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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No.139/2011

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6th September, 2011

SUNIL GUPTA

..... Appellant

Through: Mr. Sanjay Jain, Sr. Adv. with
Mr. Vikram Kapoor, Mr. Pankaj Kapoor,
Ms. Ruchi Jain, Ms. Namisha Gupta,
Mr. Abhijit Mittal & Mr. Risabh Wadha,
Adv.

VERSUS

NARGIS KHANNA

..... Respondent

Through: Mr. Harkirat Sawhney, Adv.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 is to the impugned judgment and decree dated 20.11.2010. By the impugned judgment and decree, the suit of the respondent/plaintiff has been decreed. Though the decree grants various forms of mandatory and perpetual injunctions, in

effect, the relief of possession of the suit property has been granted to the respondent/plaintiff. The suit has been decreed on an application of the respondent/plaintiff under Order 12 Rule 6 CPC.

2. The suit has been decreed relying upon Section 44 of the Transfer of Property Act, 1882 by holding that the property being N-47, Panchsheel Park, New Delhi was an undivided dwelling-house of the family and since the appellant/defendant no.2 was a stranger, he had been wrongfully inducted into possession of the second floor of the property along with certain other rights by the brother/Sh. Prem Kumar Dewan of the respondent/plaintiff, Ms.Nargis Khanna. The decision in the present appeal will therefore revolve around the meaning of the expression “dwelling-house” as found in Section 44 of the Transfer of Property Act, 1882. Before however, we go to the meaning of the expression “dwelling-house” it would be necessary to refer to the relevant facts of the case.

3. The subject property no. N-47, Panchsheel Park, New Delhi is constructed on a plot admeasuring 800 square yards and which was originally owned by late Sh. Jagan Gopal Dewan, father of the respondent/plaintiff. The perpetual sub-lease rights in the property were purchased by Sh.Jagan Gopal Dewan from the Delhi Development Authority. Sh. Jagan Gopal Dewan died on 27.2.2001. He bequeathed the subject property to his widow, Smt. Amrit Kala Dewan by his last Will and

Testament dated 9.12.1972. Smt. Amrit Kala Dewan as an owner of the property during her lifetime let out the first floor of the property to a tenant, M/s. Win-Medicare Pvt. Ltd. Smt. Amrit Kala Dewan expired on 12.11.2005 leaving behind various properties including the subject property. Smt. Amrit Kala Dewan by her last Will and Testament dated 6.10.2004 bequeathed the half share each in the subject property to her daughter/plaintiff and her son Sh. Prem Kumar Dewan. As per the paragraph 7 of the plaint, the respondent/plaintiff was in possession of the ground floor, garage, servant quarter, rear courtyard, front lawn and uninterrupted user of the drive ways of the subject premises. The second floor of the subject property was in possession of the brother/Sh. Prem Kumar Dewan and who by a registered sale deed dated 23.6.2008 sold and transferred his 50% undivided interest in the property and also the possession of the second floor of the subject property to both the defendants in the suit. The defendant no.1 thereafter transferred his interest in the property to the defendant no.2/appellant. Sh. Prem Kumar Dewan since gave the possession of the second floor of the property to the defendants in the suit along with the other rights inasmuch as the same became the genesis of the dispute resulting in filing of the suit. The subject suit thus came to be filed by the respondent/plaintiff on the basis of Section 44 of the Transfer of Property Act, 1882 by stating that since

the property was an undivided dwelling-house, the defendants in the suit had no right to enter into possession, and possession of which by means of different reliefs of perpetual and mandatory injunction was prayed for by the respondent/plaintiff and against the defendants.

