Jyoti Wazir & Ors. vs Deepak Khosla & Ors. on 4 April, 2025

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Pronounced on

\+ CS(OS) 1194/2003

JYOTI WAZIR & ORS.

Through: Mr. Siddharth Yadav, Sr.
Mr. Narender Lodiwal and
Wasim Ashraf, Advs.

versus

DEEPAK KHOSLA & ORS. .....

Through: Mr. Raman Kapur, Sr. Adv
Manish Kumar and Mr. Var
Advs. for D-1 to D-3.

CORAM:
HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

1. The question with which this Court is confronted in the present judgment is whether the issues which were framed vide order dated 26.09.2011 covered the amended plaint or whether additional issues need to be framed, which if framed would require leading of additional evidence in respect thereof.

2. To find an answer to the above question, it is necessary to appreciate the background facts of the case.

3. The property bearing number 11, Prithvi Raj Road, New Delhi was owned by Late Sh. R.N. Khosla, who had two sons namely Sh. K.G. Khosla and Sh. J.C. Khosla. The contesting parties in the present suit for partition are the heirs of Late Sh. K.G. Khosla. The plaintiffs are the three daughters of Late Sh. K.G. Khosla, whereas the Defendant No.1 is his son. When the suit was originally filed, it was filed by the Plaintiff No.1 as the sole plaintiff. Subsequently, the two other daughters of Late Sh. K.G. Khosla, who had been originally arrayed as Defendant Nos.4 and 5, were transposed as Plaintiff Nos.2 and 3 vide order dated 18.04.2006. Defendants No.2 & 3 are the sons of Defendant No.1. The Defendant No.4 (originally Defendant No.6) is the aforesaid Sh. J.C. Khosla.

4. Late Sh. R.N. Khosla during his lifetime executed a Gift Deed dated 19.06.1957. One of the disputes in the present suit revolves around the construction of the said Gift Deed.

5. The case of the plaintiff no.1 in the plaint is that:

(i) By virtue of the said Gift Deed, Sh. R.N. Khosla had gifted half share each of the said property to both of his sons to be held by them for themselves, as well as, for their respective family members.

(ii) The stand was supplemented by a Partition Deed dated 30.05.1972, the recitals of which affirm the factum of the gift having been made for the two sons and their family members as well.

(iii) Challenge has also been made in the plaint to the two Wills, one of Sh. K.G. Khosla and the other of his wife Late Kanwal Khosla, sought to be relied upon by the defendant nos. 1 to 3.

6. The prayer thus, made in the original plaint reads as under:

"i. a preliminary decree for partition of the eastern half of property no.11, Prithvi Raj Road, New Delhi and properties detailed in Schedule A declaring the Plaintiff be the owner of the 1/4th share;

ii. a final decree for partition and separate possession by division of the aforesaid properties by metes and bounds and/or in the alternative, the same be sold and sale proceedings be divided equally among the Plaintiff and Defendants No.1, 4 and 5;

iii. a decree for declaration in favour of the Plaintiff and against the Defendants declaring that the alleged wills of late K. G. Khosla and late Kanwal Khosla to be null and void and not binding on the Plaintiff;

iv. a decree for permanent injunction restraining the Defendant Nos. 1 to 5, their agents, servants, employees or any other person/s from in any way selling, transferring, alienating or in any manner dealing with the eastern half of property No.11, Prithvi Raj Road, New Delhi and properties detailed in Scheduled A hereto."

(emphasis supplied)

7. On the other hand, the pleaded case of the defendant nos.1 to 3 in their original written statement is that:

(i) The correct reading of the Gift Deed dated 19.06.1957 would be that Sh. R.N. Khosla gave half share each to both his sons to be held by them absolutely in their individual capacities.

(ii) After having executed the aforesaid Gift Deed, Sh. R.N. Khosla was not left with any right to execute a declaration with regard to the suit property having been gifted in favour of all the family members as claimed by the plaintiff.

(iii) The Partition Deed dated 30.05.1972 was executed to circumvent the provisions of Wealth Tax Act, as well as, rigours of the Urban Land Ceiling Act but no actual partition took place and the alleged partition was never acted upon.

(iv) Late K.G. Khosla executed a Partition Deed dated 12.07.1972 dividing his half share between himself, his wife, Late Kanwal Khosla and his only son defendant no.1 whereas Late Sh. J.C. Khosla allegedly gifted certain portion of his half share in the property to Vishnu Nama Bhrigu Satsang Trust on 28.07.1972. The defendant nos. 1 to 3 have also placed reliance upon mutation dated 05.11.1977 whereby the said property was mutated in favour of Late Sh. K.G. Khosla, Late Kanwal Khosla, defendant no.1, Sh. J.C. Khosla and the aforesaid Trust in the records of L&DO to show that the partition dated 12.07.1972 had in fact been acted upon.

(v) Reliance has also been placed on the alleged Will dated 20.12.1999 of Late Smt. Kanwal Khosla wherein, she gave her share in the property to Sh. K.G. Khosla or in case he pre-deceases her then to her son i.e., defendant no.1.

(vi) Furthermore, the Will dated 18.12.2002 of Late K.G. Khosla has been propounded whereby his share in the property has been given to the sons of defendant no.1 i.e. defendant nos. 2 & 3.

8. When the suit inter alia seeking decree for partition was originally filed by the plaintiff no.1, who is a daughter of Late K.G. Khosla, Section 23 of the Hindu Succession Act, 1956 was still on the statute book and a preliminary objection with regard to the maintainability of a prayer for partition was raised by the learned counsel for the defendant nos. 1 to 3.

9. Accordingly, summons were directed to be issued to the defendants vide order dated 21.07.2003 confined to prayer clauses (iii), (iv) & (v) while leaving the question of maintainability of the prayers in paras (i) and (ii) open, to be decided later. After service of summons, the defendant nos. 1 to 3 who were the main contesting defendants, filed their first written statement dated 08.09.2003 (hereinafter referred to as "WS-1").

