Smt. Simrat Katyal vs Shri Varinder Katyal on 3 December, 2010

Author: Manmohan Singh

Bench: Vikramajit Sen, Manmohan Singh

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

+                        RFA (OS) No.20/1996

                    Judgment reserved on:      26.02.2010
%                   Judgment delivered on:     03.12.2010

      Smt. Simrat Katyal                            ......Appellant
                      Through:     Mr. Arun Mohan, Sr. Adv. with
                                   Mr. Ashval Vadera, Adv.

                                  Versus
      Shri Varinder Katyal                           .....Respondent
                       Through:    Mr. Arvind K. Nigam, Sr. Adv. with
                                   Mr. Vivek Sibal, Mr. Sumesh
                                   Dhawan and Mr. Vikas Chandel,
                                   Advs.

      CORAM:
      HON'BLE MR. JUSTICE VIKRAMAJIT SEN
      HON'BLE MR. JUSTICE MANMOHAN SINGH

      1. Whether the Reporters of local papers may
         be allowed to see the judgment?                  No
      2. To be referred to Reporter or not?               Yes
      3. Whether the judgment should be reported
          in the Digest?                                  Yes

MANMOHAN SINGH, J.
```

1. Regular First Appeal from the Original Side has been filed by the Appellant challenging the Judgment and Order dated 17 th January, 1996 passed by the learned Single Judge in Suit No. 755 of 1992 wherein the suit filed by the Appellant Smt. Simrat Katyal for partition against Varinder Katyal was dismissed.

2. Smt. Simrat Katyal, Appellant herein/Plaintiff in Suit No. 755 of 1992 is the widow of late Shri Harinder Katyal. Late Shri Harinder Katyal and Shri Varinder Katyal were the joint owners of property being house No. 21, Bungalow Road, New Delhi. Late Shri Harinder Katyal had married once earlier which had ended in divorce. Later on he got married to the Appellant. He had no children from his first marriage or from the second marriage.

3. The brief facts which are relevant for the purpose of deciding the present appeal are :

a. The property in suit -21 Bungalow Road- is a two storey residential house built in 1949 on a 1,250 sq. yd. plot by Lala Bhagwan Dass Katyal.

b. Lala Bhagwan Dass Katyal died on 11.12.1968 and by virtue of his Will, his two sons Harinder Katyal and Varinder Katyal inherited 50% undivided interest each as co-owners (co-sharers).

c. In 1985, Varinder Katyal (Respondent herein) filed Suit No.2009/1985 for dissolution of partnership and rendition of accounts of Universal Poultry Breeding Farms-a partnership of Harinder Katyal and Varinder Katyal. It was not, repeat not, in relation to House No.21, Bungalow Road or any immovable property at all.

d. On 2nd February, 1989, late Shri Harinder Katyal executed a Will in favour of the Appellant and appointed the Appellant as the sole executor in addition to making the Appellant the beneficiary of the Will.

e. On 11.2.1990, Harinder Katyal died and his widow Simrat Katyal inherited his one-half share in House No.21, Bungalow Road, New Delhi.

f. After the death of Shri Harinder Katyal, the present Appellant was brought on record as defendant in Suit No.2009/1985 as legal representative of late Shri Harinder Katyal by order dated 17th May, 1990.

4. The parties, thereafter, agreed to settle all disputes between them by an agreement which was recorded in the Memorandum of Understanding dated 30th April, 1990. The relevant clauses of the Memorandum of Understanding, which incorporated agreement between the parties with regard to the said properties are reproduced as under :

"Clause-5 - Property No. 21, Bungalow Road , Delhi was jointly owned by late Shri Harinder Katyal and V.K. and consequent upon the demise of Shri Harinder Katyal his share has devolved upon SK, SK and VK have agreed that Ground Floor portion of the said property together with half share in the open lawn in front and half share in courtyard in the rear which is presently in SK s occupation shall belong to and be held by SK exclusively and the other construction on the Ist Floor and Barsati Floor portion of the said property together with half share of the lawn in front and half share in the courtyard at rear presently in occupation of VK shall be vested in and belonged to VK absolutely and forever.

It is, however, agreed that VK will at his own cost construct on the rear portion of the rear courtyard falling in SK s share a garage-cum-servant quarter block for her independent and exclusive use and till such time the said constructions are carried out and proved SK will be entitled to make use of a garage and the servant room in the existing garage-cum-servant block in the rear courtyard in the portion belonging to VK.

> Parties have also agreed that the room used as Pooja Room with the front varandah abatting it on the Ground Floor Portion shall vest in and belong to VK.
