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

% *Judgment Reserved On : February 20, 2017*
Judgment Delivered On : March 01, 2017

\+ **RFA (OS) No.125/2015**

ASHOK ALAGH ..... Appellant

Represented by: Mr.Ravinder Sethi, Sr. Advocate instructed by Ms.Shantha Devi Raman, Mr.Rajiv Kumar Ghawala and Mr.Arbaaz Hussain, Advocates.

versus

NEELAM ALAGH & ORS ..... Respondents

Represented by: Mr.Tariqui Siddiqui, Ms.Reedika Gupta, Mr.Tanveer Ahmad, Ms.Raksha Ahmad and Mr.Harish Priya, Advocates.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The appellant was the plaintiff. Suit seeking partition of ground floor of property bearing No.N-215, Greater Kailash –I, New Delhi as also rendition of accounts filed against the wife and children of appellant's brother Subhash Alagh, who expired on October 07, 2005, has been dismissed vide a impugned judgment and decree dated September 30, 2015. The suit was instituted in the year 2006 i.e. soon after the death of appellant's brother.

2. Case pleaded in the plaint by the appellant was that the ground floor, partition whereof prayed was inherited by him and his deceased brother under a Will executed by the father and since the appellant was residing in the United Kingdom he allowed his brother to continue to occupy the suit property and manage the same with an option to purchase appellant's half share. With some persuasions Subhash agreed to purchase appellant's half share in the property for which he had to raise a loan from the bank by mortgaging the property and for which purpose he sent the draft of a special power of attorney in favour of his wife. The matter could not taken forward. Subhash expired and hence the suit was filed.

3. In the written statement filed the respondents admitted inheritance as pleaded by the appellant. They alleged concealment of material facts in the plaint. As per the appellant's at a settlement reduced into writing on February 18, 1999, it was agreed that the appellant shall sell his half share to his brother in the suit property at a price to be determined by the parties and for purposes of receipt of money he executed a Power of Attorney on same date in favour of Kanchan Tuli, the sister of the parties. The brothers later on agreed that the value of the suit property ₹20,00,000/- and that Subhash paid ₹12,57,778/- to the appellant towards his half share in the property.

4. In the replication filed the appellant admitted the settlement dated February 18, 1999. He denied having executed any Power of Attorney in favour of Kanchan Tuli to receive money from his brother. He admitted having received two payments in sum of ₹70,000/- and ₹1,50,000/- from his brother

but claimed to have forfeited the same on account of his brother not paying him his share in the suit property.

5. On the pleadings of the parties, vide a order dated 30.09.2015 undernoted issues were settled.

> *"1. Whether the present suit filed by the plaintiff through his attorney Smt.Kanchan Tuli is legally maintainable? OPP*
> *2. Whether the family settlement dated 18.02.1999 entered into between the plaintiff and his late brother Mr.Subhash Alagh is binding on them and was it ever acted upon and if so, to what effect? OPD*
> *3. Whether the plaintiff's late brother Mr.Subhash Alagh had paid the price of half share of the plaintiff in the suit property after entering into the family settlement dated 18.02.1999 and if so, to what effect? OPD*
> *4. Whether the plaintiff is entitled for partition of the suit property i.e. ground floor of property bearing No.N-215, GK-I, New Delhi and if so, to what share he is entitled in the said property? OPP*
> *5. Whether the plaintiff is entitled to any amount from the defendant on account of their use and occupation of the suit property since 1999 and if so, to what amount? OPP*
> *6. Relief."*