10. Thereafter, an application dated 18.11.2003 was moved by the plaintiff under Order VI Rule 17 CPC, inter alia, seeking correction of the date of Partnership Deed which was inadvertently mentioned in the original plaint as 30.05.1971 instead of 30.05.1972. The said application was partially allowed to the extent of aforesaid correction in the date of Partnership Deed vide order dated 20.11.2003 while holding that the other amendments sought in the plaint were of no consequence in view of the preliminary issue regarding maintainability of the partition suit and were accordingly, not considered. However, plaintiff was granted liberty to seek amendment, in case, the objection of the defendant is rejected.

11. Subsequently, it so developed during the pendency of the suit that Section 23 of the Hindu Succession Act, 1956 was repealed and in view thereof, summons were issued to the defendants vide order dated 24.08.2009 in respect of prayer clauses (i) & (ii) of the plaint as well. Thus, the

defendants were directed to file a written statement, if they so wished. This led to the filing of the second written statement dated 06.01.2010 by the defendant nos. 1 to 3 (hereinafter referred to as "WS-2").

12. After completion of pleadings, this Court vide order dated 26.09.2011 framed the following issues:

> "(i) Whether the suit is not maintainable in view of Section 23 of the Hindu Succession Act as on the date of filing as applicable on the date of institution of the Suit? OPD
>
> (ii) Whether declaration dated 05.04.1961 by Sh.R.N. Khosla is binding upon the parties? OPP
>
> (iii) What is the effect of the partition deed dated 30th May 1972?
>
> Onus on both parties 1
>
> (iv) Whether partition dated 12.07.1972 and mutation dated 05.11.1977 are not binding upon the plaintiffs? OPP
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> (v) Whether Smt.Kanwal Khosla died intestate and if not, then whether Smt.Kanwal Khosla was not capable in law or otherwise to execute Will dated 20.12.1999? OPP
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> (vi) Whether the plaintiffs are entitled to a decree of partition and possession? OPP
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> (vii) Whether the plaintiffs are entitled to a decree of permanent injunction? OPP
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> (viii) Whether the plaintiff is entitled to 1/4th share in the movables left behind by the deceased Smt. Kanwal Khosla and Sh.K. G. Khosla? OPD
>
> (ix) Relief."

13. Accordingly, the parties lead their evidence on the aforesaid issues and the learned Joint Registrar vide order dated 26.07.2019 recorded that the evidence in the case is complete and the matter is ripe for final hearing.

14. In the meanwhile, the plaintiff filed an application on 07.05.2019 i.e. I.A. 6790/2019 seeking following prayer:

> "(A) The Amended Plaint, as filed by the Plaintiffs in the year 2003, be taken on record;"

15. After going through the various orders passed in the course of the trial, this Court vide order dated 24.02.2022 allowed the said application observing that only a formal order was required to be passed and took on record the amended plaint, reserving the parties their rights to raise all contentions at the time of final hearing of the suit.

Vide order dated 01.04.2019, the issue framed at serial no. (iii) was amended with the consent of the parties and it was noted that no additional evidence was required. The unamended issue no. (iii) is as follows:

> "(iii) Whether partition deed dated 30.05.1972 is not binding upon the parties? OPP"

16. Feeling aggrieved with the order dated 24.02.2022 taking on record the amended plaint, the defendant nos. 1 to 3 preferred an appeal being FAO(OS) 27/2022. The Hon ble Division Bench disposed of the said appeal and directed the learned Single Judge that the question whether the issues were struck on the basis of amended plaint filed by the plaintiff in the year 2003 as a whole and whether the parties lead their respective evidence on the basis of the said plaint, shall be determined before proceeding with the final hearing of the suit.

17. Consequently, the learned Single Judge, vide order dated 25.07.2022, opined that it is no longer open for either party to question the taking on record of the amended plaint. The only question which remains to be determined is whether issues have been framed on the basis of amended plaint and whether the evidence recorded beyond the assertions made in the original plaint, can be left to be considered at the stage of final arguments. While making the aforesaid observations, it was further opined that these questions can be determined only after the written statement, if any, has been filed by the defendants to the amended plaint. Accordingly, the defendants were directed to file their written statements to the amended plaint.

18. Again feeling aggrieved, the defendant nos.1 to 3 preferred an appeal being FAO(OS) 100/2022 against the aforesaid order dated 25.07.2022 of the learned Single Judge to the extent it recorded that the amended plaint is taken on record and directed the defendants to file the written statements. The Hon ble Division Bench, vide order dated 05.09.2022 in the aforesaid appeal, directed the appellant therein to file the written statement to the amended plaint without prejudice to their rights and contentions raised in the said appeal. Accordingly, the third written statement dated 08.09.2022 (hereinafter referred to as "WS-3") came to be filed by the defendants in response to the amended plaint.

19. Finally, the FAO(OS) 100/2022 was disposed of vide order dated 18.01.2024 by the Hon ble Division Bench with the following observations:

> "6. A perusal of the aforesaid observations made in the impugned order in essence holds that the learned Single Judge will address his/her mind to the aspect as to whether the issues which are already framed cover the amended plaint or whether additional issues need to be framed.

> 7. In our opinion, in case additional issues are framed, parties should have liberty to lead evidence qua the same, provided the evidence already led does not cover the issue(s) and pleadings available on record prior to the amendment of the plaint."

20. That is how this Court is seized of the controversy as noted in the opening paragraph of the judgment.

21. Mr. Raman Kapur, the learned Senior Counsel for the defendant nos. 1 to 3 submits that having regard to the directions of the Hon ble Division Bench passed in FAO(OS) 100/2022 and on the basis of the pleadings in the amended plaint, written statement (WS-3) to the amended plaint and replication thereto, the following additional issues (hereinafter also referred to as "the proposed additional issues") are required to be framed:

> (i) Whether the mutation bearing endorsement No.2657-L dated 26.05.1958 by L&DO based upon Gift Deed dated 19.06.1957 is binding upon the parties ? OPD
>
> (ii) Whether Late Sh. R.N. Khosla gifted 1/6th share in the suit property to the plaintiff ?OPP
>
> (iii) Whether plaintiff is entitled to 1/30th share in the suit property as claimed upon death of Late Ms. Kanwal Khosla? OPP
>
> (vi) Whether plaintiff is entitled to 1/20th share in the suit property as claimed upon death of Late Mr. K.G. Khosla? OPP
>
> (v) Whether the suit has been valued properly for the purpose of court fees and jurisdiction?

