related to each other through a common ancestress. He submits that in spite of the same, upon the death of Sh.Kamal Kishore Bindal, an application, being I.A. No.2816/1996, was filed by the original plaintiff, stating that as all the legal representatives of late Sh.Kamal Kishore Bindal are on record and are already impleaded as parties to the Suit, therefore, there is no necessity to bring his legal representatives on record. Based on such assertion, *vide* Order dated 25.07.2000, the defendant no.5 was deleted from the array of parties by stating that all his legal representatives are on record. The learned senior counsel for the defendant nos. 1 and 2 claims that the said assertion was deliberately made by the plaintiff and that the step-sons of late Smt. Abnash Kaur should have been impleaded as legal representatives of the estate of late Sh.Kamal Kishore Bindal.

98. Placing reliance on the Judgments in ***Kenchegowda*** (supra) and ***Hari Om Sharma*** (supra), he submits that a decree of partition in absence of all coparceners/co-sharers cannot be passed.

99. I have considered the submission made.

100. While there cannot be any dispute with the legal proposition urged by the learned senior counsel for the defendant nos.1 and 2, however, at the same time, based on the said submission, the Suit cannot be held to be not maintainable. It is not the case of the defendant nos.1 and 2 that the defendant nos.1 and 2 had ever opposed the application filed by the plaintiff wherein it had been claimed that Sh.Kamal Kishore Bindal had left behind only the parties to the Suit as his legal heirs, and it was based on such assertion, in fact, that this Court disposed of the said application *vide* Order dated 25.07.2000. The objection has been raised for the first time only during the oral submissions of the learned senior counsel for the defendant nos.1 and 2. There is no pleading to the said effect in the written statement or even thereafter. There is also no issue framed in that regard.

101. The Supreme Court in ***Dolai Maliko*** (supra), while observing that the respondents therein had not objected to the fact that certain legal representatives of the deceased had not been impleaded and that such objection was only raised at a belated stage, as is the case herein, has held that the mere fact that the legal representatives of a party to the Suit are not impleaded because of some over-sight or doubt itself will not lead to the abatement of the Suit. I may reproduce the relevant paragraphs of the said Judgment herein-below:

*"5.**In the present case there is no question of any fraud or collusion; nor is there anything to show that there had not been a fair or real trial, nor can it be said that against the absent heir there was a special case which was not and could not be tried in the proceeding in his absence. It may also be noticed that the respondents themselves did not object in the Court of the Subordinate Judge that some of the heirs of deceased Dolai had been left out and the case proceeded there as if the estate of Dolai deceased was represented in full by the heirs brought on record**. It was only in the High Court that it was discovered that Dolai had left three other heirs who had not been brought on the record. In the circumstances we are of opinion that the estate of Dolai was fully represented by the heirs who had been brought on the record in the Subordinate Judge's court and that these heirs represented the absent heirs also who would be equally bound by the result, and there is no reason to hold that the appeal before the Subordinate Judge had abated on that ground.*

***6.** We may in this connection refer to certain cases where a similar view has been taken. In Abdul Rahman v. Shahab-ud-Din [ILR (1920) 1 Lah 481] the appellant had died and only his sons were brought on the record and not his widow and daughters, though the appellant was a Mohammadan. It was held that as the heirs who had applied for being brought on record as heirs and legal representatives of the deceased appellant bona fide believed that they were the sole heirs and legal representatives of the deceased, the appeal did not abate notwithstanding that in Mohammadan law other persons would be co-heirs of the deceased.*

***7.** In Mohd. Zafaryab Khan v. Abdul Razzaq [ILR (1928) L All 857] it was held that "when by an order which has become final, a certain person's name has been brought on to the record of an appeal as the legal representative of the deceased appellant, it is not open to the*

respondent to urge that the appeal has abated because some other heirs have been left out".

8. *In Ram Charan v. Bansidhar [ILR (1942) All 671] the sole appellant had died leaving two daughters. One of his daughters was brought on record as his legal representative but not the other. It was held that the substitution of one of the daughters as legal representative of the deceased must be deemed to have been for the benefit of the entire inheritance which came into being on his death, and the entire estate was represented by her and there was no abatement of any part of it.*

9. *In Babuie Shanti Devi v. Khodai Prasad Singh [AIR (1942) Patna 340] on the death of the plaintiff in a suit to enforce a mortgage his sons were brought on record but not his widow who had herself filed a petition stating that she was not in possession of the properties of the deceased plaintiff nor did she desire any interest in the family properties, it was held that the failure to bring the widow on the record was a mere technical defect and the suit did not abate.*

10. *In IshwarlalLaxmichand Patel v. Kuber Mohan Lawar [AIR (1943) Bom 457] on the death of the appellant, his son was brought on record as heir on his application and the widow who also was an heir was left out, it was held that it was proper that both the son and the widow should have applied for being brought on the record but that the appeal did not abate merely because the widow had not applied as the estate was fully represented by the son.*

11. We are of opinion that these cases have been correctly decided and even where the plaintiff or the appellant has died and all his heirs have not been brought on the record because of oversight or because of some doubt as to who are his heirs, the suit or the appeal, as the case may be, does not abate and the heirs brought on the record fully represent the estate unless there are

circumstances like fraud or collusion to which we have already referred above."

(Emphasis Supplied)

102. In the present case, there is no dispute that the step-sons of late Smt. Abnash Kaur were claiming a right in the Suit Property adverse to that of late Smt. Abnash Kaur. They had filed a Civil Suit against late Smt. Abnash Kaur, which was ultimately dismissed by this Court. From the Will dated 21.07.1997 of late Sh.Ajit Singh (**Ex.PW-2/1**), it appears that the step-sons of late Smt. Abnash Kaur had, in fact, also started claiming that late Smt. Abnash Kaur was not legally wedded to late Seth Shiv Prasad. Therefore, in absence of any objection from the defendant nos.1 and 2 at the relevant time, and in view of the above peculiar facts wherein the step-sons are, in fact, claiming an interest in the Suit Property which is adverse not only to the plaintiff but also to the defendant nos.1 and 2 and to Sh.Kamal Kishore Bindal, it cannot be said that the plaintiff wanted to steal a march over the alleged legal heirs of Sh.Kamal Kishore Bindal or on the defendant nos. 1 and 2 by not impleading them in the Suit. If at all, the lapse to not implead them at the death of Sh.Kamal Kishore Bindal appears to be genuine, *bona fide*, and not lacking any due diligence.

103. In view of the above, on the death of Sh.Kamal Kishore Bindal, his share in the Suit Property would devolve upon his half-brothers as they fall under Serial II of the Class 2 legal heirs in the Schedule of the HSA. However, the Suit cannot fail due to non-impleadment of the half-brothers of Sh.Kamal Kishore Bindal as his legal heirs.

104. At this stage, it may also be relevant to note that the defendant no.1 has placed on record two Agreements to Sell dated 08.04.1993 **(Ex.DW1/33 and Ex.DW1/35)** purpotedly executed by late Sh.Kamal Kishore Bindal transferring his rights in the Suit Property in favour of defendant nos.1 and 2. As noted hereinabove, the learned counsel for the plaintiff has submitted that not only are there no pleadings in the written statement filed by the defendant nos.1 and 2 regarding any such Agreements to Sell, but also the defendant nos.1 and 2 have not proved the said documents or any consideration passing to late Shri Kamal Kishore Bindal under the same.

105. This Court need not adjudicate on the above issues as no right is being claimed by the defendant no.1 or defendant no.2 in the present Suit based on these Agreements and they are not the subject matter of the present Suit. No issue in this regard was framed or pressed by the defendant no.1 and/or the defendant no.2. In fact, the learned counsel for the defendant nos.1 and 2 did not make any submissions relying upon the said Agreements.

Whether the Suit seeking partition of the Suit Property without praying for a decree of redemption of the mortgage is maintainable?:

106. As noted hereinabove, it is the case of the defendant no.1 that in terms of the Judgment and Compromise Decree dated 20.02.1978 (**Ex.PW-4/DX8**) passed by a Division Bench of this Court in RFA(OS) No. 11/1971, titled ***Smt. Abnash Kaur through LRs. v. Smt. Sushila Daphtary and Anr.***, the defendant no.1 was subrogated

to the rights of the original mortgagee, that is, the Daphtarys. On the other hand, it is the case of the plaintiff that in terms of the above-mentioned Decree, the defendant no.1 was only given the right to recover the full decretal amount from the other legal heirs of late Smt. Abnash Kaur and, in law, the defendant no.1 cannot claim her rights as a subrogatee as understood under Section 92 of the TP Act.

107. To appreciate the above contentions, a brief recapitulation of the facts leading to the Compromise Decree dated 20.02.1978 passed in RFA(OS)11/1971, titled ***Smt. Abnash Kaur through LRs. v. Smt. Sushila Daphtary and Anr***.(**Ex. PW-4/DX8**) by a Division Bench of this Court in the above referred appeal, would need to be made.