4. By the impugned judgment and decree, the Trial Court has held that since admittedly there was no partition of the subject property, consequently, the property was an undivided property. It was further held that the subject property was a “dwelling-house” within the meaning of the expression in Section 44 of the Transfer of Property Act, 1882 and therefore it was held that the defendants had come into illegal possession of the house and which possession had to revert to the respondent/plaintiff. The relevant portions of the judgment of the Trial Court, and which could have been better on its discussion, are contained in paras 4 to 7 of the judgment and which read as under:-

“4. Ld. Counsel for the plaintiff has stated that facts of the case are not disputed and the suit can be decreed by appreciation of legalities without going through the rigmarole of a trial. To fortify his contention, he has relied upon a catena of judgments and has led stress on the fact that a transferee, not being a member of the family, is not entitled to joint possession or enjoyment of any common portion of the house. The said property is a dwelling house and has never been partitioned by metes and bounds between the plaintiff and her brother. The defendants having purchased 50% undivided, unspecified and unpartitioned stake in the said property of her brother are complete strangers to the family and are liable to be restrained from enjoying any possession. The only

recourse open to a stranger/transferee is to sue for partition, but till then remain out of possession. In support of his arguments, reliance has been placed on the decision of the Calcutta High Court in the matter of Boto Krishan Ghose V. Akhoy Kumar Ghose, Air 1950 Cal 111. The Hon'ble High Court has clarified that the undivided family simply means family not divided qua the dwelling house. The emphasis is really on the undivided character of the house. In such a state, if a member of the family transfers his share in the dwelling house to a stranger, the transferee does not become entitled to joint possession or other common or part enjoyment of the house. His only recourse is to seek partition of his share. Besides reinforcing his arguments with citations on the legal perspective of a stranger's right in joint property, Ld. counsel for the plaintiff has also cited judgments to show that a dwelling house does not cease to be a dwelling house merely because of suspension of occupation or the absence of the owner. As long as a house could be occupied even at a future date, it did not matter whether it was actually in use or not in constant occupation. The absence of the owners or the occupation of the house by tenants would not take away the effect of the property as a dwelling unit. The creation of the tenancy does not terminate the possibility of the owner of the house returning to its occupation. The emphasis is on the undivided character of the house and it is this attribute of the house which imparts to the family its character of an undivided family, even if they are separated in mess and worship.

5. The proposition and law has also been reinforced in the decision of the Apex Court in the matter of Gautam Paul V. Debi Rani Paul (AIR 2001 SC 867). The law on the point is clear and categorical. The buyer of a share of the co-sharer cannot have the right to joint possession. If a transferee gets into possession of a share in the dwelling house, the possession becomes joint and is illegal. Courts cannot countenance or foster illegal possession. The citations relied upon make it amply clear that the stranger/transferee to the suit property is not only liable to the restrained but is also to be evicted from the possession

therein. The only recourse for such a transferee is to seek partition in the suit premises.

6. Ld. Counsel for the defendant has resisted the application under Order 12 Rule 6 CPC on the ground that facts of this case required trial inasmuch as it has to be decided whether the plaintiff is a part of the undivided family being a married daughter. This opposition does not need trial. The decision in the matter Sulekha Ghosh & Anr. Vs. Partha Sarathi Gosh reported in AIR 2002 SC 2500 settles this issue. A daughter after marriage does not lose the status of a member of an undivided family of her father and acquires an interest in the dwelling house.

7. I am unable to appreciate the resistance advanced by the Ld. Counsel for the defendant. It cannot be disputed that the provisions of Section 44 of the Transfer of Property Act are aptly applicable to the present case. The undivided nature of the suit premises is not disputed. There is nothing left for trial as the facts are not in dispute and the law is clear and categorical and requires to be enforced in the present case."

The trial Court accordingly on the basis of the aforesaid decreed the suit.