22. He submits that the original plaint filed by the plaintiff contained certain specific prayers2. Inviting attention of this Court to the order dated 21.07.2003, he submits that initially summons in the present suit were issued only with respect to the prayers contained in clauses (iii), (iv) and (v). Accordingly, the defendants were directed to file their written statement (WS-1) limited to the said specific prayers. He submits that the reason for not issuing notice in the remaining prayer clause (i) and (ii) was that the said prayers seeking partition by a female heir were prima facie barred under Section 23 of the Hindu Succession Act, 1956 at the time.

23. Mr. Kapur submits that later on, amendment application under Order VI Rule 17 was filed by the plaintiff seeking to bring on record an amended plaint. However, this Court vide order dated 20.11.2003 had observed that the pleas raised in the said amendment application were of no consequence until the issue of maintainability regarding partition was decided and therefore, while refusing to allow the application, liberty was granted to the plaintiff to raise their pleas after the same had been decided.

24. He submits that the issue of maintainability was decided by this court vide order dated 24.08.2009 in favour of the plaintiff and summons were issued to the defendants with regard to prayer clauses (i) and (ii) contained Reproduced in para 6 of the present judgment.

in the original plaint with direction to file a fresh written statement (WS-2).

25. He submits that at this stage, the plaintiff did not seek leave of this Court to bring on record the amended plaint, rather they slept on the aforesaid liberty granted by this Court vide order dated 20.11.2003. It is only on 07.05.2019, at a belated stage when the trial was on the verge of being concluded that the plaintiffs realised that they had missed out on amending the plaint and several additional reliefs that had been sought in the amended plaint could not be brought on record.

26. He submits that the amended plaint which has been brought on record after conclusion of the trial, has introduced certain new prayers that were not present in the original plaint. He contends that the issues framed vide order dated 26.09.2011 did not incorporate the issues that have arisen subsequently due to the amended plaint having been taken on record vide order dated 24.02.2022.

27. Elaborating on his submission, Mr. Kapur invites attention of this Court to the prayer clause (i) in the original plaint whereby the plaintiff had barely sought partition while claiming 1/4th share in the suit properties. In contrast to the said prayer in the original plaint, he contends that the prayer clause (i) in the amended plaint claims - (a) 1/6th share from Sh. R.L. Khosla; (b) 1/30th share from Smt. Kanwal Khosla; and (c) 1/20th share from Sh. K.G. Khosla, respectively, in the suit property bearing 11, Prithvi Raj Road, New Delhi; as well as (d) 1/4th share in the remaining estate of Late Sh. K.G. Khosla and Late Smt. Kanwal Khosla.

28. He submits that similar is the case with prayer clause (ii) which has been amended in an identical manner. It is his submission that the aforesaid newly brought up shares need fresh consideration and thus, evidence has to be led in accordance with the same.

29. Relying upon the order dated 25.07.2022 passed by this Court, he further submits that a perusal of the said order reveals that being cognizant of the fact that the defendants have not been afforded an opportunity to respond to the amended plaint and being fully aware of the controversy at hand, this Court observed that the resolution to the issue at hand could only be arrived at after the defendants have filed a fresh written statement in response to the amended plaint.

30. Therefore, Mr. Kapur submits that in compliance with the order of this Court, the defendants filed their third written statement (WS-3) responding to the new pleas of the plaintiff introduced via the amended plaint which necessitated filing of certain additional documents including the mutation dated 26.05.1958 which were not on record at the time of evidence. He submits that the said document has neither been considered while framing of issues in the year 2011 nor any opportunity was present for the defendants to prove the same during evidence. He submits that the defendants would be gravely prejudiced if they are not permitted to call witnesses from L&DO as well as recall the defendant no.1 only because the plaintiff slept on their right till the very end of the trial.

31. Per contra, Mr. Siddharth Yadav, learned Senior Counsel appearing on behalf of the plaintiffs submits that the present controversy regarding framing of additional issues is merely an eyewash and a delaying tactic adopted by the defendants in an attempt to improve their case at the stage of final hearing by filling up lacunae left by them during trial.

32. He submits that the provision of Order VI Rule 2(1) is abundantly clear wherein it is stated that "every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved". He submits that as long as the parties to a suit are aware of the material facts and the case set up by the adversary, the evidence adduced thereby cannot be questioned on the ground of insufficient pleadings. In support of his contention, he places reliance in the decision of the Hon ble Supreme Court in Ram Sarup Gupta (Dead) by LRs vs. Bishun Narain Inter College and Ors., (1987) 2 SCC 555.

33. He submits that the proposed additional issue nos. (ii), (iii) and (iv) regarding the share in the property bearing nos. 11, Prithvi Raj Road, New Delhi, are not new pleas incorporated only in the amended plaint as contended by the defendants, rather, the same have already been considered and responded to by the defendants in their second written statement (WS-2) at paras 5 to 7 of their preliminary submissions. He also states that the parties while adducing evidence have also considered the issue raised. Mr. Yadav invites attention of the Court to para 3 of the evidence by way of affidavit of the plaintiff (PW-1), as well as, paras 7 to 11 of the evidence by way of affidavit of Sh. Prashant Khosla (DW-1).

34. He further submits that vide order dated 24.08.2009, this Court while issuing summons in prayer clauses (i) and (ii) had noted that since the objections raised by the defendants under Section 23 of the Hindu Succession Act, 1956 have become null and void, the other objections raised by the defendants as indicated in the previous orders of this Court shall be considered at the time of hearing of the preliminary issues which were yet to be framed at the time. It is his submission that in the said order, the direction to file written statements was with regard to the amended plaint which was already on record, and not merely to the two remaining prayers in the original plaint.

35. Elaborating on his submission, he invites attention of the Court to the order dated 28.10.2015 wherein this Court had extensively gone through the amended plaint, written statements, replications as well as, the issues framed and had directed the defendants to proceed with the cross examination of PW-1 and PW-2 on the existing affidavits, without conceding that the affidavits were not beyond the pleadings. He submits that the said order was passed in consideration of the amended plaint and the issues framed in 2011. Therefore, the said issues have already been held to be in accordance with the amended plaint.