108. It is not disputed that late Smt. Abnash Kaur had created a mortgage in favour of the Daphtarys against a loan of Rs.1,98,000/-, *vide* Mortgage Deeds dated 19.01.1959 (**Ex. DW-1/42**) and 24.01.1959 (**Ex. DW-1/43**), and the Daphtarys had obtained a preliminary Decree dated 29.01.1971, passed by a learned Single Judge of this Court in Suit No. 282/1967, titled ***Shrimati Sushila Daphtary & Anr. v. Shrimati Abnash Kaur & Ors.*** (**Ex. PW-4/16**), whereby late Smt. Abnash Kaur was directed to pay the Daphtarys a sum of Rs.1,98,000/- as principal amount along with interest thereon at the rate of 7.5% per annum from the date of the mortgage till the date of its realization. Late Smt. Abnash Kaur was allowed three months' time to redeem the said mortgage and in the event of default, the Daphtarys were held entitled to apply to the Court for a final Decree for the sale of the mortgaged property, that is, the Suit Property.

109. In an appeal filed by the legal heirs of late Smt. Abnash Kaur, that is, the parties herein, being RFA(OS) 11/1971, titled ***Smt. Abnash Kaur through LRs. v. Smt. Sushila Daphtary and Anr***, a Division Bench of this Court, while confirming the Decree passed by the learned Single Judge, further by a Decree dated 20.02.1978, held that the same will be deemed to be satisfied, if the appellants therein, that is, the legal heirs of late Smt. Abnash Kaur under the Will dated 06.02.1973, pay a sum of Rs.3,60,000/- to the Daphtarys in accordance with the schedule mentioned therein. In the said Decree, it was further recorded as under:-

> *"3. In order to avoid any possible disputes amongst the appellants themselves, it is recorded that all the other appellants will be bound to contribute to any sums that may be paid by Mrs. Adarsh Kaur Gill pursuant to this compromise, and that after payment she will be entitled to recover their proportionate share from the other appellants.*
>
> *4. If the compromise is carried out, then on payment of the amounts hereby agreed to be paid, the mortgage deeds and title deeds shall be returned to Mrs. Adarsh Kaur Gill, and the mortgaged property shall be deemed to have been redeemed by her and she will be subrogated to the rights of the mortgagees, and shall be entitled to recover the full decretal amount from the other appellants as if this compromise had not been made and the appeal had been dismissed, with interest accrued due till the date of payment by them.*
>
> *5. Nothing in paragraphs 3 and 4 above shall in any manner affect the rights of respondents Nos.1 and 2 under this compromise, or otherwise prejudice them in any manner whatsoever, and the said two paragraphs had been inserted herein solely for the purpose of the appellants.*

> *6. It is hereby recorded that the appellants other than Mrs. Adarsh Kaur Gill have also agreed to be bound by all the terms and conditions of the compromise herein recorded."*

110. It is not disputed that the defendant no.1 paid the entire amount in terms of the above Decree to the Daphtarys, and based on the same, a Division Bench of this Court passed an Order dated 08.05.1981 (**Ex. DW-1/45)** in the above appeal, which reads as under:-

> *"This application is not opposed. Mr. Chawla says that the decretal amount has been paid to his clients.*
> *Accordingly, satisfaction of the decree is recorded.*
> *The two mortgage deeds and the other title deeds mentioned in paragraph 11(11) of this application will now be delivered to the applicant by the Deputy Registrar on 20th May 1981, on which date this matter will be listed before him.*
> *The applicant will be subrogated to the rights of the mortgagees in accordance with the terms of the compromise decree dated 20th February 1978.*
> *This application is disposed of accordingly. There will be no order as to costs."*

111. It is on the basis of the above orders, that the defendant no.1 claims her rights as a subrogatee, while the plaintiff claims that she is only entitled to recover the amount paid by her to the Daphtarys from the other legal heirs of late Smt. Abnash Kaur in proportion to their shares in the Suit Property.

112. At this point, I find it necessary to refer to Section 92 of the TP Act, which defines the rights of a subrogatee of a mortgage. It reads as under:-

> *"**92. Subrogation.**—Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.*
> *The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.*
> *A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.*
> *Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full."*

113. In ***Krishna Pillai Rajasekharan Nair (dead) by LRs.*** (supra), the Supreme Court, while considering an almost similar factual situation, framed the question of law as under:-

> *"**5.** At the very outset, it may be stated that the learned counsel for Defendant 1 submitted that the parties in this case were of Sripandarachetti Cult of Kerala, governed by Hindu Mitakshara law and as there had been a partition in family before 1941, the year in which the suit for redemption was filed, it cannot be said that Defendant 1 while redeeming the property alone was acting on behalf of the family or the joint family funds were utilised for payment of mortgage money. In our opinion, this controversy is wholly besides the point. Whether there was a partition in the family and whether Schedule*

'C' property was also partitioned is not of any consequence for the present controversy inasmuch as we find that so far as the Schedule 'C' property is concerned it was subject to mortgage and the plaintiff and Defendant 1 both had shares therein. They may be co-tenants or tenants-in-common but that would not make any difference so far as the status of the plaintiff and Defendant 1 being co-mortgagors qua the suit property is concerned. We proceed on this factual premise that out of the co-mortgagors, more than one, and all having entitlement to a share each in the suit property, one of them had redeemed the property by paying the entire mortgaged money and had singularly entered into possession over the entire mortgaged property. Consequent upon redemption, it is the other co-owner of the property i.e. the plaintiff, who is now asking for the partition of the property commensurate with his share. We have to see what are the rights and obligations of the parties qua each other and whether a suit for partition filed by the plaintiff was maintainable. That would determine the question of limitation as well."

(Emphasis Supplied)

114. The Supreme Court held that such a situation would be covered by the first part of Section 92 of the TP Act. It held as under:-

***"9.** A bare reading of the provision shows that the first para of this section deals with subrogation by operation of law. Subrogation by agreement is dealt with in the third para. The present one is not a case of subrogation by agreement. The relevant provision applicable would, therefore, be as contained in first para of Section 92. The provision statutorily incorporates the long-standing and settled rule of equity which has been held to be applicable even in such territories where the Transfer of Property Act does not apply."*

115. The Supreme Court also relied upon its earlier Judgment in ***Ganeshi Lal v. Joti Pershad***, (1952) 2 SCC 373, which had repelled the contention of the defendant no.1 therein that a Suit for partition and possession was not maintainable without bringing a suit for redemption. The Supreme Court discussed the said Judgment in the following words:-

> *"**10.** In the early case of Hodgson v. Shaw [Hodgson v. Shaw, (1834) 3 My & K 183 : 40 ER 70] Lord Brougham said : (ER p. 73)*
>
> > *"... The rule here is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement."*
> >
> > *(emphasis supplied)*
>
> *I have italicised the word "reimbursement". Sheldon in his well-known treatise on Subrogation has got the following passage in Section 13 of the 2nd Edn.:*
>
> > *"**13. Subrogation will be made to serve the purposes of Justice and the intent of the parties**.—There is another class of cases in which he who has paid money due upon a mortgage of land to which he had some title which might be affected or defeated by the mortgage, and who was thus entitled to redeem, has the right to consider the mortgage as subsisting in himself, and to hold the land as if it subsisted, until others interested in the redemption, or who held also the right to redeem, have paid a contribution."*
>
> *Be it noted that what is spoken of here is a contribution.*
>
> ***11.** Dealing with the subject of subrogation of a surety by payment of a promissory note and citing the observations of the Alabama Court,*

Harris says in his work on Subrogation (1889 Edn.) at p. 125:

> *"The rule is, that a surety paying a debt, shall stand in the place of the creditor; and is entitled to the benefit of all the securities which the creditor had for the payment of the debt, from the principal debtors; in a word, he is subrogated to all the rights of the creditor; the surety, however, cannot avail himself of the instrument on which he is surety, by its payment. By payment it is discharged and ceases to exist, and the payment will not, even in equity, be considered an assignment; the surety merely becomes the creditor of the principal to the amount paid for him."*

12. *To compel the co-debtors or co-mortgagors to pay more than their share of what was paid to the creditor or mortgagee would be to perpetrate an inequity or injustice, as it would mean that the debtor who is in a position to pay and pays up can obtain an advantage for himself over the other joint debtors. Such a result will not be countenanced by equity; the favouritism shown by law to a surety, high as it is, does not extend so far. The surety can ask to be indemnified for his loss : he can invoke the doctrine of subrogation as an aid to his right of contribution. Sheldon says in Section 105 of his book:*

> *"The subrogation of a surety will not be carried further than is necessary for his indemnity; if he buys up the security at a discount, or makes his payment in a depreciated currency, he can enforce it only for what it cost him. He cannot speculate at the expense of his principal; his only right is to be repaid."*