>
> 7. The parties agree to settle all disputes between them, including the subject matter of Suit No.2009/1985 and the agreement reached by the parties was recorded in MOU on 30.4.1990. Among other things the said Memorandum of Understanding also settled the ownership/ occupation and possession of the respective portions of the parties in house bearing No.21, Bungalow Road, New Delhi (emphasis supplied)"

5. This Hon ble Court by means of order dated 17 th May, 1990 recorded the settlement arrived at between the parties and also recorded the statement of the parties in I.A. No. 1938/1990 in Suit No. 2009/1985 moved by the parties under Order 23 Rule 3 Code of Civil Procedure. The Memorandum of undertaking dated 30th April, 1990 was made a part of the decree passed by this Hon ble Court on 17 th May, 1990.

6. The Appellant, thereafter, in February 1992 filed the suit being numbered as 755/1992 for partition alleging that as per the Memorandum of Understanding between the parties dated 30.4.1990, the open space on the first floor and the second floor of the said building was kept common and joint and that a partition of the said open space be partitioned by allowing her half share of the same. The Appellant before filing the suit for partition had also filed Civil Suit No. 1731/91 on 16.8.1991 to get a decree of perpetual injunction against the present Respondent in respect of the same property which is pending for disposal.

7. The main contention of the Appellant before the Trial Court in a suit for partition was that from a reading of Clause 5 of the said Memorandum of Understanding, it is obvious that the said memorandum records a partial partition of House No. 21, Bungalow Road, between the parties. In the said document the parties have partitioned part of the said property while remaining part of it is joint. More specifically, the Appellant has got the ground floor portion and half of the front lawn as well as half of the rear courtyard along with a garage block to be constructed by the Respondent. The Respondent has got the constructed portion/covered area on the first floor and the constructed portion/covered area on the second floor along with half share in the rear courtyard. The Respondent has also got a Pooja Room on the ground Floor. Therefore, approximately 800 sq. ft. of open terrace on the first floor is joint between the parties and similarly, approximately 1500 sq.ft. on the second floor which are yet to be partitioned. The Appellant also filed the site plan which is appended as Schedule-I wherein the said area has been marked in red colour.

8. The Respondent contested the suit by filing of the Written Statement. It is contended by the Respondent that in view of the decree passed in the Suit No. 2009 of 1985 on 17.5.1990 there was a complete partition of the property in question, viz. House No. 21, Bungalow Road, Delhi and, therefore, the present suit is barred by the principles of res-judicata. The appellant cannot re-agitate the matters which were the subject matter and/or included in the suit matter of earlier suit as no right was reserved or permission was sought in the said suit. Hence, the suit for partition filed by the appellant was not maintainable and was liable to be dismissed. It is further contended that the plaintiff had brought Civil Suit No. 1731/91. While filing the said suit the plaintiff had not obtained

leave of the Court under Order 2 Rule 2 of the Code of Civil Procedure and, therefore, the plaintiff s present suit is barred.

9. Thereafter the issues were framed in the suit filed by the Appellant. Issues No. 2 to 4, as per the order, were treated as Preliminary Issues. The same are as under:

> "2. Whether the present suit is barred under the provisions of Order II Rule 2 CPC or the principles thereof"
>
> 3. Whether the present suit is barred in view of allegations made in para 3 of the preliminary objections of the Written Statement ?
>
> 4. Whether any portion of the property in question remains joint property of the parties?"

Para 3 of the preliminary objections reads as under:

> "3. That the present suit is not maintainable. The plaintiff is seeking to challenge the judgment and decree passed in suit No.2009/85. No suit lies in law to set aside the decree passed on a compromise between the parties. The present suit is, therefore, not maintainable and is barred at its very threshold.
>
> Without prejudice to the above submissions, the answering defendant submits that even prior to the institution of the present suit the plaintiff filed Suit No.1731/91 seeking relief with respect to the property, 21 Bungalow Road, Delhi, which is the subject-matter of the present suit. The plaintiff herein claimed in the said suit No.1731/91 reliefs relating to the property which had fallen to her share. No right was reserved or leave was taken, which is mandatory, by the plaintiff herein under the provisions of Order 2 Rule 2 CPC. The plaintiff is deemed to have abandoned right, if any, to claim partition and/or any other relief with respect to the said property. The present suit is, therefore, liable to be dismissed on this short ground.