36. Mr. Yadav further places reliance on the application filed by the defendants bearing I.A. 12945/2014 whereby the defendants sought directions against the plaintiff to file better evidence by way of affidavit of PW-1 to PW-4 on the ground that they are beyond pleadings. Referring to paras 3, 4, 6, 7 and 9 of the said application, as well as, the table annexed therein, he submits that the defendants have undoubtedly referred to the paragraphs of the amended plaint. He submits that

considering the aforesaid, it cannot be said that the evidence led by the parties were not in accordance with the amended plaint.

37. As regard the proposed additional issue no. (i) regarding the mutation dated 26.05.1958, Mr. Yadav submits that the said document had never been mentioned before in either of the two previous written statements and has only been introduced subsequently, in the third written statement. He contends that aforesaid proposed issue is only an attempt to bring on record the said mutation which the defendants failed to bring on record at the relevant time and prove during evidence. He further states that the additional proposed issue no. (v) regarding insufficient court fees is only a legal plea which can be raised even at the time of final arguments.

38. In rejoinder, Mr. Kapur invites attention of the Court to para 2 of the order dated 28.10.2015 to submit that the objection of the defendants regarding the evidence of PW-1 and PW-2 being beyond pleadings was left open and the defendants had not conceded to the fact that certain portions of their affidavits were within the scope of pleadings and issues framed. He submits that the same were left to be decided at the stage of final arguments.

39. Having heard the learned Senior Counsel for the parties, the question which essentially arises for consideration in the present case is whether additional issues as proposed by the defendant nos. 1 to 3, need to be framed in view of the amended plaint having been taken on record to which the defendants were allowed to file their written statement.

40. To be noted that the parties have led their evidence on the issues already framed vide order dated 26.09.2011 and the matter was at the stage of final arguments when the controversy at hand arose. Before getting into the merits of the controversy, it would be appropriate to advert to the legal position regarding pleadings, framing of issues (or non-framing thereof) and leading evidence which would be relevant to resolve the controversy.

41. The law is well settled that if the parties went to trial fully knowing the real issues involved in a case and led evidence in support of their contentions, it would not be open to a party to raise a question as to non- framing of particular issue unless such party establishes that any prejudice has been caused. Reference in this regard may be had to the decision of the Hon ble Supreme Court in Swamy Atmananda & Ors. v. Sri Ramakrishna Tapovanam & Ors, (2005) 10 SCC 51 wherein it was held as under:

> "39. If the parties went to the trial knowing fully well the real issues involved and adduced evidence in such a case, without establishing prejudice, it would not be open to a party to raise the question of non-framing of particular issue."

42. Likewise, in Kannan (Dead) By LRs & Ors. v. V.S. Pandurangam (Dead) By LRs & Ors., (2007) 15 SCC 157, the Hon ble Supreme Court was confronted with the question as to whether the omission to frame an issue would vitiate the trial in a suit where the parties went to trial fully knowing the rival case and led evidence in support of their respective contentions. The court held as under:

> "10. By a series of decisions of this Court it has been settled that omission to frame an issue as required under Order 14 Rule 1 CPC would not vitiate the trial in a suit where the parties went to trial fully knowing the rival case and led evidence in support of their respective contentions and to refute the contentions of the other side vide Nedunuri Kameswaramma v. Sampati Subba Rao.
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> 11. In Sayeda Akhtar v. Abdul Ahad it was held by this Court that even if no specific issue has been framed but if the parties were aware of that issue and have led evidence on it, the appellate court should not interfere with the findings of the trial court. A similar view was taken in Kali Prasad Agarwalla v. Bharat Coking Coal Ltd. (SCC vide para 19) and in Sk. Mohd. Umar Saheb v. Kaleskar Hasham Karimsab (SCC vide para 12 : AIR vide para 9) as well as in several other decisions.
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> 12. In the present case, the parties knew well that the question of adverse possession has been pleaded by the appellant- defendant and evidence was led on this issue. Hence no prejudice has been caused to the appellant by non-framing of a substantial question of law by the High Court. In our opinion, the ratio of the decisions on Order 14 Rule 1 CPC will also apply when a judgment of the High Court is challenged on the ground that a substantial question of law was not formulated by the High Court as required by Section 100(4) CPC. In our opinion, this Court should not take an over technical view of the matter to declare that every judgment of the High Court in second appeal would be illegal and void, merely because no substantial question of law was formulated by the High Court. Such an overtechnical view would only result in remitting the matter to the High Court for a fresh decision, and thereafter the matter may again come up before us in appeal. The judiciary is already overburdened with heavy arrears, and we should not take a view which would add to the arrears."

(emphasis supplied)

43. In Nagubai Ammal & Ors. vs. B. Shama Rao & Ors., 1956 SCC OnLine SC 14, it was held that although the rule is that evidence led on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties at the time of adducing evidence, however, the said rule would not have any application to a case where the parties go to trial with the knowledge of that particular question being an issue in the suit, even though no specific issue had been framed thereon. The relevant para of the said decision is as under:

> "11. It was argued for the appellants that as no plea of lis pendens was taken in the pleadings, the evidence bearing on that question could not be properly looked into, and that no decision could be given based on Exhibit J series that the sale dated 30-1-1920 was affected by lis; and reliance was placed on the observations of Lord Dunedin in Siddik Mahomed Shah v. Mt. Saran that "no amount of evidence can be looked into upon a plea which was never put forward". The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be

made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto. The rule applicable to this class of cases is that laid down in Rani Chandra Kunwar v. Chaudhri Narpat Singh : Rani Chandra Kunwar v. Rajah Makund Singh. There, the defendants put forward at the time of trial a contention that the plaintiff had been given away in adoption, and was in consequence not entitled to inherit. No such plea was taken in the written statement; nor was any issue framed thereon. Before the Privy Council, the contention was raised on behalf of the plaintiff that in view of the pleadings, the question of adoption was not open to the defendants. It was held by Lord Atkinson overruling this objection that as both the parties had gone to trial on the question of adoption, and as the plaintiff had not been taken by surprise, the plea as to adoption was open to the defendants, and indeed, the defendants succeeded on that very issue. This objection must accordingly be overruled."