116. The Supreme Court also distinguished its earlier Judgment in ***Valliamma Champaka Pillai v. Sivathanu Pillai and Others***, (1979)

4 SCC 429, which had dismissed an appeal filed by the plaintiff therein against a Judgment of the Full Bench of the High Court of Madras, which had held that a non-redeeming co-mortgagor has two periods of limitation within which he may file his suit against the redeeming co-mortgagor for redemption of his share, namely, within 50 years provided for by the Travancore Limitation Act, starting from the date of the mortgage, or, if that period has already expired, then within 12 years from the date of redemption by the redeeming co-mortgagor, under Article 132 of the Travancore Limitation Act. The Supreme Court in ***Krishna Pillai Rajasekharan Nair (dead) by LRs.*** (supra) held that the elevation of the status of the redeeming co-mortgagor to that of the original mortgagee, although there was no assignment of the mortgaged debt in his favour, was beyond the law enunciated by the Supreme Court in ***Ganeshi Lal*** (supra). The Court observed as under:-

> *"**15.** Whatever the difference might be between the English law and the Indian law as regards the right to enforce decrees and securities for the due payment of a debt in the case of a surety who discharges a simple money debt and a surety who pays up a mortgage, it is still noteworthy that Section V of the Mercantile Law Amendment Act, 1856 (England) provided for indemnification by the principal debtor for the advances made and loss sustained by the surety.*
>
> ***16.** There is a distinction in this respect between a third party who claims subrogation and a co-mortgagor who claims the right, and this is brought out by Sir Rashbehary Ghose in his Law of Mortgage in India, Vol. I, 5th Edn. He says at p. 354, pointingout that co-mortgagors stand in a fiduciary relation:*

> *"I should add that an assignee of a mortgage is entitled, as a rule, to recover whatever may be due on the security. But if he stands in a fiduciary relation, he can only claim the price which he has actually paid together with incidental expenses."*

117. The Court also approved its earlier Judgment in ***Variavan Saraswathi & Anr. v. Eachampi Thevi & Ors.***, 1993 Supp (2) SCC 201, by observing as under:-

> ***"17.*** *In Variavan Saraswathi case [1993 Supp (2) SCC 201] the law has been set out with precision and clarity and both the earlier decisions dealt with hereinabove have been referred to. Their Lordships (vide para 6) have dealt with the contrast between two situations: (i) where a mortgagee assigns his interest in favour of another person (i.e. a stranger); and, (ii) where a co-mortgagor or any one on behalf of the mortgagor and authorised under law pays the amount and brings to an end the interest which the mortgagee had. It has been held that in the first case the assignee becomes holder of the same interest which the mortgagee had i.e. he steps into the shoes of the mortgagee. In the latter case, once the mortgage debt is discharged by a person beneficially interested in the equity of redemption, the mortgage comes to an end by operation of law. Consequently, the relationship of mortgagor and mortgagee cannot subsist. A person paying off a debt to secure the property either with the consent of others or on his own volition becomes, in law, the owner entitled to hold and possess the property. But in equity the right is to hold the property till he is reimbursed. Such right in equity either in favour of the person who discharges the debt or the person whose debt has been discharged, does not result in resumption of relationship of mortgagor and*

mortgagee.

18. *Dealing with Section 92 of the Transfer of Property Act it has been held in Variavan Saraswathi case [1993 Supp (2) SCC 201] that the rights created in favour of a redeeming co-mortgagor as a result of discharge of debt are "so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems". Posing a question — does a person who, in equity, gets subrogated become a mortgagee? Their Lordships have held: (SCC p. 207, para 7)*

> *"A plain reading of the section does not warrant a construction that the substitutee becomes a mortgagee. The expression is, 'right(s) as the mortgagee' and not right(s) of mortgagee. The legislative purpose was statutory recognition of the equitable right to hold the property till the co-mortgagor was reimbursed. And not to create relationship of mortgagor and mortgagee. The section confers certain rights on co-mortgagor and provides for the manner of its exercise as well. The rights are of redemption, foreclosure and sale. And the manner of exercise is as mortgagee. The word 'as', according to Black's Law Dictionary, means 'in the manner prescribed'. Thus a co-mortgagor in possession, of excess share redeemed by him, can enforce his claim against non-redeeming mortgagor by exercising rights of foreclosure or sale as is exercised by mortgagee under Section 67 of the Transfer of Property Act. But that does not make him mortgagee."*

It was further observed that the abovesaid legal position does not alter either because during partition the equity of redemption in respect of property redeemed was transferred or because in the plaint it was claimed that mortgage subsisted.

> ***19.*** *In our opinion, the law as stated in Variavan Saraswathi case [1993 Supp (2) SCC 201] where Section 92 of the Transfer of Property Act has been specifically dealt with and which, as admitted at the Bar, applies to the mortgage in question, clinches the issue arising for decision in the present case."*

118. The Supreme Court has held that the doctrine of subrogation is based on the doctrine of equity and the principles of natural justice and not on the doctrine of privity of contract. One of such principles of equity is that a person paying money on someone else's behalf, which another is bound by law to pay, is entitled to be reimbursed by the other. The Court has further held that a case, similar to the one in the present, would be governed by the first paragraph of Section 92 of the TP Act, which recognizes the same equity of reimbursement as is provided under Section 69 of the Indian Contract Act, 1872.

119. The Supreme Court held that Section 92 of the TP Act does not have the effect of the substitutee becoming a mortgagee. It only confers certain rights on the redeeming co-mortgagors and also provides for certain remedies like the remedy of redemption, foreclosure and sale being available to the substitutee just as they were available to the person substituted, that is, the mortgagee. These rights, which the subrogatee exercises are, therefore, not as a mortgagee, but are akin to those vested in a mortgagor. Therefore, one of the co-mortgagors, by redeeming the mortgage in its entirety, cannot claim a right higher than what he otherwise had, nor can he defeat a legal claim for partition. The right created in his favour is the right to claim contribution from the other co-mortgagors. He can resist

the claim of the non-redeeming co-mortgagors to the partition of the property by pleading his right of contribution and by not parting with the property unless the non-redeeming co-mortgagor discharges his duty to make the contribution. However, this would not make the Suit seeking partition of property as one seeking redemption. I may quote from the Judgmentin as under:-

> *"**21.** The present one is a case of subrogation by the operation of law and hence governed by the first para of Section 92 of the Transfer of Property Act. The provision recognises the same equity of reimbursement as underlies Section 69 of the Indian Contract Act that "a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it is entitled to be reimbursed by the other". Such a payment made, carries with it, at times, an equitable charge. Section 92 of the Transfer of Property Act does not have the effect of a substitutee becoming a mortgagee. The provision confers certain rights on the redeeming co-mortgagor and also provides for the remedy of redemption; foreclosure and sale being available to the substitutee as they were available to the person substituted. These rights the subrogee exercises not as a mortgagee reincarnate but by way of rights akin to those vesting in the mortgagee. The co-mortgagor can be a co-owner too. A property subject to mortgage is available, as between co-mortgagors, for partition, of course, subject to adjustment for the burden on the property. One of the co-mortgagors, by redeeming the mortgage in its entirety, cannot claim a right higher than what he otherwise had, faced with a claim for partition by the other co-owner. He cannot defeat the legal claim for partition though he can insist on the exercise of such legal right claimed by the other co-owner-cum-co-mortgagor being made subject to the*

> *exercise of the equitable right to claim contribution vesting in him by subrogation.*
> ***22.*** *In our opinion, the suit filed in the present case being a suit for partition primarily and predominantly and the relief of redemption having been sought for only pursuant to the direction made by the High Court in its order of remand, the limitation for the suit would be governed by Article 120 of the Limitation Act, 1908. For a suit for partition the starting point of limitation is — when the right to sue accrues, that is, when the plaintiff has notice of his entitlement to partition being denied. In such a suit, the right of the redeeming co-mortgagor would be to resist the claim of non-redeeming co-mortgagor by pleading his right of contribution and not to part with the property unless the non-redeeming co-mortgagor had discharged his duty to make contribution. This equitable defence taken by the redeeming co-mortgagor in the written statement would not convert the suit into a suit for redemption filed by the non-redeeming co-mortgagor."*

120. The Court also clarified that it would make no difference in the above position of law where such co-mortgagors are joint tenants or tenants-in-common. While clarifying the same, the Supreme Court has held as under:-

> *"**25.** It was also submitted by the learned counsel for the respondent that it would make a difference if the family to which the parties belong was joint at the time of mortgage and at the time of redemption. The learned counsel submitted that on account of partition in the family the parties had ceased to be co-tenants and were tenants-in-common qua each other and therefore the redemption by the respondent was not and cannot be deemed to be on behalf of the family. In our opinion, it is not necessary to deal with this submission at*