>
> Without prejudice to the above preliminary objection, the answering defendant submits that the present suit is liable to be stayed in view of the pendency of Suit No.1731/91. The parties to the two suits are the same. The reliefs sought in the present suit (even if available in law, which is denied) can be granted by the Court adjudicating suit No.1731/91. The properties involved in the two suits are the same. The judgment in the said suit would be binding on the parties hereto. The present suit is, therefore, liable to be dismissed under Section 10 of the Code of Civil Procedure or the principles thereof or, in any event, under the inherent powers of this Hon ble Court."

10. The suit was dismissed on 17.01.1996 as Issue No. 3 was decided in favour of the Respondent whereby the learned Single Judge has come to the conclusion that in view of the Memorandum of Understanding between the parties, no portion out of the property in question is kept common

between the parties and the suit filed by the Appellant is barred on account of the decree of partition passed in the earlier suit between the parties. The present appeal has been filed against the order dated 17.01.1996 for dismissal of the appellant s Suit No. 755/1992 for partition of the alleged part of the property in question.

11. We have heard the learned counsel for the parties. The principal contentions raised by the Appellant in the present appeal are :

> i. that the Memorandum of Understanding dated 30.4.1990 (herein referred to as "the MOU) was not a complete settlement and certain unconstructed/open spaces in the property bearing No.21, Bungalow Road, New Delhi were still to be divided between the Appellant and the Respondent.

ii. the contention raised by the Appellant is that the compromise decree passed in suit No.2009/1985 was necessarily required to be registered under Section 17(2)(6) Registration Act, 1908 and since the said compromise decree was not registered, it cannot be looked into for the purpose of evidence.

12. The submissions of the Respondent are that the MOU dated 30.04.1990 was a complete family settlement between the Appellant who was the widow of the brother of the Respondent on the one hand and the Respondent himself. The family settlement was arrived at between the parties to put an end to all litigations and to arrive at an amicable settlement.

13. It is submitted that there were various properties, businesses with assets and liabilities involved in the said settlement and two baskets were made and each side got its respective share. It is stated by the respondent that throughout the contention of the appellant has been that the settlement was in the ratio of 50:50 between the parties and he has got less than 40% share in the property bearing No.21, Bungalow Road, New Delhi, which is factually incorrect. However, as per the case of the respondent at the relevant time under the MOU, the Respondent had agreed to take care of the liability of Rs.19.65 lac of Union Bank of India. Further, the Appellant had received 44 acres of land in Gurgaon which included one residential three bedroom cottage, 29 concrete poultry sheds in entirety. The House No.21, Bungalow Road was mortgaged by the brother of the Respondent against a loan taken by him for the firm Universal Poultry Breeding farm which went to the Appellant. It is submitted by the Respondent that the MOU has to be read in entirety and cannot be read in isolation.

14. It is submitted by the respondent that the MOU dated 30.4.1990 recorded prior oral settlement between the parties and hence was not required to be registered. As any family settlement arrived at between the parties it on a later stage, same is reduced in writing does not require registration, in view of the decision of Apex Court in Kale and Ors. Vs. Dy. Director of Consolidation and Ors., (1976) 3 SCC 119, at page 140 para 44 which reads as under:

> "44. In view of our finding that the family settlement did not contravene any provision of the law but was a legally valid and binding settlement in accordance with

the law, the view of Respondent No. 1 that it was against the provisions of the law was clearly wrong on a point of law and could not be sustained. Similarly the view of the High Court that the compromise required registration was also wrong in view of the clear fact that the mutation petition filed before the Assistant Commissioner did not embody the terms of the family arrangement but was merely in the nature of a memorandum meant for the information of the Court. The High Court further erred in law in not giving effect to the doctrine of estoppel which, is always applied whenever any party to the valid family settlement tries to assail it. The High Court further erred in not considering the fact that even if the family arrangement was not registered it could be used for a collateral purpose, namely, for the purpose, of showing the nature and character of possession of the parties in pursuance of the family settlement and also for the purpose of applying the Rule of estoppel which flowed from the conduct of the parties who having taken benefit under the settlement keep their mouths shut for full seven years and later try to resile from the settlement."

15. It is argued by the respondent that in the present case also the MOU dated 30.4.1990 records the oral settlement arrived at between the parties on an earlier occasion, the same is admitted by the Appellant in her suit No.1731/1991. It is stated that in fact during the pendency of the litigation between the parties the brother of Respondent i.e. husband of the Appellant had died on 11th February, 1990, thereafter, a number of meetings had taken place and settlement arrived at orally which was reduced in writing by way of MOU. As the MOU was clear and unambiguous and recorded a settlement arrived at earlier between the parties on an earlier occasion, the same did not require any registration under Registration Act.