5. In order to decide the issue at hand as to whether the property N-47, Panchsheel Park, New Delhi is or is not an undivided dwelling-house as per Section 44 of the Transfer of Property Act, 1882, it is necessary firstly to reproduce the said Section 44 and which reads as under:-

"44.Transfer by one co-owner.- Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the

property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.” (Emphasis is mine)

6. Section 44 of the Transfer of Property Act, 1882 is part of a scheme of agnate and cognate statutes, and in which laws, the object was that in a residential/dwelling-house of an undivided family, a stranger should not be allowed to enter into possession. Of course, the stranger could seek partition and thereafter take the possession of the property allotted to him on partition, however, till the property was partitioned by metes and bounds, the stranger could not come into possession of the family dwelling-house. This provision of Section 44 has its foundation in the customs and traditions of this country and its denizens wherein family privacy in a dwelling-house was zealously guarded. People were traditional and conservative. This was more so because the ladies of the family were expected to avoid contact with strangers. In many communities ‘*purdah*’ system was prevalent. It was therefore required that the atmosphere and the privacy of a joint family in a dwelling-house should be preserved against the strangers though, the stranger, as stated above, could enforce his right to possession through partition of the undivided family house.

In the same scheme of the legislature which brought about Section 44 of the Transfer of Property Act, 1882 there were also similar provisions contained in Section 4 of the Partition Act, 1893 and Section 23 of the Hindu Succession Act, 1956, latter provision has since however been repealed as now the daughters have been given rights equal to the sons in the joint family property.

7. The direct judgment of the Supreme Court which considers the meaning of the expression “dwelling-house” is the decision in the case of ***Narashimaha Murthy vs. Susheelabai (Smt) and Ors. 1996 (3) SCC 644.*** Relevant paras of this judgment are para nos. 12, 13, 14, 20 (of the judgment authored by K. Ramaswami, J.) and para nos. 22, 27, 28, 31 & 32 (of the judgment authored by Punchi, J. for himself and Kuldip Singh J.) and which read as under:-

“12. When succession of a Hindu intestate is open, his/her Class-I heirs specified in the Schedule is entitled at a partition to their respective shares. The succession cannot be postponed. However exception has been engrafted by Section 23 respecting tradition of preserving family dwelling house to effectuate family unity and prevent its fragmentation or disintegration by dividing it by metes and bounds. The prohibition gets lifted when male heirs have chosen to partition it. The words specified in Class-I of the Schedule and Section 23, are used in a descriptive sense to economise the words denoting the legislative animation. The expression "dwelling house" though not defined in the Act, the context would indicate that it is referable to the dwelling house in which the intestate Hindu was living at the time of his/her death; he/she intended that his/her children would continue to normally

occupy and enjoy it. He or she regarded it as his or her permanent abode. On his or her death, the members of the family can be said to have continued to preserve the same to perpetuate his/her memory. Obviously Section 23 is an exception to the general rule of succession and has been engrafted for that purpose. Where there are only one male heir and one or more female heirs are left surviving behind the Hindu intestate, the members of the family would continue to remain in occupation and in enjoyment of it as dwelling house. Due to marriage, the daughter would leave the parental house and get transplanted into matrimonial home. The proviso to Section 23 visualises certain contingencies and made provision for right of residence to Class-I female heirs. In the event the male member(s) choose(s) to separate or cease(s) to reside or instead introduce a stranger into family house, then the female heir gets the right to a share in the dwelling house as well. The reverence to preserve the ancestral house in the memory of the father or mother is not the exclusive preserve of the son(s) alone. Daughter(s) too would be anxious and more reverential to preserve the dwelling house to perpetuate the parental memory.

13. Section 23 thus limits the right of the Class-I female heirs of a Hindu who died intestate while both male and female heirs are entitled to a share in the property left by the Hindu owner including the dwelling house. The marginal note itself indicates that Section 23 is a special provision: in other words, it is an exception to the general partition. So long as the male heir(s) chose not to partition the dwelling house, the female class-I heir(s) has been denied the right to claim its partition subject to a further exception, namely, the right to residence therein by the female class-I heir(s) under specified circumstances. In other words, the male heir(s) becomes entitled to perpetuate the memory of the deceased-Hindu who died while remaining to live in the dwelling house during his or her life time. Thereby the dwelling house remains indivisible. The male heir(s) thereby evinces animus possedendi. But the moment the male heir(s) chooses to let out the dwelling house to a stranger/third party, as a tenant or a licensee, he or they exhibit(s) animus