> *all. Whether joint-tenants or tenants-in-common, the fact remains that the status of the plaintiff and defendant was that of co-mortgagors, one being a non-redeeming co-mortgagor and the other being a redeeming co-mortgagor. The law would remain the same and its applicability would not change whether the parties are treated as co-tenants or tenants-in-common."*

121. Applying the above principles to the facts of the present case, the Compromise Decree dated 20.02.1978 passed in RFA(OS)11/1971, titled ***Smt. Abnash Kaur through LRs. v. Smt. Sushila Daphtary and Anr***.(**Ex. PW-4/DX8**) by the Division Bench of this Court had stated that the defendant no.1 was subrogated to the rights of the original mortgagees, that is, the Daphtarys. It also clarified that the defendant no.1 was entitled to recover the full decretal amount with interest accrued till the date of payment from the appellants therein, that is, the parties to the present Suit, as if the compromise had not been made and the appeal had been dismissed. It also clarified that the other appellants in the said appeal were bound to contribute to the sums that were being paid by the defendant no.1 in pursuance of the compromise and after the payment, the defendant no.1 herein was entitled to recover the proportionate share of the amount paid by her for redemption of the mortgage, as contribution from the other appellants in the appeal. The order dated 08.05.1981(**Ex. DW-1/45)** also stated that the defendant no.1 would be subrogated to the rights of the mortgagees in accordance with the terms of the Compromise Decree dated 20.02.1978.

122. In terms of the above Decree and Order, the right vested in the defendant no.1 was to recover the full decretal amount, along with interest accrued thereon till the date of the payment from the other legal heirs of late Smt. Abnash Kaur who had a share in the Suit Property. In view of the Judgment of the Supreme Court in ***Krishna Pillai Rajasekharan Nair (dead) by LRs.*** (supra), therefore, the only right vested in the defendant no.1 is to claim a contribution of the amount paid by her, along with interest, from the other legal heirs of late Smt. Abnash Kaur, and to resist a claim for partition and possession of the property made by the other co-owners unless such amount is first paid by the other legal heirs to the defendant no.1. The other legal heirs, however, do not have to specifically pray for redemption of the mortgage.

Claim of the plaintiff that the mortgage was redeemed from the estate of late Smt. Abnash Kaur:

123. The learned counsel for the plaintiff, as recorded in the Order dated 09.05.2023, has restricted prayer (f) of the Suit by claiming that the mortgage had been redeemed by the defendant no.1 from the rental income received by the defendant no.1 from the Suit Property after the death of Smt. Abnash Kaur in 1976 and till the date of redemption of the mortgage in May, 1981, and not from any other part of the estate of late Smt. Abnash Kaur.

124. I must herein itself note that the original plaint had claimed that the mortgage had been redeemed by the defendant no.1 in her name from the estate of late Smt. Abnash Kaur, based on legal advice. As

the estate was not defined, the learned counsel for the plaintiff, during the course of submissions, as noted hereinabove, has confined the same to be from the rental income from the Suit Property received by the defendant no.1 between the period of 1976 till 1981. The learned counsel for the plaintiff further submits that the rent between the period of 1978 and 1979 was Rs.6,000/- per month; and between the period of January, 1980 till May, 1981 was Rs.12,500/- per month.

125. I do not find any merit in the above contention of the learned counsel for the plaintiff.

126. The settlement agreement as recorded in the Decree dated 20.02.1978 passed in RFA(OS)11/1971, titled ***Smt. Abnash Kaur through LRs. v. Smt. Sushila Daphtary and Anr***.(**Ex. PW-4/DX8**) by the Division Bench of this Court, and the Order dated 08.05.1981 passed by the Division Bench of this Court (**Ex. DW-1/45),** all clearly record that the defendant no.1 is the person who had redeemed the mortgage, and that she would be entitled to claim the amount paid by her for the redemption of the mortgage from the other co-sharers. This itself belies the claim of the plaintiff that the mortgage had been redeemed by the defendant no.1 from the estate of late Smt. Abnash Kaur. There is no challenge to the decree or the order passed in the above appeal, before this Court.

127. Even otherwise, in terms of the Lease Deed dated 18.11.1958 executed between late Smt. Abnash Kaur and the defendant no.1, the defendant no.1 was entitled to sub-lease the property. The rent received from such sub-lease, therefore, cannot be said to be the estate of late Smt. Abnash Kaur.

128. The learned senior counsel for the defendant nos.1 and 2 has also drawn my attention to the averment made in the original plaint itself wherein it has been claimed as under:

> *"32. The plaintiff submits that the last leave and licence agreement was executed by him (he being the General Attorney of Defendant No.1) on the instructions of Smt. Abnash Kaur with the G.D.R.Embassy in November, 1974 for the period from 1.1.1975 to 31.12.1979 at Rs.11,000/- per month. G.D.R. Embassy made the full payment of the said five years in advance in the name of defendant No.1 to the plaintiff, that is Rs.6,60,000/- (Rs.3,60,000/- by cheque of their BankersUnited commercial Bank, Parliament Street, New Delhi, in favouir of the plaintiff, and Rs.3,00,000/- in cash against receipt), as desired by Smt. Abnash Kaur. The said amount of Rs.6,60,000/- was paid by the plaintiff to Smt. Abnash Kaur. The plaintiff submits that even while filing the income tax returns for the assessment year 1975-76 in the name of the defendant No.1, Smt. Abnash Kaur had shown only Rs.5,000/- per month instead of Rs. 11,000/- per month, for the months of January, February and March, 1975."*

129. It was the own case of the plaintiff that the rent for the period till 31.12.1979 had been paid by the G.D.R. Embassy in advance to the plaintiff/late Smt. Abnash Kaur. The said money was, therefore, not in the hands of the defendant no.1 for her to redeem the mortgage. The plaintiff is clearly building a new case in the course of his submissions and the same is liable to be rejected.

130. In view of the above, I find no merit in the claim of the plaintiff that the mortgage over the Suit Property was redeemed by the defendant no.1 from the estate of late Smt. Abnash Kaur.

Submission of the learned counsel for the plaintiff that the plaintiff is deemed to have contributed his share of the redemption amount to defendant no.1 from the rent received by defendant no.1:

131. The learned counsel for the plaintiff has submitted that the defendant no.1, admittedly, has received a rent of Rs.6,000/- per month from 20.02.1978 (date of redemption of mortgage) to 31.12.1979, and thereafter, Rs.12,500/- per month from January 1980 to March 1985, and Rs.17,500/- per month from January 1986 to December 1990 from the G.D.R. Embassy. He submits that, therefore, the defendant no.1 has received a total of Rs.17,35,500/- as rent for the above period. He submits that as against this, the plaintiff, in terms of the Decree dated 20.02.1978 passed in RFA(OS)11/1971, titled ***Smt. Abnash Kaur through LRs. v. Smt. Sushila Daphtary and Anr***.(**Ex. PW-4/DX8**) by the Division Bench of this Court, is liable to contribute 61.11% as his share in the redemption amount, which would be Rs.10,58,685/-. He submits that, therefore, the plaintiff is deemed to have paid his share of the redemption amount to defendant no.1.

132. I do not find any merit in the above contention of the learned counsel for the plaintiff.

133. Apart from the fact that it was the own case of the plaintiff that the rent from G.D.R. Embassy for the period 01.01.1975 to 31.12.1979 had been received in advance by the plaintiff and was given to late Smt. Abnash Kaur, even otherwise, not only under the Lease Deed but also as a subrogate mortgagee, it has not been shown

by the plaintiff how the plaintiff can claim any right in the rent being received by the defendant no.1.

134. In the Decree dated 20.02.1978 passed in RFA(OS)11/1971, titled ***Smt. Abnash Kaur through LRs. v. Smt. Sushila Daphtary and Anr***.(**Ex. PW-4/DX8**) by the Division Bench of this Court, it has not been provided that any rent or income received by the defendant no.1 as a subrogatee mortgagee of the Suit Property would have to be adjusted against her claim for payment of the principal amount or the interest of the redemption amount. In the absence of any such stipulation, the plaintiff cannot claim that any rent received by the defendant no.1 post the redemption of the mortgage would ensure to the benefit of the plaintiff or the other co-sharer.

Period of limitation for filing of the Suit:

135. The learned senior counsel for defendant nos.1 and 2, based on the plea that the defendant no.1 had been subrogated to the right of the mortgagee/Daphtarys, and as the Suit does not pray for the redemption of mortgage, contended that the Suit would now be barred under Article 61 of the Limitation Act.

136. I do not find any merit in this submission.

137. As held in ***Krishna Pillai Rajasekharan Nair (dead) by LRs,*** the plaintiff is not to sue for redemption of the mortgage and a suit for partition would be maintainable, though the defendant no.1 would be entitled to resist the claim of partition unless the plaintiff contributes his share of money paid for the redemption of the mortgage by defendant no.1 and the incidental expenses thereto.