16. According to the learned counsel for the Respondent the said fact is also recorded by the learned Single Judge in impugned order. The learned Single Judge has categorically recorded in the impugned order that after the death of the appellant s husband, the parties had negotiated and they had arrived at a settlement and understanding and in consequences of the same, they executed MOU on 30.4.1990 and thereafter they filed a joint application under Order XXII Rule 3 of the CPC by annexing MOU as Annexure A to the said application and a decree was passed in terms of the compromise application. MoU as Annexure A was ordered to be made as part of the decree.

17. The learned counsel for the Respondent has referred the following decisions in support of his submissions:

a. Shankar Sitaram Sontakke and Anr. Vs. Balkrishna Sitaram Sontakke and Ors., AIR 1954 SC 352 (para 9 and first 8 lines of para 10) b. Raja Sri Sailendra narayan Bhanja Deo Vs. The State of Orissa, AIR 1956 SC 346 (para 8).

c. Byram Pestonji Gariwala Vs. Union Bank of India and others, 1992 (1) SCC 31 (paras 41 and 43).

d. Hope Plantations Ltd. Vs. Taluk land Board, Peermade & Anr., 1999 (5) SCC 590 (paras 26 and

31).

e. Bhanu Kumar Jain Vs. Archana Kumar and Anr., 2005 (1) SCC 787 (para 18, 19 and 30).

f. Tulsan Vs. Pyare Lal and Ors., 2006 (10) SCC 782 (para 13).

18. Admittedly in the plaint, the Appellant s case before the trial court was that by way of Memorandum of Understanding/ document, the parties have partitioned the part to the said property while remaining part of it is joint.

In the Suit, the Appellant did not challenge the validity of the settlement and order and decree passed by the Court nor any application for clarification or modification was filed. Rather, the Appellant filed an independent suit for partition mainly on the abovesaid reasons. The prayer in the suit was to pass a decree for partition of the unconstructed portion of the first and second floor of the House No.21, Bungalow Road, Delhi, as marked in Schedule-I and deliver the separate possession of the share belonging to the plaintiff.

19. The learned Single Judge after hearing of the preliminary issue has dismissed the suit on issue No.3 which was also framed as preliminary issue and was decided against the respondent. The main findings are in paras 10 and 11 of the judgment which are:

> "10. From the above terms of the document it would be quite clear that whenever a party intended to keep a property joint that they had specifically mentioned so in the Memorandum of Understanding and they have also further mentioned as to how and in what manner the said joint property is to be subsequently divided by the parties. If the said terms as regards the property in question, viz. property No.21, Bungalow Road, Delhi, is taken into consideration then it would be quite clear that not only details are given as regards division of the said property in the said compromise and there is no mention of keeping that property out of the bungalow in common. There is also no subsequent para in the said Memorandum of Understanding mentioning therein that the property in question is kept common. It must be also remembered that when the parties are effecting partition they will have complete partition effected in respect of the properties between them. If the above terms are also seen then it would be quite clear that they have done so. No doubt, two properties are kept common but they are kept common because they were not in their possession and they were in possession of third person and they were also not owners of them but they had some rights in respect of those properties and, therefore, as they had become impartible between them at the time of Memorandum of Understanding they had kept them common.
>
> 11. .....It is not also mentioned in the terms that the open space which are terraces of the first floor and barsati floor are kept common between the parties. When there is no use of the word „only as well as the wording that the open space on the first floor and second floor are kept common between the parties it does not lie in the mouth of

> the plaintiff to contend that the open spaces on the first floor and barsati floor are joint properties between the parties. The open space, which are terraces of the first floor and the barsati floor will go alongwith the constructed portion because of the construction including the open construction on the first floor and second floor are allotted to the defendant."

20. While dismissing the suit, the learned Single Judge has come to a conclusion that in view of the clear term of the Memorandum of Understanding between the parties, no portion out of the property in question is kept common between the parties.

21. We are of the view that before dealing with the submission of the learned counsel for the Appellant, we must refer to certain admitted facts in the matter between the parties:

> i) It is an undisputed fact that the settlement application was signed and supported by the affidavits of the parties. The statements of the parties were also recorded at the time of passing the judgment and decree on 17.5.1990 in suit No.2009/1985. The memorandum of understanding was ordered to form part of the decree.
>
> ii) It is also not disputed by the parties that most of the terms and conditions mentioned in the application had been acted upon between the parties who have taken the benefit under said settlement.