dissident and the dwelling house thereby becomes partible. Here the conduct of the male heir(s) is the cause and the entitlement of the female Class-I heir(s) is the effect and the latter's claim for partition gets ripened into right as she/they is/are to sue for partition of the dwelling house, whether or not the proviso comes into play. Here the female heir(s) becomes entitled to not only mere partition of the dwelling house but also her right to residence after partition.

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14. It is, therefore, clear that though the right to succession devolves upon the female heir under Section 8, being Class-I heir to the Hindu intestate, in respect of the dwelling house, her right to seek partition has been interdicted and deferred only so long as the male heir(s) decide to remain occupied therein as undivided or continue to have it as a dwelling house. Though the words 'the male heirs choose to divide their respective shares', suggest that at least two such male heirs must exist and decide not to partition the dwelling house in which event the right of the female heir is postponed and kept in abeyance until the male heir or heirs of the Hindu intestate decided to partition it, it does not necessarily lead to the only inevitable conclusion that the operation of Section 23 must stand excluded in the case of the Hindu intestate leaving behind him/her surviving only a son and a daughter. Take the present policy of family planning to have only two children and invariably preferring to have a son and daughter. More than one son may not exist. The restriction is contingent and conditional and will cease to operate on the death of the sole male heir or the last of such male heirs of the intestate or if he or they choose(s) to partition and sell(s) his/their shares to a stranger or to let out to others. Take a case of a Hindu male or female owning a flat in metropolis or major cities like Bombay etc. with two room tenement left behind by a Hindu intestate. It may not be feasible to be partitioned for convenient use and occupation by both the son and the daughter and to be sold out. In that event the son and his family will be thrown on the street and the daughter would coolly walk away with her share to her matrimonial

home causing great injustice to the son and rendering them homeless/shelterless. With passage of time, the female members having lost the moorings in the parental family after marriage, may choose to seek partition though not voluntarily but by inescapable compulsions and constrained to seek partition and allotment of her share in the dwelling house of her intestate father or mother. But the son with his share of money may be incapable to purchase a dwelling house for his family and the decree for partition would make them shelterless. Take yet another instance, where two-room tenement flat was left by deceased father or mother apart from other properties. There is no love lost between brother and sister. The latter demands her pound of flesh at an unacceptable price and the male heir would be unable to buy off her share forcing the brother to sell the dwelling flat or its lease-hold right or interest to see that the brother and his family are thrown into the streets to satisfy her ego. If the right to partition is acceded to, the son will be left high and dry causing greatest humiliation and injustice.

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20. The above consideration would indicate that the legislature intended that during the life-time of the surviving male heir(s) of the deceased Hindu intestate, he/they should live in the parental dwelling house as partition thereof at the behest of the female heir would render the male heir homeless/shelterless. **Obviously, to prevent such hardship and unjust situation, special provision was made in Section 23 of impartibility of the dwelling house. Section 44 of the Transfer of Property Act and also Section 4(1) of the Partition Act appear to prevent such fragmentation of the ancestral dwelling house.** Singular includes plural under S 13(2) of the General Clauses Act and may be applied to Section 23 as it is not inconsistent with the context or subject. Even without resorting to it or having its aid for interpretation, by applying common sense, equity, justice and good conscience, injustice would be mitigated. After all, as said earlier, the purpose of law is to prevent brooding sense of injustice. It is not the words of