138. As far as the Suit for partition is concerned, it would be governed by Article 65 of the Limitation Act.

139. In ***Devi alias Vidya Vati (dead) by LRs*** (supra), the Supreme Court has reiterated that the legislature has not prescribed any period of limitation for filing a Suit for partition because partition is an incident attached to the property and there is always a running cause of action for seeking partition by one of the co-sharers. Where the property is joint, co-sharers are the representatives of each other, and a co-sharer who is in possession of the joint property shall be deemed to be in possession on behalf of all the co-sharers. It is only if the co-sharer or joint owner in possession of the property, professes a hostile title as against the other co-sharers openly and to the knowledge of the other co-owners, that he can be provided the hostile title where the possession has continued uninterruptedly for the whole period prescribed for recovery of possession, that is, 12 years. I may quote from the Judgment as under:

> *"20. The legislature has not prescribed any period of limitation for filing a suit for partition because partition is an incident attached to the property and there is always a running cause of action for seeking partition by one of the co-sharers if and when he decides not to keep his share joint with other to co-sharers. Since the filing of the suit is wholly dependent upon the will of the co-sharer, the period of limitation, specially the date or time from which such period would commence, could not have been possibly provided for by the legislature and, therefore, in this Act also a period of limitation, so far as suits for partition are concerned, has not been prescribed. This, however does not mean that a co-sharer who is arrayed as a defendant in*

> *the suit cannot raise the plea of adverse possession against the co-sharer who has come before the court as a plaintiff seeking partition of his share in the joint property.*
> *21. Normally, where the property is joint, co-sharers are the representatives of each other. The co-sharer who might be in possession of the joint property shall be deemed to be in possession on behalf of all the co-sharers. As such, it would be difficult to raise the plea of adverse possession by one co-sharer against the other. But if the co-sharer or the joint owner had been professing hostile title as against other co-sharers openly and to the knowledge of other joint owners, he can, provided the hostile title or possession has continued uninterruptedly for the whole period prescribed for recovery of possession, legitimately acquire title by adverse possession and can plead such title in defence to the claim for partition."*

140. A learned Single Judge of this Court, has explained the above concept for its relevance to the period of limitation, in ***Ashok Kumar v. Mohd. Rustam& Anr.,*** 2016 SCC OnLine Del 466, by observing as under:

> *"**16**. Article 58 of the Schedule to the Limitation Act, for the relief of declaration, undoubtedly provides limitation of three years from the date when the cause of action accrues. However I am of the opinion that once the plaintiff, besides suing for declaration of title also sues for recovery of possession of immovable property on the basis of title, the limitation for such a suit would be governed by the limitation provided for the relief of possession and not by limitation provided for the relief of declaration. To hold otherwise would tantamount to providing two different periods of limitation for a suit for recovery of possession of immovable property based on title i.e. of three years if the suit*

besides for the said relief is also for the relief of declaration of title and of twelve years as aforesaid if no relief of declaration is claimed. A relief of declaration of title to immovable property is implicit in a suit for recovery of possession of immovable property based on title inasmuch as without establishing title to property, if disputed, no decree for the relief of possession also can be passed. Thus, merely because a plaintiff in such a suit also specifically claims the relief of declaration of title, cannot be a ground to treat him differently and reduce the period of limitation available to him from that provided of twelve years, to three years. Supreme Court in Anathula Sudhakar v. P. Buchi Reddy (2008) 4 SCC 594 held (i) where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession is the remedy; (ii) where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession; (iii) a cloud is said to arise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown.

17. *I am supported in my aforesaid view by:*

A. GhanshyamdasVallabhadasGujrathi v. BrijramanRasiklal where a Division Bench of the High Court of Bombay negatived the contention as found favour with the learned Additional District Judge in the impugned order and held that the main relief being of possession, and declaration being an ancillary relief, the proper Article of the Limitation Act would be Article 65 and not Article 58 of the First Schedule;

B. State of Maharashtra v. Pravin JethalalKamdar (2000) 3 SCC 460 where it was held that the factum of the plaintiff besides the relief of possession having sought declaration also is of no

consequence and in such a case the governing article of the Schedule to the Limitation Act is Article 65;

C. MechineniChokka Rao v. SattuSattamma where the High Court of Andhra Pradesh reiterated that to a suit based on title but claiming declaration of title to the suit property with consequential relief of possession, Article 65 would apply and Article 58 would have no application; Article 58 applies only to a case where declaration simpliciter is sought i.e. without any further relief; the 89th Report of the Law Commission recommending for amendment of Article 58 by adding the words "without seeking further relief" after the word "declaration" in the first column of Article 58, so as to avoid any confusion was also noticed;

D. Ashok Kumar v. Gangadhar AIR 2007 AP 145 where the High Court of Andhra Pradesh again held that a suit for declaration of title and consequential relief of possession filed within twelve years from the date when the defendant dispossessed the plaintiff cannot be held to be barred by limitation;

E. C. Natrajan v. Ashim Bai (2007) 14 SCC 183 where it was held that if the suit has been filed for possession as a consequence of declaration of the plaintiff's title, Article 58 will have no limitation;

F. Boya Pareshappa v. G. Raghavendra Nine where the High Court of Andhra Pradesh while reiterating the earlier view further reasoned that Part V of the Schedule to the Limitation Act specifically deals with category of suits relating to immovable property and having regard to the categorisation made in the Schedule, the limitation provided in Article 65 in Part V is to prevail over Article 58 contained in Part

III; it was further reasoned that under Section 27 of the Limitation Act, the right in immovable property stands extinguished after the expiry of the period prescribed for filing of suit for possession thereof; therefore, if the period falls short of the requisite period of 12 years, the right over an immovable property will not get extinguished; thus when a person has a right over an immovable property which right is not extinguished, he can lay the suit in respect of immovable property, even praying for the relief of declaration, at any time within the period of 12 years at the end of which only his right would get extinguished; therefore declaratory suits pertaining to immovable property are governed by Articles 64 and 65 and not by Article 58 of the Act;

G. Seetharaman v. Jayaraman (2014) 2 MWN (Civil) 643 where also it was held that a title over immovable property cannot extinguish unless the defendant remains in adverse possession thereof for a continuous period of 12 years or more and therefore Article 65 of the Schedule to the Limitation Act applies to a suit for declaration of title and for recovery of possession of immovable property."

141. Applying the above principles to the facts of the present case, it is the own case of the defendant no.1 that in terms of the Decree dated 20.02.1978 passed in RFA(OS)11/1971, titled ***Smt. Abnash Kaur through LRs. v. Smt. Sushila Daphtary and Anr***.(**Ex. PW-4/DX8**) by the Division Bench of this Court, the right of the plaintiff as a co-sharer in the Suit Property had been recognised. It had also been provided that all the other co-sharers, including the plaintiff, shall be

bound to contribute to the sums paid by the defendant no.1 for redemption of the mortgage. She would, therefore, be entitled to seek protection of her possession till the time the other co-sharers contribute their shares in the redemption amount paid by her. Her possession over the suit property would, therefore, not be adverse to that of the plaintiff but would be permissive, as has been held by the Supreme Court in ***Krishna Pillai Rajasekharan Nair (dead) by LRs.*** (supra).

142. It is also important to note here that the defendant no.1 is also claiming her possession as a lessee of the property. Though, the plaintiff denies such lease and claims that the lease was a sham document, at the same time, where the defendant no.1 herself claims her right to the possession of the Suit Property as a lessee, she cannot, at the same time, claim adverse possession over the Suit Property. The two pleas would be contradictory to each other and cannot stand together. Reliance in this regard is placed on the Judgment of Supreme Court in ***Mohan Lal & Ors. v. Mirza Abdul Gaffar & Anr.***, (1996) 1 SCC 639, wherein the Supreme Court, while delving into the question of mutually destructive pleas, held as under:

> *"3. The only question is whether the appellant is entitled to retain possession of the suit property. Two pleas have been raised by the appellant in defence. One is that having remained in possession from 8-3-1956, he has perfected his title by prescription. Secondly, he pleaded that he is entitled to retain his possession by operation of Section 53-A of the Transfer of Property Act, 1882 (for short 'the Act').*
>
> ***4. As regards the first plea, it is inconsistent with the second plea. Having come into***

possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period of his title by prescription nec vi, nec clam, nec precario. *Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."*

(Emphasis Supplied)

143. In view of the above, I do not find any merit in the plea raised by the learned senior counsel for the defendant nos.1 and 2 that the present suit would be barred by limitation as far as the prayer for partition is concerned.