>
> iii) The Appellant filed the suit for partition on 20.2.1992 after expiry of the period of about one year and nine months.

22. The first submissions of Mr. Arun Mohan, learned senior counsel for the Appellant, that the Memorandum of Understanding between the parties on the basis of which the decree has been passed by filing an application for settlement/compromise under Order 23 Rule 3 of the Code of Civil Procedure only partitions the constructed portion of the property and since the property in question was joint before the execution of Memorandum of Understanding, the same was admittedly not divided horizontally or vertically and the said property was also not partitioned by metes and bounds. No site plan demarcated the respective shares. According to him, the Memorandum of Understanding dated 17.04.1990 did not mention or partition or allocate the following:

> 1. Land underneath 21 Bungalow Road;
>
> 2. Open Terraces as well as floors above First and Barsati floor;
>
> 3. Right to construct a basement;
>
> 4. Common Passages like the driveways; and
>
> 5. Water tank on the first floor.

He has referred the decision reported in 2008 (102) DRJ 744; Abhay Sapru vs. Chitralekha Bakshi (the judgment was also upheld by the Division Bench reported in 2008 (106) DRJ 589) wherein in para 33 it was held:

> 33. ... The family settlement does not suggest that the parties had also partitioned by metes and bounds this interest in the land ... . Since the land rights have not been dealt with in Ex.D-1/3 with any finality, which is only a memorandum recording an oral family settlement and is an unregistered document, there was no complete partition by metes and bounds.

It is argued by the senior counsel for the Appellant that the Memorandum of Understanding is restricted only to existing construction on the first floor and Barsati floor and it does not deal with the open and unconstructed areas on the terrace of the first floor and above. He has referred the judgment of Jagdip Mehta vs. Kuldip Mehta bearing No.RFA(OS) No.21/2007 decided on 19.12.2008 wherein the Division Bench approved the decision of the Single Bench in the case of Madhu Kohli vs. Suresh Khatter; 2006 128 DLT 116 and has given its findings that: (1) Construction was quite old; and (2) Large covered area on each floor was permitted, a Preliminary Decree for partition of the entire property was passed by the Single Judge but in Appeal the matter remitted back to the learned Single Judge to re- decide the mode of partition of the property.

23. It was submitted by the counsel for the appellant that the unwritten terms cannot be superimposed by the Court. He argues that the property under these circumstances has not been partitioned by metes and bounds which is required under law in view of decision of Apex Court in the case of Balkrishna Somnath vs. Sadu Devram Koli; AIR 1977 2 SCC 15 wherein in para it was held:

> 13. .... Notional division or division in status also may not be enough because the Act insists on separation „by metes and bounds . Ordinarily „metes and bounds are appropriate to real property, meaning as the phrase does, „the boundary lines of land, with their terminal points and angles . In the context, the thrust of the expression is that the division must be more than notional but actual, concrete, clearly demarcated. ....."

24. After having gone through the judgments referred by the counsel, we are of the view that the same are not applicable in the facts of the present facts and the same are distinguishable. In the case of Abhay Sapru Vs. Chitralekha Bakshi (supra), the finding of the Court was that no partition by metes and bounds had taken place and therefore, the Local Commissioner was appointed by the learned Single Judge in the suit for the purpose of suggesting actual modalities of physical partition of the property. There was no consent decree between the parties in the suit, however, in the present case the property in question was divided as per clause 5 of MOU which was made part of the decree as per settlement between the parties, thus, in the present case, the facts are materially different.

Similarly in the case of Jagdip Mehta vs. Kuldip Mehta (supra), the facts were that the property was owned by their father late Shri Krishan Lal Mehta. During his lifetime, late Shri Krishan Lal Mehta

had executed Will dated 18.2.1980. By that Will, he gave specific portions of the suit property to the two brothers. Under the said Will the broad division made by the testator was to give first floor of the suit property to the respondent herein (elder son) and ground to the appellant (younger son). That apart there was disposition of garage and servant quarter as well. The parties have been living in the respective portions, as per the said Will, for the last number of years. The litigation, however, started when the respondent wanted to make further constructions over the first floor. The appellant claimed that on the portion above the first floor both the brothers have equal share. The respondent rebutted this claim of the appellant by contending that as per the true construction of the Will and the intention of the testator, anything above the first floor belongs to him. He, therefore, filed CS(OS) No.1963/1997 for declaration seeking declaration to the effect that on the construction of the testator s Will dated 18.2.1980, the first floor and above belongs to him and he is free to use such construction thereon. Alternate prayer made was that in case above prayer is not granted, the property in question be partitioned in such a manner as the court deemed proper, by separating the share of the plaintiff/respondent.