the law but the spirit and internal sense of it that makes the law meaningful. The letter of the law is the body but the sense and reason of the law is the soul. Therefore, pragmatic approach would further the ends of justice and relieve the male or female heir from hardship and prevent unfair advantage to each other. It would, therefore, be just and proper for the Court to adopt common sense approach keeping at the back of its mind, justice, equity and good conscience and consider the facts and circumstances of the case on hand. The right of residence to the male member in the dwelling house of the Hindu intestate should be respected and the dwelling house may be kept impartible during the life time of the sole male heir of the Hindu intestate or until he chooses to divide and gives where to his sister or sisters or alienate his share to a stranger or lets it out to others, etc. Until then, the right of the female heir or heirs under Section 8. is deferred and kept in abeyance. So, instead of adopting grammatical approach to construe Section 23, we are of the considered view that the approach of the Calcutta High Court and its companion Courts is consistent with justice, equity and good conscience and we approve of it. We accordingly hold that Section 23 applies and prohibits partition of dwelling house of the deceased Hindu male or female intestate, he left surviving sole male heir and female heir/heirs and the right to claim partition by the female heir is kept in abeyance and deferred during the life time of the male heir or till he partitions or ceases to occupy and enjoy it or lets it out or till at a partition action, equities are worked out.

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Punchhi, J.

22. The special and multi angular provision, Section 23 of the Hindu Succession Act, 1956, emits two legal questions of importance for determination, in this appeal by special leave, against the order of the Karnataka High Court dated 21-2-1992 in R.S.A. No. 1045 of 1991, affirming in limine the appellate order of the Civil judge, Ramanagaram dated 22 October 1990 in R.A. No. 31 of 1985, namely :

(i) What is a 'dwelling-house' on which the provision confers the cloak of impartibility? and

(ii) Where a Hindu intestate leaves surviving him or her a single male heir and one or more female heir or heirs, specified in Class I of the Schedule, is the provision attracted?

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27. The expression "dwelling-house" has not been explained elsewhere then in the Section 23 itself. There is no specific definition of the expression in the Act as such. Because of that, various commentators of the subject have foreseen that the courts were likely to face a problem in defining it. According to Webster Comprehensive Dictionary, the expression "dwelling house" means a house built for habitation, a domicile. In law it may embrace the dwelling itself and such buildings as are used in connection with it. According to Black's Law Dictionary (sixth edition), under statute prohibiting breaking and entering a "dwelling-house", the test for determining if a building is such a house is whether it is used regularly as a place to sleep. In Stroud's judicial Dictionary (fifth edition), the expression "dwelling-house" has been described as a house with the super-added requirement that it is dwelt in or the dwellers in which are absent only temporarily, having animus revertendi and the legal ability to return Ford v. Barnes, . It is described that the word "inhabitant" would seem to bring about more fully the meaning of the word "dwelling-house". In Words and Phrases (Third Edition) a quotation is available from Lewin v. End, attributed to Lord Atkinson in whole words a "dwelling-house" as understood by him was "a house in which people live or which is physically capable of being used for human habitation". Another quotation from R. v. Allison, is available of Maule, J. saying that a house, as soon as built and fitted for residence, does not become of dwelling-house until some person dwells in it. In I.P. Mukherjee's The Law Lexicon (Volume I) 1989, it is stated at page 565 that a dwelling-house, as the words imply, projects the meaning that the house or a portion

thereof is an abode of his, available to him at all times without any let or hindrance by others. Further thereat is stated that a dwelling place is one where a person inhabits and in law should be his domus mansionalis. In Aiyar's Judicial Dictionary (11th Edition), an old decision of the Allahabad High Court in Fatima Begum v. Sakina Begum, has been mentioned in which it has been held that the words "dwelling" or "residence" are synonymous with domicile or home and mean that place where a person has his fixed permanent home to which whenever he is absent, he has the intention of returning. An extraction from Commissioner of Income Tax v. K.S. Ratanaswamy, MANU/SC/0298/1979 : [1980]122ITR217(SC) is also quotable saying that primarily the expression "dwelling place" means 'residence', "abode" or "home" where an individual is supposed usually to live and sleep and in the context of a taxing provision which lays down a technical test of territorial connection amounting to residence, the concept of an "abode" or "home" would be implicit in it. In other words, a dwelling place must be a house or portion thereof which could be regarded as an abode or home of the assessee in taxable territories.