Whether the Lease Deed dated 18.11.1958 is a sham transaction:

144. As is noted hereinabove, it is the case of the plaintiff that the Lease Deed dated 18.11.1958 is a sham transaction and was entered into by late Smt. Abnash Kaur with the defendant no.1 only for the purposes of saving the Suit Property from the claims of her step-sons, and also from the attachment pursuant to the orders passed by the Income Tax Authorities. The learned counsel for the plaintiff has submitted that the alleged Lease Deed dated 18.11.1958 has not been filed, leave alone, proved on record of the Suit. He has stated that the defendant no.1 was a minor as on the date of the said lease. He has

also placed reliance on the Agreement to Sell dated 02.10.1963 executed between late Smt. Abnash Kaur and Sh.Jaswant Rai **(Ex.PW4/11),** contending that there was no mention of any lease in the said document and it acknowledges that the possession of the Suit Property was with late Smt. Abnash Kaur. He also places reliance on a Certificate dated 27.09.1963 **(Ex.PW4/10)** executed by the defendant no.1, wherein the defendant no.1 has acknowledged that the lease had been entered into only to show her charge on the Suit Property so as to save it from the claims of the step-sons of late Smt. Abnash Kaur and the Income Tax Department. He states that in the said document, the defendant no.1 has also acknowledged that late Smt. Abnash Kaur has full right as an owner to sell the Suit Property or give it on rent.

145. I, however, find no merit in the said claim of the plaintiff.

146. In the present Suit, the plaintiff claims his share in the Suit Property under the Will dated 06.02.1973 (**Ex. PW-4/2**) of late Smt. Abnash Kaur. The said Will itself acknowledges the said Lease Deed executed in favour of the defendant no.1. Since the plaintiff has filed the present Suit relying on the Will of late Smt. Abnash Kaur, he cannot disown the said document in parts. Once the testator, through whom the plaintiff derives his title, has herself acknowledged the existence of the said Lease in favour of the defendant no.1, it is not for the plaintiff to deny the same.

147. The learned senior counsel for the defendant nos.1 and 2 has also relied upon various documents wherein not only late Smt. Abnash Kaur but also the original plaintiff himself has admitted to the existence of the said Lease Deed in favour of the defendant no.1. As I

have already held, the plaintiff, who is claiming his right under the Will of late Smt. Abnash Kaur, is bound by the terms thereof, including the acknowledgment of the Lease by late Smt. Abnash Kaur. The said documents are being referred to hereinunder merely for the sake of convenience:

EXHIBIT NO.	**DESCRIPTION**
DW 1/2	Letter Dated 10.10.1959 from Smt. Abnash Kaur to the Defendant No. 1 to continue as tenant on account of Smt. Abnash Kaur being unable to repay the cost of renovation.
DW 1/3	Letter Dated 03.01.1968 from Shri. Ajit Singh, Original Plaintiff to the Income Tax Officer, on behalf of the Defendant No.1.
DW 1/4	Letter dated 15.01.1968 from Shri. Ajit Singh, Original Plaintiff writing on behalf of the Defendant No. 1 to the Income Tax Officer.
DW 1/5	Affidavit Dated 15.01.1968 of Shri. Ajit Singh, Original Plaintiff, in Income Tax proceedings against the Defendant No. 1.
DW 1/6	Letter Dated 14.03.1968 from Shri. Ajit Singh, Original Plaintiff, writing on behalf of the Defendant No. 1 to the Income Tax Officer.
DW 1/7	Letter Dated 30.06.1969 from Smt. Abnash to the Income Tax Officer.
DW 1/8	Notice Dated 06.12.1969 from Income Tax Officer to Smt. Abnash Kaur.
DW 1/9	Letter Dated 27.12.1969 from Smt. Abnash Kaur to the Income Tax Officer.
DW 1/10	Reply to the questionnaire dated 27.12.1969 of the Income Tax Officer.
DW 1/11	Order dated 28.07.1971 of the Income Tax Appellate Tribunal
DW 1/12	Letter Dated 26.11.1971 from Shri. Ajit Singh on behalf of the Defendant No. 1 to the Embassy of the German Democratic Republic.
DW 1/13	Letter Dated 15.12.1971 from Shri. Ajit Singh, Original Plaintiff on behalf of the Defendant No. 1 to the Appellate Assistant Commissioner Income Tax.

DW 1/14	Letter Dated 29.12.1971 from Shri. Ajit Singh Original Plaintiff, to Appellate Assistant Commissioner Income Tax.
DW 1/16	Letter Dated 25.05.1972 from Smt. Abnash Kaur to the Land and Development Officer.
DW 1/17	Letter Dated 17.02.1973 from Shri. Ajit Singh, Original Plaintiff to Smt. Abnash Kaur recording arrears of rent paid by the Defendant No. 1.
DW 1/18	Letter Dated 20.02.1973 from Smt. Abnash Kaur to the Income Tax Officer.
DW 1/19	Letter Dated 23.09.1973 from Shri. Ajit Singh, Original Plaintiff, on behalf of the Defendant No. 1 to the Income Tax Officer.
DW 1/20	Receipt from the Smt. Abnash Kaur for the year 1973 for 18,000 from the Defendant No.1 dated 15.12.1973
DW 1/21	Receipt from the Smt. Abnash Kaur for the year 1974 for 18,000 from the Defendant No. 1 dated 28.12.1974.
DW 1/22	Revised returns dated 29.10.1974 of the Defendant No. 1 filed by Shri. Ajit Singh, Original Plaintiff.
DW 1/23	Statement of Defendant No. 1 filed by Shri. Ajit Singh, original Plaintiff dated 27.10.1975.
DW 1/25	Letter dated 30.10.1975 from Shri. Ajit Singh original Plaintiff to the Income Tax Officer, recognizing the rent was paid by the Defendant No. 1 from her own funds.
DW 1/26	Order Dated Nov 1975 of the Income Tax Appellate Tribunal, in proceedings against Smt. Abnash Kaur.
DW 1/28	Order of the Appellate Assistant Commissioner Income Tax, in proceedings against Smt. Abnash Kaur, dated 18.06.1977.
DW 1/29	Order dated 10.08.1977 of the Income Tax Appellate Tribunal in proceedings against Smt. Abnash Kaur.
DW 1/30	Order dated 13.03.1979 of the Income Tax Appellate Tribunal.
DW 1/32 A	Affidavit dated 29.01.1981 of Ms. Surjit Kaur Gill in reply to K.K. Bindal in Notice of Motion No. 1603 of 1980 in S.C. Suit No. 2084 of 1980 before the Ld. Bombay City Civil Court at Bombay titled ‘Smt. Surjit Kaur Gill versus Shri. Ajit Singh Bahadur Singh and others’ [Para 10. The lease deed is a perfectly genuine document]
DW 1/32 B	Affidavit dated 29.01.1981 of Smt. Surjit Kaur Gill in reply to Shri. Kuldip Singh.
PW 4/DX 5	Letter from Shri. Gurnir Singh to Commercial and Taxation Officer dated 23.07.1977

PW 4/DX 6	Plaint dated 31.08.1976 in Civil Suit No. 236 of 1976 filed by the Legal heirs of Smt. Abnash Kaur against the NDMC, signed by Smt. Surjit Kaur Gill, now Plaintiff No. 1 and Shri. Gurnir Gill, Plaintiff No. 2. Para 5-As per Clause 11 of the agreement dated: 18.11.1958- if lessee remains in possession after the expiry of the lease, the lessee shall be entitled to sub-let the premises or to give the same on leave and license basis.
PW 4/DX 2	Application dated 24.02.1987 filed by Shri. K. K Bindal, seeking leave to defend in eviction case no. E-367-86 filed by Shri. Gurnir Singh, the Plaintiff No. 2, against the Embassy of German Democratic Republic and others.
DW 1/33	Agreement to Sell 08.04.1993 executed between Kamal Kishore Bindal (vendor) and Noorien Kaur (purchaser) registration No. 2568.
DW 1/34	Agreement to Sell 08.04.1993 executed between Kamal Kishore Bindal (vendor) and Nidas Estate Pvt. Ltd. (purchaser) registration No. 2952.
DW 1/35	Agreement to Sell 08.04.1993 executed between Kamal Kishore Bindal (vendor) and Smt. Adarsh Kaur Gill (purchaser) registration No. 2951.
DW 1/36	Power of Attorney dated 21.04.1993 given by Kamal Kishore Bindal in favour of Smt. Adarsh Kaur Gill and Noorien Kaur Gill registration No. 2004 and a notarised version.
DW 1/37	Affidavit dated 21.04.1993 of Kamal Kishore Bindal.
DW 1/38	Letter dated 19.02.1994 by Shri. G. C. Mittal, Advocate of Late Smt. Abnash Kaur to Ms. Malvika Rajkotia, counsel for Defendant No 1.
DW 1/39	First Schedule (Form-I) annexure to the Return (submitted to the competent Authority, Delhi Urban Land Ceiling Authority) signed by Surjit Kaur Gill, Shri. Gurnir Gill and K.K. Bindal.
DW1/51	Will of Smt. Abnash Kaur dated 06.02.1973
DW1/59	Certificate dated 01.11.1990 by GDR- Embassy whereby they handed over the premises 3, South End Road, New Delhi to the owner and tenant - Smt. Adarsh Kaur Gill