(emphasis supplied)

44. On similar principle as discussed in the aforementioned decisions, the Hon ble Supreme Court in Ram Sarup Gupta (supra) held that once it is found that in spite of deficiency in the pleadings, if the parties knew the case of opposing party and proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal. The relevant portion of the judgment is as under:

"6. The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the licence was irrevocable as contemplated by Section 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair- splitting technicalities. Some times, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they

went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence in that event it would not be open to a party to raise the question of absence of pleadings in appeal. In Bhagwati Prasad v. Chandramaul a Constitution Bench of this Court considering this question observed....."

(emphasis supplied)

45. Thus, the legal position emerging from the reading of the above decisions of the Hon ble Supreme Court is that when the parties proceed to trial, knowing fully well the case of the other side and being aware of the issues involved in the controversy, thereby leading evidence accordingly, then it would not be open for them to raise a question at a later stage regarding non-framing of an issue or there being deficiency in pleadings.

46. Having noted the aforesaid legal position, what needs to be seen in the present case is whether the defendant nos. 1 to 3, who are insisting on framing of additional issues, were cognizant of the rival case set up by the plaintiff as pleaded in the amended plaint and adduced their evidence in light of the same. An incidental question which thus, needs to be addressed is whether the proposed additional issues are covered by the original plaint itself on which the parties led their evidence. Concomitantly, it would also be helpful to ascertain whether any substantial changes have been brought about in the stand/claim/plea of the plaintiff by way of the amended plaint in contrast to the one filed originally.

47. At this stage, apt would it be to refer to the stand taken by the plaintiff in the original plaint dated 26.05.2003. The original plaintiff (now plaintiff no.1) has claimed that her grandfather i.e. Late Sh. R.N. Khosla, who was the owner of the property bearing No.11, Prithvi Raj Road, New Delhi had gifted one half share in the said property to his eldest son Late Sh. K.G. Khosla, his wife i.e. Late Smt. Kanwal Khosla and their children i.e. the Plaintiff (daughter; now plaintiff no.1), Defendant No. 1 (son), Defendant No. 4 (daughter; now plaintiff no.2) and Defendant No. 5 (daughter; now plaintiff no.3). The plaintiff has further relied upon a Partition Deed dated 30.05.1971 executed between Late K.G. Khosla and his brother Sh. J.C. Khosla claiming thereby that the aforesaid property was divided amongst them with an understanding that the eastern portion would fall in the share of her father, her mother and the three children including herself while the western portion fell to the share of Sh. J.C. Khosla with a caveat that as and when he marries, the same shall belong to him, his wife and children.

48. In this backdrop, the plaintiff claimed 1/6th share in the eastern half of the suit property in her own right. Further, the plaintiff has claimed that her mother, Late Kanwal Khosla had died intestate on 19.01.2001 whereupon her 1/6th share in the eastern portion of the property devolved upon her heirs, i.e. K.G. Khosla and the four children, and thus she sought further 1/30th share in that regard. Similarly, the plaintiff claimed that her father, Late K.G. Khosla also died intestate on 7.05.2003 and further sought 1/20 th share from his share as well. In this way she has claimed 1/4th total share in the eastern portion of the suit property as well as the movable estate of her parents. The plaint also discloses the challenge posed by the plaintiff in regard to the genuineness and validity of the

purported Wills dated 20.12.1990 and 18.12.2002 of her mother and father respectively, with specific pleas of deteriorated health condition of her parents at the alleged time of execution of the Wills. It may also be noted, that consequential to the aforesaid stand taken by the plaintiff, she had valued the relief in the suit claiming herself to be a co-owner and in joint possession of the property.

49. Coming to the amended plaint dated 19.11.2003, this Court after perusing the same has observed that the amendments are limited to certain paragraphs being paras 3A, 4, 4A, 4B, 15A and the prayer clauses i(a), i(b), i(c), i(d), ii(a), ii(b), ii(c), ii(d) and iv(a). The pleas in the aforesaid respective paras are discussed below:

> Paragraph 3A The gift made by Late R.N. Khosla in favour of his two sons, i.e. Late K.G. Khosla and Sh. J.C. Khosla has been explained by providing details of the Gift Deed dated 19.06.1957 and thereby reiterating the stand taken previously that the intention of Late R.N. Khosla was to give half share each of the suit property to his two sons to be held by them for themselves and their respective wives and children.

The plaintiff has further stated that since the language of the gift deed was not clear, thus, two declarations were executed, both dated 05.04.1961, one by Sh. R.N. Khosla and the other by Late K.G. Khosla and J.C. Khosla, confirming the aforementioned intent of the parties.

Paragraph 4 The date of the Partition Deed earlier mentioned as being dated 30.05.1971 was changed to 30.05.1972 as noted above. This amendment was allowed vide order dated 20.11.2003.

Paragraph 4A It has been pleaded that recitals in the aforesaid Partition Deed dated 30.05.1972 also support the stand of the Plaintiff.

Paragraph 4B Plaintiff placed reliance on the written statement filed on behalf of Sh. K.G. Khosla and Sh. Deepak Khosla in response to a suit filed by Sh. J.C. Khosla in 1994.

Therein, the father and brother (defendant no.1) of the plaintiff have admitted the declarations dated 05.04.1961. The said declarations have also been stated to be annexed with the written statement.

Paragraph 15A Challenge has been made to the alleged Partition Deed dated 12.07.1972 between Late K.G. Khosla, Late Kanwal Khosla and Sh. Deepak Khosla as well as the mutation dated 05.11.1977 stating therein that the parties to the said deed had no right to partition the property since the eastern half of the suit property was co- owned by the plaintiff as well, along with her other sisters.