28. From the aforequoted statements it is manifest that in the legal world the word "dwelling-house" is neither a term of art nor just a word synonymous with a residential house, be it ancestral, joint family owned or self acquired, as understood in the law applicable to Hindus. In the context of Section 23 therefore with the legislature has closely employed the word "dwelling-house", it has done so with a purpose, which is to say that on the death of the intestate, a limited status quo should prevail as existing prior to his or her death. His or her abode, shared by him or her, with members of his or her family, identifiable from Class I Heirs of the Schedule, should continue to be in enjoyment thereof, not partible at the instance of the female heirs till the male heirs choose to effect partition thereof.

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31. Attention may now be invited to the last sentence in the provision and the proviso, for there lies the clue to get

to the heart of the matter. On first impression the provision may appear conflicting with the proviso but on closer examination the conflict disappears. A female heir's right to claim partition of the dwelling-house does not arise until the male heirs chose to divide their respective shares therein, but till that happens the female heir is entitled to the right to reside therein. The female heir already residing in the dwelling-house has a right to its continuance but in case she is not residing, she has a right to enforce her entitlement of residence in a court of law. The proviso makes it amply clear that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow. On first impression, it appears that when the female heir is the daughter, she is entitled to a right of residence in the dwelling-house so long as she suffers from any one of the four disabilities i.e. (1) being unmarried; (2) being a deserted wife; (3) being a separated wife; (4) being a widow. It may appear that female heirs other than the daughter are entitled without any qualification to a right of residence, but the daughter only if she suffers from any of the aforementioned disabilities. If this be the interpretation, as some of the commentators on the subject have through it be, it would lead to an highly unjust result for a married granddaughter as a Class-I heir may get the right of residence in the dwelling-house, and a married daughter may not. This incongruous result could never have been postulated by the legislature. Significantly, the proviso covered the cases of all daughters, which means all kinds of daughters, by employment of the words "where such female heir is a daughter" and not "where such female heir is the daughter". The proviso thus is meant to cover all daughters, the description of which has been given in the above table by arrangement. The word "daughter" in the proviso is meant to include daughter of a predeceased son, daughter of a predeceased son of a predeceased son and daughter of a predeceased daughter. The right of residence of the female heirs specified in Class-I of the Schedule, in order to be real and enforceable, presupposes that their entitlement cannot be obstructed by

any act of the male heirs or rendered illusory such as in creating third party rights therein in favour of others or in tenancing it, creating statutory rights against dispossession or eviction. What is meant to be covered in Section 23 is a dwelling house or houses, (for the singular would include the plural, as the caption and the section is suggestive to that effect) fully occupied by the members of the intestate's family and not a house or houses let out to tenants, for then it or those would not be dwelling-house/houses but merely in description as residential houses. The section protects only a dwelling-house, which means a house wholly inhabited by one or more members of the family of the intestate, where some of all of the family members, even if absent for some temporary reason, have the animus revertendi. In our considered view, a tenanted house therefore is not a dwelling-house, in the sense in which the word is used in Section 23. It may be a dwelling-house in the structural sense but it cannot be said to be a dwelling-house in habitation by the members of the intestate's family. In that twin sense, when the female heirs are entitled to a right of residence therein, which right is enforceable against the male heirs, that right militates against the created or creating of tenancy by the male heir or heirs and deprive them of their right to residence therein as also their right to partition; an incidence normal to the opening of succession. Thus it appears to us that if the male heirs derive the right under the provision to resist partition of the dwelling-house unless they chose to divide their respective shares therein, then correspondingly it is incumbent on the male heirs to keep the property well arranged, inhabited or occupied by themselves keeping the property available for the female heirs to enforce the right of residence therein. But if the latter right is frustrated on creation of third party rights or a contractual or statutory tenancy, there remains no right with the males to resist partition.