DW1/61	Written Statement dated 01.06.1970 of Smt. Adarsh Kaur Gill-defendant No. 11 in CS No. 207 of 1967- 'Nirmal Kumar & Others v. Smt. Abnash Kaur'
PW3/2 (Colly)	Assessment Order dated 28.02.1970 for Smt. Adarsh Kaur Gill for the year 1959-1960 470-485 Vide Agreement dated 18.11.1958 3, South End Road, was leased out to Smt. Adarsh Kaur Gill

148. The learned senior counsel for the defendant nos.1 and 2 has also relied upon the cross-examination of the present plaintiff-Sh.Gurnir Singh Gill. The relevant extracts of which are as under:

> *"Q What do you mean by the word 'fake lease deed' as mentioned in your affidavit?*
>
> *A I say that the lease deed is fake as firstly it was not made in the year 1958, it was made in the year 1961. Secondly, it is not properly stamped and registered. I also say that this lease deed is fake as its original is not in existence. Again said, original has been destroyed.*
>
> *My statement that the lease deed is fake is not based on my personal knowledge rather it is based on the information received by me from Sh. Ajit Singh. Sh. Ajit Singh told me about this before filing of the present suit, i.e. somewhere in the year 1987 or in 1988 or may be in the year 1989. I have not filed any proceedings in any court of law thereby challenging that the said lease deed dated 15/11/1958, is a fake lease deed.*
>
> *It is correct that from the year 1973 when I came to know with respect to contents of Will of Smt. Abnash Kaur, upto year 1987/1988 or 1989 when Ajit Singh told me that this lease deed is fake, I had been treating the lease deed as genuine one.*
>
> *At this stage witness states that the fact that lease deed is a fake lease deed was told to him by Ajit Singh in the year 1983.*
>
> ***Court Observation***Demeanour of the witness is observed in his

testimony where he is giving contradictory replies. Law shall take its own course.

Witness is warned to reply after having understood the question properly.

The fact that the fake lease deed had been prepared for protecting the suit property and its rental income from the hands of step sons of Smt. Abnash Kaur, was told to me by Sh. Ajit Singh after the death of Smt. Abnash Kaur who died in the year 1976. From the word 'after' I mean that this fact was told to me either in the year 1976 itself or in the year 1977.

****

Q I put it to you that Mr. Ajit Singh did not take stand qua Ms. Adarsh Kaur Gill in the Eviction Petition No. 367/1986 that the lease deed in favour of Ms. Adarsh Kaur Gill by Ms. Abnash Kaur was a fake lease deed.

A The eviction petition has been filed by me and my mother. I do not remember what stand had been taken by Mr. Ajit Singh in the said eviction petition qua Ms. Adarsh Kaur Gill and I will be able to answer this question, if I am shown a copy of the record of the eviction petition.

Q Please see copy of memorandum of appeal in SAO No. 55/1988 titled Shri Gurnir Singh Gill Vs. Embassy of German Democratic Republic &Ors. In your cross examination dated 06.02.2016 you stated that you did not file appeal against the order of dismissal passed by the court of learned ARC in your eviction petition. Was the SAO filed without your instructions?

A I did not remember about the appeal when I answered the question on 06.02.2016. After seeing the document, I say that the appeal might have been filed. To answer these questions, I need to see the entire record of the

proceedings emanating; from the eviction petition filed by me before the court of learned ARC. Due to lapse of time, I do not remember all facts related to those proceedings."

149. I, therefore, find no merit in the submission of the learned counsel for the plaintiff that the Lease Deed dated 18.11.1958 executed by late Smt. Abnash Kaur in favour of the defendant no.1 was a sham document and that the defendant no.1 cannot be said to be the lessee in the Suit Property.

Plaintiff's claim of termination of the lease:

150. The learned counsel for the plaintiff has submitted that even assuming that the lease in favour of the defendant no.1 was valid, the same now stands terminated. He submits that admittedly, the rent received by the defendant no.1 from the G.D.R. Embassy was more than Rs.3,500/- per month. He submits that in terms of Section 3(1)(c) of the DRC Act, where the rent received from the sub-lessee is more than Rs.3,500/-, the lease could no longer be protected under the DRC Act. He has further submitted that the defendant no.1, having set up a claim of title to the Suit Property, in terms of Section 111(g) of the TP Act, is liable to be evicted and the lease comes to an end. He further submits that the defendant no.1 has also claimed ownership right over the Suit Property and, therefore, the lease would come to an end as the defendant no.1 cannot approbate and reprobate.

151. On the other hand, the learned senior counsel for the defendant nos.1 and 2 has submitted that the present Suit is premised on the

basis that the Lease Deed in favour of defendant no.1 is a sham. He submits that the plaintiff cannot set up a new case in the course of oral arguments and relief cannot be granted on such new case being set up by the plaintiff.

152. I find merit in the objection of the learned senior counsel for defendant nos.1 and 2. A bare reading of the plaint would show that the entire basis of claim of the plaintiff in the present suit is that the Lease Deed dated 18.11.1958 executed by late Smt. Abnash Kaur in favour of the defendant no.1 was sham and, therefore, the defendant no.1 is not entitled to retain the possession of the Suit Property. It is only in the course of oral submissions that the plaintiff has now changed his stand and, in the alternate, has submitted that in case this Court finds the said Lease to be a genuine transaction, the defendant no.1 is, even otherwise, liable to be evicted from the Suit Property. In the absence of any pleadings to this effect, however, and based only on the oral submissions of the learned counsel for the plaintiff, the nature of the Suit cannot be allowed to be changed. In fact, for some other submissions, the learned counsel for the plaintiff has himself relied upon the Judgment of the Supreme Court in ***Bachhhaj Nahar v. Nilima Mandal and Anr.***, (2008) 17 SCC 491, wherein the Supreme Court has cautioned and held as under:-

> *"23. It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res Judicata, estoppel, acquiescence, non-joinder of causes*

of action or parties, etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of rupees one lakh, the court cannot grant a decree for rupees ten lakhs. In a suit for recovery possession of property 'A', court cannot grant possession of property "B'. In a suit praying for permanent injunction, court cannot grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc.

24. In the absence of a claim by the plaintiffs based on an easementary right, the first defendant did not have an opportunity to demonstrate that the plaintiffs had no easementary right. In the absence of pleadings and an opportunity to the first defendant to deny such claim, the High Court could not have converted a suit for title into a suit for enforcement of an easementary right. The first appellate court had recorded a finding of fact that the plaintiffs had not made out title. The High Court in second appeal did not disturb the said finding. As no question of law arose for consideration, the High Court ought to have dismissed the second appeal. Even if i the High Court felt t that a case for easement was made out, at best liberty could have been reserved to the plaintiffs to file a separate suit for easement. But the High Court could not, in a second appeal, while rejecting the plea of the plaintiffs that they were owners of the suit property, grant the relief of injunction in regard to an easementary right by assuming that they had an easementary right to use the schedule property as a passage."

153. Keeping in view the above, the plea of the learned counsel for the plaintiff that even otherwise, the lease should be treated to have

been terminated and an order of eviction be passed against the defendant no.1, cannot be accepted.

154. Even on facts, I do not find much merit in the submission of the learned counsel for the plaintiff. It was for the plaintiff to have shown the amount of rent being received by the defendant no.1 from the sub-lessee, in order to bring the lease out of the purview of the DRC Act. The learned counsel for the plaintiff has been unable to show any document, which would satisfy this Court on the amount of rent being received for the Suit Property by the defendant no.1, if any, as on the date of filing of the Suit or even thereafter. Mere assertion that at one point of time the licence fee being received by the defendant no.1 was more than Rs.3,500/-, in my view, may not be sufficient to bring the tenancy of the defendant no.1 out of the protection granted under the DRC Act.

155. In addition, the defendant no.1 has pleaded a right in the property as a subrogatee mortgagee. She has not claimed that she has an exclusive title to the same. Therefore, Section 111(g) of the TP Act would also not come to the aid of the plaintiff in the present case.

156. As far as the claim of the plaintiff that the lease has been forfeited under Section 111(d) of the TP Act, is concerned, the same also does not hold much water. In terms of the Will dated 06.02.1973 (**Ex. PW-4/2**) of late Smt. Abnash Kaur, the defendant no.1 received only 1/6th share in the Suit Property. For the application of Section 111(d) of the TP Act, the whole of the property has to be vested in the lessee for the termination of the lease to take place.

