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

\+ **RFA No. 336/2005**

% **24th October, 2017**

VIJAY LAXMI GUPTA ..... Appellant

Through: Ms. Geeta Luthra, Sr. Advocate with Ms. Shivani Luthra Lohiya, Ms. Parul Sharma, Mr. Anshul Duggal and Mr. Prateek Yadav, Advocates.

versus

SURESH KUMAR PURI AND ORS. ..... Respondents

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff/daughter/sister impugning the judgment of the trial court dated 19.11.2005 by which the trial court has dismissed the suit for possession and injunction filed by her with respect to a portion of the property bearing no. 8646 and 8651 Gau Shala Marg, Double Phatak Road, Bagh Rao Ji Ward-16, Delhi-6. The property as a whole is hereinafter referred to as the subject property.

2. As per the plaint appellant/plaintiff pleaded that the entire property at Gau Shala Marg was absolutely owned by her father Sh. G.S. Puri who died intestate on 5.2.1976. The mother of the appellant/plaintiff and wife of Sh. G.S. Puri, namely, Smt. Pushpawati Puri also died intestate at Delhi on 29.2.2000. It was pleaded that in November, 1997 there was an oral partition/settlement whereby a portion on the ground floor of the subject property, shown in black colour in the site plan annexed to the plaint comprising of three rooms, kitchen, bathroom, verandah, open space as also the terrace at the first floor was given to the appellant/plaintiff as her share of the property, hereinafter referred to as the suit property. It was further pleaded in the plaint that possession of the suit property was illegally taken over by the defendants and hence the suit was filed. Appellant/plaintiff also pleaded that she had got her name mutated with the Delhi Development Authority (DDA) on 12.12.1997 and this was informed to her by the Tehsildar Nazrul vide letter dated 22.9.1998 that the mutation has been done vide mutation no. 9082 dated 22.9.1998. Accordingly, the suit was prayed to be decreed with the following reliefs:-

> "i. A decree for possession in favour of the plaintiff and against the defendants of the portion/premises comprising three rooms, kitchen,

> bathroom, latrine, veranda open space at the ground floor and terrace and first floor as shown in black colour in the site plan of the properties bearing No. 8646 and 8651 situated at Gau Shala Marg, Double Phatak Road, Bagh Rao Ji Ward-16, Delhi-6.
> ii. A decree for injunction where by the defendants be restrained from selling, alienating, parting with possession nor creating any third party interest in the suit properties bearing No. 8646 and 8651 situated at Gau Shala Marg, Double Pathak Road, Bagh Rao Ji Ward-16, Delhi-6 as shown in the site plan attached with plaint."

3. There were a total of six defendants in the suit and which six defendants are the brothers of the appellant/plaintiff. These defendants are also the respondents in the present appeal. All the defendants except defendant no. 3 disputed the case of the plaintiff and prayed for the suit to be dismissed. Defendant no. 3/Sh. Rakesh Kumar Puri, respondent no. 3 in this appeal, had filed a written statement and had also given evidence supporting the appellant/plaintiff that the suit be decreed as prayed by the appellant/plaintiff. The other defendants being defendant nos. 1, 2, 4, 5 and 6 (hereinafter referred to as the contesting defendants/respondents) filed their written statement and contested the suit. It was pleaded that the subject property had no longer remained the individual property of the father late Sh. G.S. Puri, inasmuch as, the father late Sh. G.S. Puri in the year 1965 had formed an HUF being Sh. G.S. Puri Hindu Undivided Family (HUF), and had put the subject property in the common hotchpotch of HUF. It was pleaded

that Sh. G.S. Puri had not died intestate but he had left his Will dated 21.9.1975 and whereby he had given his 1/8th share in the subject property, being his share of the HUF property, in favour of his wife Smt. Pushpawati Puri i.e mother of the parties. It is also pleaded in the written statement that the mother of the parties Smt. Pushpawati Puri had executed Will dated 22.9.1997 whereby she bequeathed her 1/4th share in the subject property (1/8th share received by her as a member of HUF on the death of Sh. G.S. Puri and another 1/8th share received being the share of Sh. G.S. Puri under his Will dated 21.9.1975) in favour of her sons being the defendants in the suit. It was thus pleaded that the sons who are the defendants in the suit became 1/6th owners each of the subject property. The defendants denied that any oral partition or settlement had taken place as regards the subject property in November, 1997 as was pleaded by the appellant/plaintiff. The defendants also pleaded that the mutation if carried out in favour of the appellant/plaintiff in the records of DDA is illegal because this mutation was done without any notice to the defendants.