32. Every right has a corresponding duty. This principle vigorously applies in this multi angular provision. A house tenanted brings in strangers and it ceases to be a dwelling-house inhabited by members of the family. The protection of Section 23 is thus not available to the males.

It is in this light that question No. 1 need be answered to say that a dwelling-house is that house which is in actual, physical, inhabited possession of one or the other members or the family in stricto sensu, and if some are absent due to exigencies of service or vocations, the dwelling-house remains available for them to re-enter without any obstruction or hindrance and on that premise enabling the female heir to assert a right of entry and residence therein. A tenanted house does not fit into this description. Disabled daughters need instant succor, not litigation. They need doors of the dwelling-house always wide open, not stony-eyed responses of strangers. The provision silences them in seeking partition, but not their ownership extinct. If marriage has the inescapable consequence of displacement of the daughter from the parental roof, her interests forever cannot be sacrificed on the alter of matrimony. Her distress revertendi is of equal importance standing alongside the qualified defence of impartibility by the male heir as afore-explained. The first question is answered accordingly.” (Emphasis added)

8. The emphasized portions of the judgment, and which underlining has been provided by me, show that the Supreme Court has inter alia, held as under:-

- i) A dwelling-house is a residential house of a family which is exclusively occupied by and lived in by members of a family.
- ii) Except the members of the family, no one else has resided in the dwelling-house, i.e. a stranger has not come into possession of whole or part of the dwelling-house.
- iii) Once a stranger comes into possession of a dwelling-house, then in such circumstances, the dwelling-house loses the character of

a family dwelling-house considering the object that the sanctity of a family dwelling-house was required to be preserved till a stranger did not come into possession of the same.

iv) the provisions of Section 23 of the Hindu Succession Act, 1956 and provisions of agnate and cognate acts being Section 4 of the Partition Act, 1893 and Section 44 of the Transfer of Property Act, 1882 are part and parcel of the same scheme and the intention of the legislature and therefore, the meaning which has to be ascribed to the expression “dwelling-house” in all the three provisions of the three Acts has to be similar.

9. To the aforesaid, I must add that, though the basic foundation of the provisions of Section 44 of the Transfer of Property Act, 1882, Section 4 of the Partition Act, 1893 and Section 23 of the Hindu Succession Act, 1956 still continues to protect a dwelling-house of an undivided family, however, one cannot be oblivious to the fact that the society has moved on. Today in metropolitan cities and megapolises, such as the capital of this country, traditions and conservative attitude of the ladies not coming into contact with strangers is more or less a thing of the past. A family dwelling house is mostly non-existent because people live in flats in high rises or in small buildings having three or four or about these many number of flats. Privacy of course is zealously guarded, however, when

properties are built on a plot of land which are in the form of flats and which can be occupied by different persons/families/entities, the traditional concept of an undivided family house has almost vanished. It is in accordance with the contemporary situations and ground realities which exist today that the expression “dwelling-house” as found in Section 44 must be interpreted, of course, keeping in mind the peculiar facts and circumstances as would be found in the facts of each case. A very important aspect to be borne in mind while interpreting the expression ‘dwelling house’ is that it is one whole house used as a dwelling as distinguished from part of the house used as a dwelling house and thus there does not live therein any person other than the family member. Once in part of the dwelling house there is a stranger then it results in the fact that the whole dwelling house is not with the family and then in such situation it cannot be said that an additional stranger cannot come in. In the facts of the present case admittedly it is the case that the whole property N-47 is the dwelling house, but, in the first floor portion of which there is already a tenant and thus there is already a stranger in the dwelling house. Further it must always be borne in mind that the interpretation of Section 44 of Transfer of Property Act, 1882 must take into account the aspect that it is not as if the dwelling house is permanently impartible. The stranger who purchases the share of the co-

owner can always get his share separated and thereafter possess and enjoy his share. Thus the disability to take possession is only temporary till partition and therefore if there is already living a stranger in the house factually there is separation of a share of the dwelling house in which the tenant/stranger lives, though in law a partition by metes and bounds between co-owners has to take place. Therefore there has to be a balanced interpretation of Section 44 of Transfer of Property Act, 1882 keeping in view the fact that the inability to take possession by a stranger-purchaser is only temporary till the interest purchased is separated and bound to be separated by partition.