Settlement Agreement dated 12.02.1991

157. It was the case of the plaintiff that the defendant no.1 had proposed the terms of the Settlement, by a document dated 12.02.1991 (**Ex. PW-4/27**), acknowledging the rights of the plaintiff in the Suit Property. The said document was denied by defendant no.1. The learned counsel for the plaintiff, in the course of his submissions, submitted that the defendant no.1 had produced one Shri Deepak Jain **(DW-3)** as a handwriting expert, whose testimony is totally unreliable not only because he is not an expert, but also because he has not stated to have used the scientific techniques for comparison of the signatures and, even otherwise, his report is totally doubtful. He submitted that, therefore, the document dated 12.02.1991 (**Ex. PW-4/27**) should be considered by this Court as proved.

158. While I find merit in the submission of the learned counsel for the plaintiff that the evidence of Shri Deepak Jain is not worthy of reliance for the reasons that the learned counsel for the plaintiff has contended, at the same time, once the document is denied by the person, who is alleged to have executed it, the onus of proving the document lies on the plaintiff, who is the propounder thereof. The learned counsel for the plaintiff has not drawn my attention to any evidence by which the plaintiff has proved the said document. Merely because the defendant no.1 may have failed to disprove the same, does not mean that automatically the document shall stand proved in evidence.

159. In the absence of any such evidence proving the document 12.02.1991 (**Ex. PW-4/27**), the claim of the plaintiff cannot be accepted.

Whether the plaintiff is entitled to a decree of partition?:

160. In view of the above, it has to be held that the status of the parties to the Suit as co-owner of the Suit Property has not undergone a change. As a co-owner, the plaintiff is entitled to seek partition of the Suit Property, and the same can be resisted by the defendant no.1 only so long as the plaintiff and the other co-owners do not contribute their share of the redemption amount, along with interest as stipulated in the original Mortgage Deeds dated 19.01.1959 (**Ex. DW-1/42**) and 24.01.1959 (**Ex. DW-1/43**), to the defendant no.1. Once the share is paid by them, the right of the defendant no. 1 as a subrogatee mortgagee shall come to an end.

Share of the parties in the Suit Property:

161. Due to the death of the original plaintiff- late Shri Ajit Singh, the original defendant no. 3, late Smt. Surjit Kaur Gill, and the original defendant no. 5, Late Shri Kamal Kishore Bindal, the rights of the parties are determined as under:-

(a) Plaintiff:	33.34% (as for himself and as LR of late Smt. Surjit Kaur Gill)
(b) Defendant no.1:	16.67%
(c) Defendant no.2:	16.67%
(d) legatees under the Will dated 21.07.1997 **(Ex.PW-2/1)** of late Sh.Ajit Singh, with the present plaintiff as executor of the Will:	16.67%
(e) Half-brothers of	

late Shri Kamal Kishore Bindal: 16.67%

162. However, as far as the share in the Suit Property devolving on the death of Shri Ajit Singh, is concerned, the same shall devolve on his legatees in accordance with his Will dated 21.07.1997 (**Ex. PW-2/1**). The plaintiff-Shri Gurnir Singh Gill shall hold his share for the legatees of late Shri Ajit Singh in trust and in a fiduciary capacity.

Findings on the Issues:

163. In view of the above discussion, I render the following findings on the issues that were framed by this Court *vide* its Order dated 01.02.2005.

Issue 1 - Whether the suit is barred by limitation? OPD-1

164. The Suit cannot be said to be barred by limitation. The issue is decided accordingly.

Issue 2 - Whether the plaint has been valued correctly for purposes of Court Fee and Jurisdiction. If not, to what effect? OPD

165. As held hereinabove, the possession of the defendant no.1 to the Suit Property was as a lessee or a co-owner or as a permissive user as a subrogatee mortgagee. Once the relief of possession is granted to the plaintiff, the plaintiff would, even otherwise, have to pay the Court Fee in accordance with his share of the Suit Property. The issue is answered accordingly.

Issue 3 - Whether redemption of the mortgage by the defendant no. 1 entitles the defendant no.1 to retain possession of property bearing No.3, South End Road, New Delhi? OPD-1

166. In terms of the Compromise Decree dated 20.02.1978 passed in RFA(OS)11/1971, titled ***Smt. Abnash Kaur through LRs. v. Smt. Sushila Daphtary and Anr***.(**Ex. PW-4/DX8**), the defendant no.1 is entitled to retain the possession of the property bearing No.3, South End Road, New Delhi, till such time the plaintiff and the other co-sharer contribute and pay their contribution of the redemption amount along with interest to the defendant no.1. The learned counsel for the plaintiff, in the course of his submissions, has submitted that the plaintiff is ready and willing to pay the said amount to the defendant no.1. On the plaintiff paying the said amount to the defendant no.1, the defendant no.1 would not be entitled to retain the possession of the Suit Property in her capacity as a subrogate mortgagee. The issue is decided accordingly.

Issue 4 - Whether the lease deed dated 18.11.1958 is a sham document as alleged by the plaintiff in paras 20 to 23 of the plaint and as explained in subsequent paragraphs thereof? OPP

167. As held hereinabove, the plaintiff has failed to prove that the Lease Deed dated 18.11.1958 is a sham document or that the defendant no.1 was acting only as a *benamidar* of the owner, that is, late Smt. Abnash Kaur. The issue is decided accordingly.

Issue 5 - If issue no.4 is held in favour of the plaintiff, what would be the legal consequences thereof?

168. In view of the finding on issue no.4, this issue does not survive.

Issue 6 - Whether late Smt.Abnash Kaur left behind any moveable properties as asserted by the plaintiff? OPP

169. In view of the statement of the learned counsel for the plaintiff recorded on 19.05.2023 and 19.07.2023, and the affidavit of the plaintiff dated 26.07.2023, this issue no longer survives.

Issue 7 - What is the share of the plaintiffs and the defendants in the estate left behind by late Smt.Abnash Kaur?

170. In view of the findings hereinabove, the shares of the parties have been stated in paragraph 161 hereinabove. The issue is answered accordingly.

Issue 8 - Whether the plaintiff is entitled to a preliminary decree of partition in respect of property bearing No.3, South End Road, New Delhi? OPP

171. The plaintiff is held entitled to a preliminary decree of partition in respect of the Suit Property, however, subject to the plaintiff contributing his share of the redemption amount along with interest in terms of the Mortgage Deeds dated 19.01.1959 (**Ex. DW-1/42**) and 24.01.1959 (**Ex. DW-1/43**) to defendant no.1. The issue is answered accordingly.

Issue 9 - Whether the plaintiff is entitled to a decree for rendition of accounts against defendant No. 1? OPP

172. The plaintiff is not held entitled to a decree of rendition of accounts against the defendant no.1 inasmuch as the defendant no.1 continues to be entitled to the possession of the Suit Property not only as a lessee thereof but also in terms of the Compromise Decree dated 20.02.1978 passed in RFA(OS)11/1971, titled ***Smt. Abnash Kaur through LRs. v. Smt. Sushila Daphtary and Anr***.(**Ex. PW-4/DX8**), which recognizes her right as a subrogate mortgagee of the Suit

Property as long as the other co-sharers have not contributed their shares of the redemption amount to her. The issue is answered accordingly.

Issue 10 - Whether the plaintiff is entitled to a decree of declaration as prayed in clauses (e), (f), (g)? OPP

173. In view of the above, this issue is answered by holding that the plaintiff is not entitled to the declaration as prayed for in Clauses (e), (f) and (g) of the plaint.

Issue 11 - Whether the plaintiff is entitled to a decree of permanent injunction as per clause (h) of the prayer clause? OPP

174. The plaintiff is held entitled to a Decree of permanent injunction as prayed for in Clause (h), being a co-sharer in the Suit Property.

Relief:

175. In view of the findings hereinabove, a Decree is passed declaring the share of the plaintiff, the defendant no.1, and the defendant no.2 as 33.34%, 16.67%, and 16.67% respectively in the Suit Property. The share of late Shri Ajit Singh being 16.67% in the Suit Property, shall be held by the plaintiff as the executor under the Will dated 21.07.1997 **(Ex.PW-2/1)** of late Sh.Ajit Singh for the benefit of the legatees under the said Will, while the share of late Shri Kamal Kishore Bindal being 16.67% in the Suit Property shall devolve upon the half-brothers of Sh.Kamal Kishore Bindal.

176. As the decree of final partition cannot be passed at this stage, with the plaintiff and the other legal heirs yet to contribute their respective share of the redemption amount alongwith the interest to

the defendant no.1, and the defendant no.1 being in possession of the Suit Property, the Suit is being disposed of with the above determination of the shares of the parties, leaving it open to any of the parties to pray for a final division of the Suit Property by metes and bounds, or by way of sale in an appropriate proceeding, at a later stage.

177. The parties shall bear their own costs.

178. Let a decree sheet be drawn accordingly.

179. The Suit is, accordingly, disposed of in the above terms.

NAVIN CHAWLA, J.

OCTOBER 25, 2024/ns/Arya/rv/***VS/SJ***