4.(i) After pleadings were complete, the trial court framed the following issues:-

"5. On the pleadings of the parties following issues were framed on 3.10.2002 for determination in this case:

1. Whether the plaintiff is entitled to possession of the suit property and the injunction prayed for? OPP
2. (ii) Whether the present suit is time barred? OPD
3. (ii) Whether the present suit is not properly valued for the purpose of the court fee and jurisdiction? OPD
4. (iv) Whether the mutation order dated 22.9.98 in respect to the suit property is nullity? OPD
5. (v) Relief."

(ii) Thereafter, additional issues were framed on 19.5.2004 and these issues read as under:-

"i. Whether L. Sh. G.S. Puri had executed a will dated 21.9.75 as mentioned in preliminary objection of the written statement of defendant Nos. 1, 2, 4, 5 & 6? OPD
ii. Whether L. Smt. Pushpawati Puri executed a Will dated 22.9.97 as mentioned in preliminary objection of the W.S. Filed by def. Nos. 1, 2, 4, 5 & 6? OPD"

5.(i) Parties led evidence. Appellant/plaintiff entered the witness box and deposed as PW-1. She also examined Sh. Raj Singh a Patwari from DDA as PW-2 and who proved the letter Ex.PW1/2 issued by DDA dated 22.9.1998 regarding mutation of the suit property.

(ii) Defendant nos. 1, 2, 4, 5 and 6 examined the defendant no. 1 Sh. S. Puri as DW-1. The attesting witness of the Will of the father, namely Sh. K.S. Puri (and who was the younger brother of late Sh. G.S. Puri), was examined as DW-2. One Sh. Vishwa Mitra Kain was examined for giving valuation of the property, and who deposed as DW-3 and he proved his valuation report as Ex.DW3/1.

(iii) In her rebuttal evidence, the appellant/plaintiff examined photographer Sh. J.P. Gupta as PW-3 and handwriting expert Sh. T.R. Nehra as PW-4, and who were examined, inasmuch as, the case of the appellant/plaintiff was that the Will dated 21.9.1975 of late Sh. G.S. Puri relied upon by the respondents/defendants was not a valid Will.

6.(i) Trial court has dismissed the suit by holding that late Sh. G.S. Puri had created an HUF and the subject property is HUF property. It was also held Sh. G.S. Puri had died leaving behind his Will dated 21.9.1975 and which was proved through the attesting witness Sh. K.S. Puri as Ex.DW2/1. The trial court also rejected the case of the appellant/plaintiff that the report of the handwriting expert, and who was examined as PW-4, would help the appellant/plaintiff, inasmuch as, the handwriting expert did not give the report that the signature of Sh. G.S. Puri on the Will dated 21.9.1975 were not of Sh. G.S. Puri but the handwriting expert only gave his report that the signatures of Sh. G.S. Puri were taken on a blank paper. Trial court also disbelieved the case of oral family settlement and partition as pleaded by the appellant/plaintiff, inasmuch as, appellant/plaintiff failed to file any documentary proof that such an oral partition had ever taken place giving to the appellant/plaintiff the suit property which is marked in black colour in the site plan filed with the plaint. Trial court also disbelieved the case of the appellant/plaintiff that oral settlement took place in November, 1997 because as per the letter sent for mutation to DDA appellant/plaintiff pleaded that all the parties had become the owners of the subject property and appellant/plaintiff did not set up a case of any specific portion given to her in the subject property by alleging an oral partition in the year 1997. Accordingly, the trial court dismissed the suit.

(ii) I may, however, interestingly note that the contesting defendants/respondents made no attempt to prove the Will of the mother dated 22.9.1997 and therefore the suit could not have been dismissed because the appellant/plaintiff should have been given her share out of the share of the mother i.e $1/7^{th}$ share of the $1/4^{th}$ share falling to the mother, and therefore even as per the pleadings and evidence which existed on the record of the trial court while the suit would have been dismissed for the relief of possession, yet the trial court should have exercised its powers under Order VII Rule 7 CPC to treat the suit as a suit for partition and granted the appellant/plaintiff her undivided 1/28th share of the subject property.

