

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
 % Date of Decision: 10.10.2012
 + **CS(OS) 720/2010**
 USHA RANI GAUTAM & OTHERS Plaintiff
 Through: Mr. Prakash Gautam, Advocate
 versus
 DEVENDER GAUTAM Defendant
 Through: Mr. F.S. Chandan, Advocate

CORAM:
HON'BLE MR. JUSTICE V.K.JAIN
JUDGMENT

V.K.JAIN, J. (ORAL)

CS(OS) No.720/2010 & IA No.11548/2012 (under Order VII Rule 11 CPC) & IA No.11669/2010 (under Order XII Rule 6 CPC)

This is a suit for partition for partition of the property bearing number J&K-66, admeasuring 100 square yards out of Rect. No.63-Kila No.15 situated at Laxmi Nagar, Delhi-92 in the area of Village Khureji Khas, Delhi-92. It is alleged in the plaint that the aforesaid property was purchased by late Smt. Sushila Devi, mother of the parties to the suit vide Sale Deed dated 13.07.1970. Late Smt. Sushila Devi expired on 17.2.1995. It is alleged in the plaint that after death of Smt. Sushila Devi, the plaintiffs relinquished their respective share in the suit property in favour of their father Shri Gauri Shankar Gautam. As a result of the aforesaid relinquishment, the share of late Shri Gauri Shankar Gautam in the suit property increased to $\frac{4}{5}^{\text{th}}$. It is also alleged that late Shri Gauri Shankar Gautam executed a registered Will dated 19.12.2008 whereby he bequeathed all his

immovable/moveable properties to the plaintiffs. Shri Gauri Shankar Gautam is also alleged to have executed registered Gift Deed 2.9.2009 in favour of the plaintiffs, in respect of the suit property. The plaintiffs are now seeking partition of the aforesaid property.

2. The defendant filed written statement contesting the suit. He took a preliminary objection that the suit was liable to be dismissed being hit by Section 23 of the Hindu Succession Act, 1956. It has been specifically stated in the written statement that the suit property was purchased by the mother of the plaintiffs and the defendant by virtue of the Sale Deed dated 13.7.1970. It is further stated in the written statement that the defendant contributed from his own funds for construction of the suit property. In para 2 of the reply on merits, it is alleged that the suit property was purchased by late Smt. Sushila Devi. It is further alleged that the suit property was purchased by late Smt. Sushila Devi from her own funds and the character of the suit property was self-acquired. The relinquishment by the plaintiffs in favour of their father was alleged to be illegal. The Will of the father dated 19.12.2008 is also stated to be illegal. As regards Gift Deed dated 2.9.2009, the same is alleged to be extraordinary exercise of the plaintiffs and it is stated that the person who has no right against gifting/ giving the suit property.

3. IA 11548/2012 has been filed by the defendant for rejection of the plaint. The learned counsel for the parties has drawn my attention to the Sale Deed dated

7.7.1970 filed by the plaintiffs. He has pointed out that as per the Sale Deed the suit property measuring 200 sq yards purchased by late Smt. Sushila Devi and Mr. Mahabir.Prasad Gautam. He submits that the suit for partition of the property, therefore, is not maintainable without impleading Mr. Mahabir Prasad Gautam, who is still alive. The second contention of the learned counsel for the defendant is that the plaintiffs being daughters have no right to seek partition of the property of their mother and, therefore, the plaint is liable to be rejected.

4. It would be seen from a perusal of the pleadings that as far as the suit property is concerned, it measures only 100 sq yards and not 200 sq. yards. Therefore, the scope of the present suit is confined to the property measuring 100 sq yards and not to the whole of the land which was jointly purchased by Shri Mahabir Prasad Gautam and late Smt. Sushila Devi. The defendant has expressly admitted in the written statement that as far as the suit property was concerned, the same was purchased by late Smt. Sushila Devi from her own funds and was her self-acquired property. Therefore, as far as property in question, which measures only 100 sq yards, since there is an admission that the same was owned only by late Smt. Sushila Devi and there is no averment in the averment in the written statement that the whole of the property measuring 200 sq. yards was jointly owned by late Smt. Sushila Devi and Mr. Mahabir Prasad Gautam, it would not be correct to say that Shri Mahabir Prasad Gautam is a necessary party to the present suit. He would

have been a necessary party to the suit, had the partition been claimed in respect of the whole of the 200 sq yards of land purchased by late Smt. Sushila Devi and Shri Mahabir Prasad Gautam. But, as far as the property admeasuring 100 sq yards is concerned, it is the admitted case in the pleadings that the same was self-acquired property of late Smt. Sushila Devi.

If the defendant made some contribution for construction being raised on the aforesaid property, that would make no difference as far as the title of the suit property is concerned, as such contribution in construction would not confirm any right upon the defendant in the title of the property and it would be taken only either as a gift or loan from him to his mother who admittedly was the owner of the property.

5. At this stage, the learned counsel for the defendant states that he does not press the plea of Section 23 of the Hindu Succession Act as the same has since been removed from the statute book with effect from 9.9.2005, whereas the present suit was filed in April, 2010. Therefore, I find no merits in IA No.11548/2012 and the same is hereby dismissed.

6. Since the suit property was admittedly owned by late Smt. Sushila Devi, it would devolve upon all her legal heirs in equal proportion in case, the relinquishment deed and gift deed set up in the plaint are excluded from

consideration. The learned counsel for the plaintiffs states on instructions from the plaintiffs that they have no objection to they being declared as owners of the 1/3rd share each in the suit property and the defendant being declared owner of the remaining 1/4th share in the suit property. In view of the submissions, made by the learned counsel for the plaintiffs, a preliminary decree for partition of the suit property is hereby passed declaring that the parties to the suit have 1/4th share each in the aforesaid property. Decree sheet be drawn accordingly.

7. Ms. Rashmi Priya, Advocate who is present in the Court is hereby appointed as Local Commissioner to inspect the suit property and report whether it is possible to partition the suit property by metes and bounds, and if so in what manner. She would be entitled to the assistance of an Architect for submitting her report. The fee of the Local Commissioner is fixed at Rs.50,000/-. 3/4th of her fee would be paid by the plaintiffs and 1/4th by the defendant. In case any architect is appointed by the Local Commissioner, 3/4th of his fee shall be paid by the plaintiffs and 1/4th by the defendant. The Local Commissioner shall submit her report within six weeks.

IA No.11669/2010 stands disposed of.

CS(OS) No.720/2010

List on 8.4.2013.

V.K. JAIN, J

OCTOBER 10, 2012/*rd*