25. In the present case, the situation is entirely different. The suit filed by the respondent was decreed with the consent of the parties where various properties of the parties partitioned the subject matter of the property with open eyes and complete knowledge, the open space referred by the Appellant was in existence when the matter was settled. The MOU which was annexed with an application under Order 23 Rule 3 CPC was ordered to form part of the decree. The property in question was divided as per clause 5 of the MOU.

26. Further, the Appellant did not file any application for modification of decree nor is the plea of the Appellant about fraud played upon the court or otherwise, rather she had chosen to file independent suit for partition after one year and nine months which shows that she was trying to resile from the settlement. Therefore, all the decisions referred by the learned counsel for the Appellant are not applicable in the facts and circumstances of the present case as facts are materially different. It is settled position that each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant circumstance may alter the entire aspect. Reliance in this regard has been placed by the petitioners in the two cases namely Zee Telefilsm Limited and another Vs. UOI, AIR 2005 SC page 2677 and UOI Vs. Amritlal Manchanda, AIR 2004 SC page 1625.

27. The second submission of Mr. Arun Mohan, Senior counsel is that the compromise decree is not a judgment and will not operate as res judicata in the subsequent suit though it may operate as estoppel. However, the said objection of estoppel has not been pleaded by the Respondent in the written statement. In support of his contention, he has referred the case of Pulavarthi Venkata Subba Rao vs. Valluri Jagannadha Rao; AIR 1967 SC 591 wherein in para 10 it was observed:

> "10. ...The compromise decree was not a decision by the Court. ... A compromise decree merely sets the seal of the court on the agreement of the parties. The Court does not decide anything. Nor can it be said that the decision of the Court was implicit. Only a decision by the Court can be res judicata. ... The decree might have created an estoppel by conduct between the parties; but here the Appellants are in an

> unfortunate position, because they did not plead this estoppel at any time."

On similar point he has also referred the case of Baldevdas Shivlal vs. Filmistan Distributors (India) P. Ltd.; AIR 1970 SC 406, wherein in para 8 it was observed:

> "8. ... A consent decree, (according ?) to the decisions of this Court, does not operate as res judicata, because a consent decree is merely the record of a contract between the parties to the suit, to which a superadded the seal of the Court."

28. It is settled law that where a bar is created by law from instituting a claim and when the disposal of the suit is possible on admission fact, the preliminary issue can be framed under the provision of Order 14 Rule 1 of the Code of Civil Procedure.

29. As regard the distinction between the res judicata and estoppel is concerned, the doctrine of res judicata really differs in essential particulars from the doctrine of estoppel. Actually, it is treated as branch of law of estoppel. The rationale behind the said doctrine is that if the controversy in issue is finally determined or decided by the Court and if such decision attains finality, then it would be illogical to allow the party to reopen the same issue again which may destroy the binding nature of pronouncement.

30. The rule of res judicata proceeds on doctrine of public policy while rule of estoppel proceeds upon the doctrine of equity. Both are not merely technical doctrines but are fundamental doctrines of all Courts based upon the twin principles; that there must be an end of litigation and the party should not be vexed twice over the same cause. It is settled law that the rule of res judicata prohibits in inquiry in limine and ousts the jurisdiction of the Court to try the case.

31. In the instant case, the suit for partition filed was dismissed mainly for the reasons that no portion out of property in question is kept common between the parties in view of MOU and the suit was barred on account of the decree of partition passed in the earlier suit between the parties. The respondent in his written statement took the defence on the same line and in addition to that the plea of res judicata was taken. The learned Single Judge after considering the rival submission of the parties has dismissed the suit on issue No.3 mainly on the reason that in view of the consent decree passed between the parties on the basis of MOU, no portion out of the property in question is kept common between the parties, hence, the suit was barred on account of the decree of partition passed in the earlier suit between the parties. Therefore, the second submission of the Appellant is also without any merit and is rejected.

32. Third submission of Mr. Arun Mohan, learned senior counsel for the Appellant, is that the property No.21, Bungalow Road was neither the property in suit No.2009/1985 nor in issue. The suit No.2009/1985 was only for dissolution of partnership. The compromise application did not refer to the said property. But clause 5 of the attached Memorandum of Understanding did. According to him, there was no judgment as it was a compromise arrived at between the parties which was recorded by the Court. It was mentioned that it is a decree in a suit for dissolution of partnership and not a decree in a suit for partition.