10. In the present case, it is undisputed that the property is built in the form of independent flats on different floors, and it is because of that reason, that the flat on the first floor was let out by the mother of the respondent/plaintiff to a company, M/s. Win-Medicare Pvt. Ltd. I understand M/s. Win-Medicare Pvt. Ltd. failed to vacate the premises after expiry of the lease and litigation is pending with the tenant though the keys of the property in that civil suit have been deposited in the Court. What is however important is that the property bearing no. N-47, Panchsheel Park, New Delhi since long lost the character of a typical dwelling-house which is envisaged as per the provisions of Section 44 of the Transfer of Property Act, 1882. Once a stranger comes in, in view of

the decision in the case of **Narashimaha Murthy (supra)**, there does not arise the scope for applicability of the provisions of Section 44 of the Transfer of Property Act, 1882. In the facts of the present case therefore the appellant/defendant no.2 cannot/ought not be ousted from the second floor of the property and the related rights which were purchased by him with the defendant no.1 in the suit for valuable consideration through a registered sale deed and the registered sale deed is final as regards the transfer of title.

11. Learned counsel for the respondent argued that merely because the tenant had been inducted in the first floor of the property would not mean that the property ceased to be a dwelling-house. Learned counsel for the respondent/plaintiff in support of his arguments placed reliance upon a decision of learned Single Judge of this Court in the case of **Shri Brahm Dev Narang vs. Mr. Satyajeet Narang & Anr. 82(1999) DLT 979**. Of course, this judgment does help the respondent/plaintiff inasmuch as it lays down that a property does not cease to be a dwelling-house for the purpose of Section 44 of the Transfer of Property Act, 1882 merely because the property had been tenanted, however, I note that the said judgment does not deal with the binding precedent of the Supreme Court in the case of **Narashimaha Murthy (supra)**, and therefore in my opinion, the decision in the case of **Shri Brahm Dev Narang (supra)**

does not lay down the correct law. I am bound to follow the decision in the case of **Narashimaha Murthy (supra)** of the Supreme Court in preference to the decision of a Single Judge of this Court though the same may have been rendered later in the year 1999 and the decision of the Supreme Court is earlier being of the year 1996. I also in view of the binding precedent of the Supreme Court in the case of **Narashimaha Murthy (supra)** need not refer to certain other judgments of other High Courts which were sought to be relied upon by learned counsel for the respondent/plaintiff.

12. I am informed that the respondent/plaintiff has already taken physical possession of the second floor of the subject property which was purchased by the defendants (including the appellant) in execution proceedings of the impugned judgment and decree. I therefore while setting aside the impugned judgment and decree hold that the suit of the respondent/plaintiff was liable to be dismissed inasmuch as the provision of Section 44 of the Transfer of Property Act, 1882 has no application in the facts as found in the present case. The appellant, who was dispossessed from the property, even before the period of limitation expired for filing of the appeal, will be after a period of 2 weeks from the passing of the present judgment entitled to immediate possession of the property purchased by him from Sh. Prem Kumar Dewan under the sale

deed dated 23.6.2008 by applying for execution of this judgment and decree and by way of restitution on principle of Section 144 CPC.

13. In view of the above, the appeal is accepted. The impugned judgment and decree is set aside. Suit of the respondent/plaintiff stands dismissed. Decree sheet be prepared. Trial Court record be sent back.

SEPTEMBER 06, 2011
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VALMIKI J. MEHTA, J.