7. Learned senior counsel for the appellant/plaintiff has for seeking to set aside the judgment of the trial court, argued as under:-

(i) That though the respondents/defendants had proved a declaration Ex.DW1/1 by which the father Sh. G.S. Puri had declared creation of an HUF for the first time in the year 1965 by throwing the subject property in common hotchpotch, however, it is argued that there is no further proof, much less documentary proof, that such a declaration was ever acted upon. It is argued that if an HUF which was created allegedly by the declaration Ex.DW1/1 then the best proof of the same would be by acting upon and relying on the same for the purpose of mutation of the subject property in the records of DDA and also definitely by filing of the Income Tax Returns (ITRs) as HUF by the father Sh. G.S. Puri during his lifetime from the year 1965 when Ex.DW1/1 was executed and till he died in the year 1976. It is also argued that subsequent to the year 1976 even the contesting defendants/respondents/brothers have not filed ITRs showing the subject property as HUF property in their income tax records. Very strong reliance is placed upon certain admissions which were made by the defendant no. 1/DW-1 in his cross-examination which was conducted on 27.1.2004 and which as per the appellant/plaintiff shows that the HUF really was never acted upon and therefore the document Ex.DW1/1 only remained a nominal document.

(ii) It is argued that courts always have inherent powers not only under Section 151 CPC, but more importantly because of Order VII Rule 7 CPC, that even if the reliefs prayed for in the suit cannot be granted, but once it is found that instead other reliefs can be granted on admitted or proved, facts and evidence which has come on record, then the trial court should have granted appropriate reliefs by moulding the reliefs prayed in the suit for possession and injunction, to the modified relief of granting the appellant/plaintiff a decree of partition of her $1/7^{th}$ share in the suit property i.e each of the six brothers getting $1/7^{th}$ share and the appellant/plaintiff getting her $1/7^{th}$ share in the suit property.

(iii) It is argued on behalf of the appellant/plaintiff that taking that the Will dated 21.9.1975 of late Sh. G.S. Puri as being proved as Ex.DW2/1, even then, the effect of this Will will be to make the mother Smt. Pushpawati Puri to be the owner of the subject property, and since the Will of Smt. Pushpawati Puri dated 22.9.1997 has admittedly not been proved, and especially because no attesting witness has been examined of this Will of Smt. Pushpawati Puri, hence we have to take Smt. Pushpawati Puri as having died intestate and therefore since she was the sole owner of the subject property in terms of the Will of Sh. G.S. Puri and whereby upon the appellant/plaintiff would devolve $1/7^{th}$ share in the subject property. Also alternatively it is argued that the Will of the father Sh. G.S. Puri would be of no legal effect as that Will only proceeds on Sh. G.S. Puri being $1/8^{th}$ owner of the subject property whereas he would be the sole and complete owner of the subject property as an HUF never came into existence.

8. In my opinion, the arguments urged on behalf of the appellant/plaintiff have to be accepted. This is because existence of an HUF is not found except in the declaration of the year 1965 Ex.DW1/1 and in the Will of late Sh. G.S. Puri Ex.DW2/1. From the period from the year 1965 till the Will is executed in the year 1975 i.e for 10 years not a single document has been filed to show that this HUF which was allegedly created by Ex.DW1/1 in the year 1965 was

ever acted upon. No ITRs of Sh. G.S. Puri have been filed and nor have ITRs have been filed of any of the sons of Sh. G.S. Puri, being the contesting defendants of the suit, that they had showed the subject property in the ITRs as an HUF property. Also, the defendant no. 1/respondent no. 1 in his cross-examination admitted that there were tenants in the property who were paying the rent, and if that be so the rental income should have been shown as the rental income of the HUF in the ITRs but admittedly no ITRs either of Sh. G.S. Puri or late Smt. Pushpawati Puri or any of the five contesting defendants have been filed to show that in their ITRs the subject property has been shown as the HUF property or income from the subject property has been shown as income from the HUF property. Also, it is very important that in no other public record, including the record of DDA who is the superior lessor of the subject property, the subject property has been ever got mutated for being shown as an HUF property and not the individual property of late Sh. G.S. Puri. In my opinion, there are very serious admissions which are made in this regard by the defendant no. 1/respondent no.1 in his cross-examination as DW-1 on 27.1.2004 and which clearly shows that the defendant no. 1/respondent no.1 had no clue as to HUF coming into existence in the year 1965, that the father never showed in the ITRs the subject property as HUF as no such ITRs were filed, and that even after the death of the father in the year 1976 and till defendant no. 1/respondent no.1 deposed in the year 2004 i.e for a period of around 28 years, even the defendant no. 1/respondent no.1 in his ITRs never showed the subject property as an HUF property. The relevant portion of the cross-examination of DW-1 which is rightly relied upon by the appellant/plaintiff reads as under:-