33. Admittedly, the respondent herein had filed the suit against the husband of the Appellant for dissolution of partnership firm and rendition of accounts. During the pendency of the said suit, the Appellant s husband had died and she was brought on record. After the death of the husband, the Appellant and the Respondent had negotiated and had arrived at a settlement and understanding and in consequence of the same, they executed Memorandum of Understanding on 30.4.1990 and therefore, they filed a joint application under Order 23 Rule 3 of the Code of Civil Procedure by annexing the Memorandum of Understanding as Annexure A to the application and the decree was passed in terms of compromise application and Annexure A. It is not in dispute that the Court had recorded the statements of both the parties on oath and after satisfying that the compromise arrived at between the parties was valid, the decree in terms thereof was passed. In the amendment of the Code of Civil Procedure in the year 1976, the provision is very clear that if the property was not originally the subject matter of the suit, the Court has the power to pass a decree in respect of the agreement or compromise arrived at between the parties.

34. It is clear from the above that once the MOU formed part of the decree which contains the terms and conditions of settlement and also included the subject of property, it amounts to passing of a decree of partition of property also. The Appellant in order to resile from the settlement cannot be permitted to raise technical plea which are frivolous on the face of it. Therefore, the objection raised by learned counsel for the Appellant has no force.

35. Mr. Arun Mohan, learned senior counsel for the Appellant, during the course of arguments has also raised various other objections in respect of interpretation, construction of documents and the effect of non-registration of MOU. He has also raised the objection that since the property in question was not subject matter of the suit, therefore, the decree has to be framed on stamp paper and requires registration. In respect of his submissions he has also referred to number of judgments.

36. It is pertinent to mention that these objections were not raised in her original suit No.755/1992 filed by the Appellant before the trial court as well as specifically in the memorandum of appeal. The arguments on these objections were addressed at the time of hearing of an Appeal. Thus, we feel that it is not necessary to discuss these objections in the present appeal.

37. It is pertinent to mention that when the application under Order 23 Rule 3 CPC was filed before the Court along with MoU attached with the application, the said open spaces in the area were still in existence and the Appellant had the knowledge about the same. Admittedly, the Appellant did not file any application in the suit filed by the respondent thereby stating that the memorandum of understanding records a partial partition of the property and there was no partition of the said open space as mentioned by the Appellant in the present suit for partition which has been filed after the expiry of more than 20 months of recording the settlement between the parties.

As per settled law no independent suit lies to set aside a compromise decree in view of the provision of Rule 3A of Order 23 CPC which does not permit any party to challenge the compromise decree except on the plea of fraud having been played on the Court, the Appellant rather filed the independent suit for partition.

38. It appears that the Appellant was aware on the date of filing of a suit that no independent suit lies, therefore, without challenging the validity of the settlement arrived at between the parties and the court passed the judgment and decree. Now the Appellant filed fresh suit on the ground that it was a partial partition of the house. On the one hand, the appellant has alleged that she is not challenging the settlement and decree while on the other hand it is alleged that part of the property is still joint. In a way, we feel that the appellant by filing the fresh Suit indirectly or by implication trying to set-aside the compromise decree in the clever manner which is not permissible in law. Even otherwise, the said plea is contrary to MOU and the admission made in para 7 of the suit for injunction filed by her being suit No.1731/1991 after settlement, which reads as under:

> "7. The parties agree to settle all disputes between them, including the subject matter of Suit No.2009/1985 and the agreement reached by the parties was recorded in MOU on 30.4.1990. Among other things the said Memorandum of Understanding also settled the ownership/ occupation and possession of the respective portions of the parties in house bearing No.21, Bungalow Road, New Delhi (emphasis supplied)"

39. In almost similar situation, the Apex Court in the case of Pushpa Devi Bhagat (dead) through LR. Sadhna Rai (Smt) Vs. Rajinder Singh and others, (2006) 5 SCC 566, at page 576 in para 17 laid down as under:

> "17. The position that emerges from the amended provisions of Order 23 can be summed up thus:
>
> (i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC.
>
> (ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) of Rule 1 Order 43.
>
> (iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3A.
>
> (iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent

compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21.8.2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27.8.2001), filed an appeal and chose not to pursue the application filed before the court, which passed the consent decree. Such an appeal by the second defendant was not maintainable, having regard to the express bar contained in Section 96(3) of the Code.