50. Amendment by way of prayer clauses i(a), i(b), i(c), i(d), ii(a), ii(b), ii(c) and ii(d) will be dealt with later in this judgment. However, prayer iv(a) is being reproduced hereinunder:

> "iv(a). a decree for declaration in favour of the Plaintiff and against the Defendants declaring the alleged partition dated 12th July, 1972 and mutation dated 5th

November, 1977 to be null and void and not binding on the Plaintiff;"

51. A perusal of the amendments made in the plaint reveal that the plaintiff has sought to bring about two major additions. The first is with regard to the stand already taken by the plaintiff in the original plaint being the gift made by Late Sh. R.N. Khosla in favour of Sh. K.G. Khosla, his wife and his children as well as Sh. J.C. Khosla, to be held by him on behalf of himself and his future family. The said stance has been substantiated and explained in newly added paras 3A, 4A and 4B by placing reliance on the Gift Deed dated 19.06.1957, the two declarations dated 05.04.1961, recitals of Partition Deed dated 30.05.1972 and the written statement filed by Late K.G. Khosla and Defendant No.1 in a suit of 1994.

52. The second major addition is contained in para 15A and prayer clause iv(a) whereby the plaintiff has sought to challenge a Partition Deed dated 12.07.1972 and one mutation dated 05.11.1977. The said documents however do not find reference in the rest of the plaint, either the original one or the amended. Intriguingly, these documents were first referred to and relied upon by the Defendant Nos. 1 to 3 in their written statement dated 08.09.2003 (WS-1). It must be noted that the said written statement was on record before the plaintiff moved for amendment of the plaint. It thus, appears that the additions introduced by way of para 15A and the relief sought in prayer iv(a) were consequential to the defence of the defendants. The relevant extract of WS-1 concerning the aforesaid two documents are as follows:

"9. On 12.7.1972 Shri K G Khosla divided his half share between himself, his wife Late Kanwal Khosla and his only son i.e. defendant no.1. Defendant no.6, out of his own share allegedly gifted 6796.50 sq.ft. land to Vishnu Nama Bhrigu Satsang Trust, Uttarkashi on 28.7.1972 though no partition took place and at the most the Trust could be a co-owner of a certain share in the property.

10. That Land and Development Office vide letter no L-I- 9/1(18)/74 dated 24.8.1974 issued show cause notice to Late Shri K G Khosla and defendant no.6 alleging that the co-owners had sub divided the plot by executing the alleged partition deed and settlement deeds which were in violation of Master Plan and Zonal Plan and further attracted Clause (13) of the Perpetual Lease Deed executed with respect to the property and that breach may be remedied within 30 days from the date of receipt of the said final notice failing which it was threatened that action to re- enter the premises would be taken by Land and Development Office.

11. That defendant no. 6 vide letter dated 30.9.1974 sent on 1.10.1974 replied to the aforesaid show cause notice and stated that no physical partition or sub division in the property had taken place and that therefore there was no violation of the Master Plan or the Zonal Plan as alleged in the aforesaid show cause notice. He further requested that the Land and Development Office may kindly carry out the mutation. Land and Development Office vide letter dated 5.11.1977 bearing no. L-1-9(18)/77/1221 mutated the property in favour of Shri K G Khosla, Smt Kanwal Khosla, defendant no.1, defendant no.6 and the Vishnu Nama Bhrigir Satsang Trust with clear condition that though the property stands mutated in the name of the said 5 co-owners subject to the condition that the property will neither be sub-divided not sold without prior permission of the Lessor in future i.e. the Land and Development Office."

(emphasis supplied)

53. Similarly, the Gift Deed dated 19.06.1957 and the declarations dated 05.04.1961 were also dealt with by the defendants in WS-1 itself. The defendants have made reference to the said documents in WS-1 in the following terms:

> "7. That though after execution and registration of the Gift Deed dated 19.6.1957 and acting upon the same, Late Shri R N Khosla was left with no right, title or interest in the property, he expressed his desire vide a Declaration dated 5.4.1961 that he had made gift dated 19.6.1957 in favour of his two sons and that one half of the property be made available to Shri K G Khosla, his wife and children and the other half to defendant no.6 and in case he marries and has children, the same be deemed to be for benefit of his wife and children though he is still a bachelor. Late Shri R N Khosla had no right to make any declaration on 5.4.1961 after having executed and registered the Gift Deed dated 19.6.1957, under section 126 of the Transfer of Property Act, it was, without prejudice, not a registered document and can at the most be a desire of Late Shri R N Khosla. The said alleged declaration had no effect on the ownership of Late Shri K G Khosla and defendant no.6 being owners of the property in equal shares and without prejudice, the alleged declaration dated 5.4.1961, does not in any way spell out that wife or children of Late Shri K G Khosla or if defendant no.6 marries, his wife or children, would have any right in the "property".

(emphasis supplied)

54. As regards the written statement filed by Late K.G. Khosla and defendant no.1 in response to the suit instituted by Sh. J.C. Khosla in the year 1994 is concerned, the defendants have adverted to the said suit in their second written statement dated 06.01.2010 (WS-2). Relevantly, the said written statement was filed by the defendant nos. 1 to 3 before framing of issues on 26.09.2011. Even in the evidence by way of affidavit of DW-1 dated 22.02.2018, reference has been made to the aforesaid suit of 1994 at para 21.

55. From a reading of the two plaints and upon analysing the same in light of the response of the defendant nos. 1 to 3 in the first two written statements, claimed to have been filed in response to the original plaint, it is evident that the stand and case of the plaintiff has been consistent throughout. The plaintiff, by way of an amended plaint has only sought to further substantiate her claim by placing reliance on the various documents and explaining the weight of the same in her favour. Clearly, the defendant nos. 1 to 3 were always aware of the case set up by the plaintiff, rather the documents discussed in the amended plaint were first introduced by them in their own written statements filed prior to the suit proceeding to trial.

56. Now coming to the proposed additional issue no.(i), which pertains to mutation dated 26.05.1958 in the records of L&DO based upon the Gift Deed dated 19.06.1957, it may be noticed that a reading of all the three written statements filed by the defendant nos.1 to 3 reveals that the fact of this mutation was never pleaded by the said defendants in their WS-1 or WS-2. The mutation

has been pleaded for the first time in the WS-3 which was filed by the defendants in response to the amended plaint, therefore, the same at best is a „consequential amendment which could be confined to an answer to the amendment made by the plaintiff in the plaint. However, as noted above, it does not seem that any of the amendments made in the plaint necessitated the defendants to bring on record the aforesaid mutation. The alleged mutation dated 26.05.1958 could very well have been introduced by the defendant nos. 1 to 3 at the first opportunity available to them.