> "I do not remember the year when my father had created an H.U.F. perhaps it was around 1965. I cannot say if he had executed a document in this regard. Vol. I had seen an affidavit in this regard. This affidavit was of the year 1965. I had seen this affidavit in 1968 on my return from England. I used to communicate with my father while I was in England particularly in the year 1964 onwards. **My father had not informed me or had not talked to me about the formation of an H.U.F.** In 1968 only I came to know that I was the member of the H.U.F. **It is correct that my father was assessee to Income Tax. I had not seen the HUF return at any time.**
> Xxxxxxxxxxxxxxxxxxxxx
> Q:- I put it to you that no HUF was formed by your father and, therefore, no HUF return was filed at any time ?
> Ans. An HUF existed but I am not aware whether no HUF return was filed at any time.
> Q:- Please let us know what properties and business were put by your father in the said G.S.Puri HUF?
> Ans. The house situated at New Rohtak Road with numbers 8651 & 8646 was the only property which was put in HUF by my father.
> It is correct that the aforesaid property was the self occupied property of my father. Perhaps there was one tenant in the said property. He was Mr. Bhalla. It is incorrect that there were four tenants in this property from 1965 to 1971. It is correct that land underneath the aforesaid property belongs to the D.D.A. and on lease-hold basis. I cannot say if DDA was informed at any time that this property had been put in an HUF. I cannot produce any rent receipt issued to a tenant showing that it was an HUF property. I am not aware if ground rent of this property had been deposited in the name of the HUF at any time. The HUF is still in existence. My father had expired in 1975. Again said in Feb. 1976. I am the eldest son. It is incorrect that

after the death of my father I have not acted as a Karta of H.U.F. I became a Karta after the death of my mother in the year 2000. I have taken the record of the H.U.F. It is incorrect that I have no record of HUF and no HUF was formed at any time.

C.Q:- I have not filed the return of the HUF as Karta as yet. The tenant Mr. Bhalla was paying a rental of Rs.100-200 p.m. Apart from the rent there was no other income to the HUF. It is correct that during the lifetime of our father as well as after his death, we all six brothers had our separate kitchen and were not dependent on our father. I am assessed to Income Tax individually. In my income tax return I have not mentioned the share of the HUF or the income of the HUF property at any time." (emphasis added)

9. In my opinion, once the subject property was admittedly the self-acquired property of late Sh. G.S. Puri, it was then incumbent upon the contesting defendants/respondents to show to the satisfaction of the judicial conscience of the Court that the declaration of creation of an HUF by throwing the subject property in common hotchpotch has been acted upon after the year 1965, but in this regard the contesting defendants/respondents have miserably failed, as neither in the Income Tax records nor in the records of the superior lessor DDA nor in any other public record, is the subject property shown as a HUF property after the year 1965 when it is said to be allegedly put into common hotchpotch. This position continued till the year 1976 when the father Sh. G.S. Puri died and even after the death of Sh. G.S. Puri in the year 1976 till 2004 when the defendant no. 1/respondent no.1 deposed as DW-1. I, therefore, hold that the trial court has erred in

holding that an HUF existed and the subject property was an HUF property.

10. I may note at this stage that there is no challenge by the appellant/plaintiff to the factum that late Sh. G.S. Puri had executed a Will and which has been proved before the trial court as Ex.DW2/1.

11. Once therefore the subject property is not an HUF property and the subject property admittedly vested with the mother Smt. Pushpawati Puri by virtue of Will of late Sh. G.S. Puri, Ex. DW2/1 (as whatever was of Sh. G.S. Puri has to have been taken to have been given by him to his wife Smt. Pushpawati Puri by virtue of the Will Ex. DW2/1), and since Smt. Pushpawati Puri has died intestate because no Will of Smt. Pushpawati Puri has been proved on record, hence the appellant/plaintiff became $1/7^{th}$ undivided owner of the subject property and accordingly by exercising powers under Order XLI Rule 33 CPC read with Order VII Rule 7 CPC, this appeal is allowed by holding that the appellant/plaintiff is the owner of $1/7^{th}$ undivided co-ownership share in the subject property bearing no. 8646 and 8651 Gau Shala Marg, Double Phatak Road, Bagh Rao Ji Ward-16, Delhi-6 and a preliminary decree for partition is accordingly passed. Parties are left to bear their costs. Now, the suit will be taken

up by the trial court for passing of a final decree and holding of proceedings for passing of the final decree.

12. List before the District & Sessions Judge (Central) Tis Hazari Courts on 1st December, 2017 and District & Sessions Judge will now mark the suit for disposal to the competent court in accordance with law for the final decree proceedings. Trial court record be sent back so as to be available to the District & Sessions Judge.

OCTOBER 24, 2017 **VALMIKI J. MEHTA, J**
AK/godara