40. This Court in the case of Joginder Singh Bedi Vs. Bawa Darbara Singh & Ors., 39 (1989) DLT 270, has dealt with the same question to a great extent by referring the case of similar controversy. In para 8 it observed:

> "....Exactly similar question arose before this Court in Uttam Chand Bhatia v. Amir Chand Bhatia. S. No. 284/84, decided on 6th December, 1984 as to whether a suit would lie for setting aside the compromise decree. The observations of M.K. Chawla. J. in that case are reproduced below :
>
> "The words „lawful agreement or compromise in Rule 3 had given rise to a conflict in the matter of interpretation. One view was that agreements which are voidable under Section 19 A, (power to set aside contracts induced by undue influence) of the Contract Act by some High Courts. To resolve this controversy an Explanation was added to the Rule to set the matter right. The Explanation reads thus:-
>
> "An agreement which is void or voidable under the Indian Contract Act, 1972, shall not be deemed to be lawful within the meaning of this rule."

For quite some time the amended provision held the field. It must be remembered that a compromise decree is but a contract with the command of a Judge superadded to it. It could be set aside on any of the grounds such as fraud, mistake, undue influence, misrepresentation etc. In view of the Explanation added to Order 23 Rule 3, number of suits were filed seeking to set aside the consent decrees. Subsequently, however, a new conflict arose between different High Courts, while interpreting the word „lawful . Ordinarily the word „lawful means lawful within the meaning of the Contract Act or other Rules or substantive law governing contract. But in a Mysore case, it was held that where a compromise decree passed by a court of competent jurisdiction contains a term which is opposed to law or public policy, but the decree has not been set aside, in proper proceedings, the decree operates as res judicata. The other High Courts took a different view. To resolve this conflict Rule 3A was inserted by the Amendment Act 104 of 1976 in the Code of Civil Procedure. It reads as under :-

> 'Rule 3A-No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.' The learned Judge has dealt with the provision of Order 23 Rule 3 CPC and further observed as under:

"The fact remains that by filing the present suit the plaintiff seeks the relief of a declaration to the effect that the compromise application, the judgment and the decree dated 26-4-1982 in Suit No. 349/1982 be declared as illegal, void, nullity and not binding on the plaintiff. The provisions of Rule 3A of Order 23 are very clear and exhaustive. No scope is left for filing or entertaining such like suits. The intention of the Legislature in enacting this provision was to put an end to the frivolous litigation, after the parties had entered into a compromise with open eyes. The bare reading of this Rule goes to show that even if the compromise was made the basis of the passing of the decree was not lawful, yet no suit shall lie to set aside the said decree."

Para 9 of the judgment reads as under:

"9. The matter does not rest here. The defendants are entitled to succeed on second ground as well that after the compromise decree was passed, the plaintiff has acted upon and taken benefits and advantage out of it as already explained and referred to earlier which need not be re- stated. The claim in this suit is in respect of the same transaction and between the same parties. In this connection the observations of the Supreme Court in Nagubai Ammal and others v. B. Sharma Rao and others. (AIR 1956 SC 593) may be referred to :

"The observations of Scrutton, L.j. on which the appellants rely are as follows:

„A plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election-namely, that no party can accept and reject the same instrument : Ker v. Wauchope (1819) 1 Bligh 1(21) (E) : Douglas Menzies v. Umphelby 1908 AC 224 (232)(F). The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction. It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The law is thus stated in Halsbury's Laws of England, Volume XIII, p. 454, para 512 :

"On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais, and may conveniently be referred to here. Thus a party cannot after taking advantage under an order (e.g. payment of costs), be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of

third parties who have acted on it."

In view of the facts and circumstances of this case and in the light of the observations of the Supreme Court, the plaintiff cannot be permitted to challenge the compromise decree after having taken benefits and advantage out of it. He cannot be permitted to approbate and reprobate."

41. In the present case it is not disputed that the Appellant before filing of the suit for partition, instituted the suit No.1731/1991 seeking relief relating to the property which had fallen to her share. In view of the above, the impugned order passed by the learned Single Judge in suit No.755/1992 is correct and legal and we are agreeable with the finding given by the learned Single Judge and the same cannot be set aside as prayed by the Appellant.

42. We are of the view that arguably the only remedy which lies with the Appellant is to file the application, if maintainable, before the concerned Court who passed the consent decree between the parties or to take all the objections which are available to the Appellant in the execution proceedings at the time of enforcement of decree, if situation arises.

43. For the aforesaid reasons, there are no grounds to interfere with the impugned order by the learned Single Judge. The Appeal filed by the Appellant is without any merit and the same is dismissed with cost of Rs.20,000/-.

MANMOHAN SINGH, J.

VIKRAMAJIT SEN, J.

DECEMBER 3, 2010 dp/jk