57. The Hon ble Supreme Court in Gurdial Singh & Ors. v. Raj Kumar Aneja & Ors., (2002) 2 SCC 445, explaining the concept of „consequential amendment , observed that when one party has amended his pleadings, the other party would ordinarily be allowed to amend his pleadings and such amendments are known as consequential amendments, which have to be confined as a response to the amendment made in the pleading by opposite party. A new plea cannot be permitted to be added in the guise of such a consequential amendment, though it can be incorporated by way of an independent amendment by making an application under Order VI Rule 17 CPC. The relevant part of the decision reads thus:

> "19. When one of the parties has been permitted to amend his pleading, an opportunity has to be given to the opposite party to amend his pleading. The opposite party shall also have to make an application under Order 6 Rule 17 CPC which, of course, would ordinarily and liberally be allowed. Such amendments are known as consequential amendments. The phrase "consequential amendment" finds mention in the decision of this Court in Bikram Singh v. Ram Baboo. The expression is judicially recognized. While granting leave to amend a pleading by way of consequential amendment the court shall see that the plea sought to be introduced is by way of an answer to the plea previously permitted to be incorporated by way of an amendment by the opposite party. A new plea cannot be permitted to be added in the garb of a consequential amendment, though it can be applied by way of an independent or primary amendment.
>
> 20. Some of the High Courts permit, as a matter of practice, an additional pleading, by way of response to the amendment made in the pleadings by opposite party, being filed with the leave of the court. Where it is permissible to do so, care has to be taken to see that the additional pleading is confined to an answer to the amendment made by the opposite party and is not misused for the purpose of setting up altogether new pleas springing a surprise on the opposite party and the court. A reference to Order 6 Rule 7 CPC is apposite which provides that no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

(emphasis supplied)

58. Thus, the defendants, in the garb of such a consequential amendment, could not be permitted to set up an altogether new plea. Incidentally, the defendants did not seek independent amendment of the written statement to insert new pleading as regards the mutation dated 26.05.1958, for which

the defendants always had an opportunity before the commencement of trial. At this stage, when the trial has already concluded and the matter is ripe for final arguments, taking note of such a pleading or framing an issue based on the same, will cause grave prejudice to the plaintiff.

59. Insofar as the three proposed additional issues no.(ii), (iii) & (iv) are concerned, the basis of the same appears to be the prayer clauses i(a), i(b) and i(c), as well as ii(a), ii(b) and ii(c) inserted by way of amended plaint. The amended prayer clause of the plaint is reproduced herein below:

> "i(a). a preliminary decree for partition of property bearing No.11, Prithvi Raj Road, New Delhi declaring the Plaintiff to be the owner of 1/6th share gifted to her by late Shri. R.N. Khosla;
>
> i(b). a preliminary decree for partition of property bearing No.11, Prithvi Raj Road, New Delhi declaring the Plaintiff to be the owner of further 1/30th share of suit property which devolved upon her upon the death of late Smt. Kanwal Khosla;
>
> i(c). a preliminary decree for partition of property bearing No.11, Prithvi Raj Road, New Delhi declaring the Plaintiff to be the owner of further 1/20th share which devolved upon her upon the death of late Shri. K.G. Khosla;
>
> i(d). a preliminary decree for partition of estate (other than property bearing No.11, Prithvi Raj Road, New Delhi) of late Shri. K.G. Khosla and late Smt. Kanwal Khosla, mentioned in Scheduled A and detailed particulars to be disclosed by Defendants No.1 to 3, and declare the Plaintiff to be the owner of 1/4th share;
>
> ii(a). a final decree for partition and separate possession by division of the property bearing No.11, Prithvi Raj Road, New Delhi by metes and bounds in respect of her 1/6th share gifted to her by late R.N. Khosla and/or in the alternative, the same be sold and sale proceedings be divided amongst the Plaintiff and Defendants No.1, 4 and 5;
>
> ii(b) a final decree for partition and separate possession by division of the property bearing No.11, Prithvi Raj Road, New Delhi by metes and bounds in respect of her further 1/30th share which devolved upon her upon the death of late Kanwal Khosla and/or in the alternative, the same be sold and sale proceedings be divided amongst the Plaintiff and Defendants No.1, 4 and 5;
>
> ii(c) a final decree for partition and separate possession by division of the property bearing No.11, Prithvi Raj Road, New Delhi by metes and bounds in respect of her further 1/20th share which devolved upon her upon the death of late K.G. Khosla and/or in the alternative, the same be sold and sale proceedings be divided amongst the Plaintiff and Defendants No.1, 4 and 5;

ii(d) a final decree for partition and separate possession by division of the estate, other that in property bearing No.11, Prithvi Raj Road, New Delhi, by metes and bounds in respect of her 1/4th share and/or in the alternative, the same be sold and sale proceedings be divided amongst the Plaintiff and Defendants No.1, 4 and 5.

xxx xxx xxx"

60. Although the aforesaid three proposed additional issues are claimed to be arising from the newly incorporated prayers in the amended plaint, however, from a reading of the following paragraphs of the original plaint itself, it is apparent that the amended prayer is only a bifurcation and elaboration of the original prayer seeking 1/4th share in the movable and immovable properties.

"5. By virtue of the above stated documents, the Plaintiff became the owner of the 1/6th share in the eastern half of the property bearing No.11, Prithvi Raj Road, New Delhi as detailed hereunder:-

Late K.G. Khosla	-	1/6th
Late Kanwal Khosla	-	1/6th
Mrs. Jyoti Wazir	-	1/6th
Mr. Deepak Khosla	-	1/6th
Mrs. Rashmi Mehra	-	1/6th
Mrs. Vibha Vig	-	1/6th

6. Mrs. Kanwal Khosla died intestate on 19th January, 2001, whereupon her 1/6th share devolved upon late K.G. Khosla, Shri Deepak Khosla, Mrs. Jyoti Wazir, Mrs. Rashmi Mehra and Mrs. Vibha Vig in equal shares and their share in suit property became as under:-

Late K.G. Khosla	-	1/6th + 1/30th =
Mrs. Jyoti Wazir	-	1/6th + 1/30th =
Mr. Deepak Khosla	-	1/6th + 1/30th =
Mrs. Rashmi Mehra	-	1
Mrs. Vibha Vig	-	1/

7. Shri K.G. Khosla died intestate on 7th May, 2023 whereupon his 1/5th share devolved upon the Plaintiff and Defendants No.1, 4 and 5 in equal shares and they became the owners of 1/4th share each in the suit property as detailed herein below:-

Mrs. Jyoti Wazir	-	1/
Mr. Deepak Khosla	-	1/
Mrs. Rashmi Mehra	-	1/
Mrs. Vibha Vig	-	1/

61. Therefore, the defendants cannot be held to be blind sighted by the supposed new prayers. The case of the plaintiff, since the inception, has been clear and specific with regard to her claim of 1/4th share in the suit property as well as the aforesaid share break-up, which the defendants were also well aware of. In the considered view of this court, the issues framed in 2011 include the above additional issues apropos the shares now sought to be raised by the defendants3. Acquiescence by the defendants to the issues initially framed vide order dated 26.09.2011 evinces that the prayer for additional issue nos. (ii), (iii) and (iv) is belated and unwarranted. Thus, this court does not find any justification for framing the aforesaid three proposed issues.

62. As regards the proposed additional issue no.(v), which pertains to valuation of relief for the purposes of court fee and jurisdiction, suffice it to note that all the three written statements filed by the defendant nos.1 to 3 contain an objection to the effect that the plaintiff is not in possession of the See issue nos.(ii), (iii), (v) and (vi) framed vide order dated 26.09.2011, noted at para 12 of this judgment.

suit property and, therefore, the suit has not been properly valued for the purposes of court fee and jurisdiction.

63. The relevant paragraphs of the three written statements filed by the defendant nos.1 to 3 are reproduced hereinbelow for ready reference:

IN WS-1:

"17. Para 17 of the plaint is wrong and denied. The suit has not been properly valued for the purposes of court fee and jurisdiction. In suits for partition, jurisdiction is on the value of the property and court fee is payable on the shares being claimed. The same has not being done by the plaintiff. Plaintiff is not in the possession of the suit property and therefore, unless and until she pays the court fee for the alleged share being claimed, the present suit cannot proceed. This is without prejudice to the fact plaintiff otherwise cannot maintain a suit for partition under Section 23 of Hindu Succession Act and not having any share in the property, even otherwise she has no right to file the present suit. Suit is not maintainable on merits and even on this account suit deserves outright dismissal."

IN WS-2:

"12. That the present suit has been grossly under valued and not valued in according to law. In a suit for partition the jurisdictional value is the value of the suit property

and court fee is payable on the share claimed. If plaintiffs are not in possession of the property (suit property), court fee on the share claimed has to be paid. Plaintiffs are claiming 3/4th share in the suit property i.e. 1/4theach. The market value of the suit property is more than Rs.100 crores and plaintiffs have to pay court fee on the market value of 3/4th share they are claiming otherwise plaint is liable to be rejected.

xxx xxx xxx

17. Para 17 of the plaint is wrong and denied. The suit has not been properly valued for the purposes of court fee and jurisdiction. In suits for partition, jurisdiction is on the value of the property and court fee is payable on the shares being claimed. The same has not being done by the plaintiffs. Plaintiffs are not in the possession of the suit property and therefore, unless and until they pay the court fee for the alleged share being claimed, the present suit cannot proceed. This is without prejudice to the fact plaintiffs otherwise cannot maintain a suit for partition under Section 23 of Hindu Succession Act, and not having any share in the property even otherwise they have no right to file the present suit. Suit is not maintainable on merits and even on this account suit deserves outright dismissal."

IN WS-3:

"12. That the present suit has been grossly undervalued and not valued in according to law. In a suit for partition the jurisdictional value is the value of the suit property and court fee is payable on the share claimed. If plaintiffs are not in possession of the property (suit property), court fee on the share claimed has to be paid. Plaintiffs are claiming 3/4th share in the suit property i.e., 1/4th each. The market value of the suit property is more than Rs.100 crores and plaintiffs have to pay court fee on the market value of 3/4th share they are claiming otherwise plaint is liable to be rejected.

xxx xxx xxx

17. Para 17 of the plaint is wrong and denied. The suit has not been properly valued for the purposes of court fee and jurisdiction. In suits for partition, jurisdiction is on the value of the property and court fee is payable on the shares being claimed. The same has not being done by the plaintiff. Plaintiff is not in the possession of the suit property and therefore, unless and until she pays the court fee for the alleged share being claimed, the present suit cannot proceed. This is without prejudice to the fact plaintiff otherwise cannot maintain a suit for partition under Section 23 of Hindu Succession Act, and not having any share in the property even otherwise she has no right to file the present suit. Suit is not maintainable on merits and even on this account suit deserves outright dismissal."

(emphasis supplied)

64. Thus, it is luminously clear that right from the beginning, it is the case of the defendants that the suit has not been properly valued for the purposes of court fee and jurisdiction and that the plaintiff is not in possession of the suit property whereas the case of the plaintiff has always been that they are in constructive possession of the suit property being co-owners as noted above.

65. Incidentally, the defendants never insisted upon framing of an issue as to improper valuation of the relief sought. Even otherwise, the defendants were conscious of the pleadings and adduced evidence knowing fully the rival case of the plaintiff. Therefore, the prayer of the defendants at this belated stage to frame an additional issue specifically on the aspect of improper valuation, is not sustainable.

66. The upshot of the above discussion is that there is no need to frame any additional issues and accordingly the objection raised by the defendant nos.1 to 3 and the consequential prayer made for framing of additional issues, is rejected.

67. List before the Roster Bench for directions on 17.04.2025.

VIKAS MAHAJAN, J APRIL 04, 2025/dss