6. Needless to state decision on issues Nos.2 and 3 would decide the fate of the parties.

7. To support his case, the appellant had examined three witnesses, including himself as PW-1. In his affidavit Ex.PW-1/A he had deposed about the Will dated July 15, 1986 Ex.PW-1/6 (also Ex.D2) of his father; executing of an Affidavit Ex.PW-1/7 and an Indemnity Bond Ex.PW-1/8 on his behalf

by his sister Kanchan Tuli for effecting mutation of the suit property. He denied having ever agreed to the market price of the suit property or he ever authorized his sister Kanchan Tuli or her family members to receive money on his behalf towards the value of his share in the suit property. He rather deposed that a final agreement was yet to reach and that the family settlement was never acted upon. He further deposed that the Power of Attorney dated February 18, 1999, as relied by the respondents, was rather executed by him in favour of his sister Kanchan Tuli for the purpose other than as alleged by the respondents. He denied having received an amount of ₹12,57,778/- towards the value of his share in the suit property and rather received only the sums of ₹70,000/- and ₹1,50,000/- which he forfeited as his brother had failed to pay his share. He also proved a letter dated December 2003 Ex.PW-1/2 to show that his brother was rather hard pressed for money and even talked about taking loan to pay for his share. PW2 Kanchan Tuli also supported her brother by deposing that she was never authorized by the Power of Attorney dated February 18, 1999 to receive any amount on behalf of the appellant towards the value of his share in the suit property. She even denied having received from Subhash Alagh, the amounts totaling to ₹4,25,266/-, for the appellant. She further denied the appellant ever received from Subhash Alagh, an amount of ₹12,57,778/- through different modes, as alleged. PW-3 Anupam Kumar Kulshreshth, a senior accountant of M/s Watchdog Security and Detective Agency Pvt. Ltd., produced the ledger account Ex.PW-3/1 of the Company showing the salary paid to Subhash Alagh for the years 2000 to 2004 and also the ledger account Ex.PW-3/2 of salary being paid to Smt.Neelam Alagh. He deposed that his company never received any amount, much less of ₹18,132/-, ₹24,380/- and ₹41,880/- in the years 2001, 2002 and 2003 from Subhash Alagh or Neelam Alagh. He denied the receipt of the cheques bearing No.943378 dated 13.3.2001, cheque No.773326 dated 02.07.2002 and cheque No.565070 dated 03.10.2003 drawn upon Standard Chartered Bank for the sums as aforesaid or such amounts ever being credited in his company's account.

8. The respondents examined seven witnesses, including Smt.Neelam Alagh who appeared as DW-1. She proved the Agreement of Family Settlement dated February 18, 1999 as Ex.PW-1/DX between the brothers; the General Power of Attorney dated February 18, 1999 as Ex.PW/DW/X executed by Ashok Alagh in favour of Kanchan Tuli; the valuation report dated May 15, 1999 of the suit property as Ex.DW-1/1; the tabulation of the amounts allegedly paid to the appellant by her husband towards value of his share as Ex.DW-1/2; the cheque book Ex.DW-1/3 of United Bank of India; the cheque books Ex.DW-1/3A to EX.DW-1/3D of M/s ANZ Grindlays Bank; and the cheque books Ex.DW-1/3G to Ex.DW-1/3K of Standard Chartered Bank. The index/ record slip of cheque books above were in the handwriting of Subhash Alagh wherein he had made entries in respect of the cheques being issued either for self or for Satish Tuli or for Watchdog. She also deposed about the payment of ₹2,50,000/- to Kanchan Tuli vide cheque No.307325 dated September 13, 2005 as shown in the statement of account Ex.DW-1/7 of Standard Chartered Bank and of cheque No.005712 dated October 5, 2005 for ₹2,50,000/- in favour of Puja Tuli, as shown in the passbook Ex.DW-1/8 of her saving A/c No.44261 in United Bank of India. She deposed that the market

value of the suit property was around ₹18,51,000/- in February 1999 and that the share of the appellant was agreed to be ₹10,00,000/- which was paid to appellant with interest by her husband. DW-2 Amit Sharma, the valuer though had proved his report Ex.DW-1/1 qua the valuation of the suit property but did not appear for his cross-examination, hence his testimony could not be read. DW-3 Devender Kumar, Senior Manager of Syndicate Bank proved the statement of account Ex.DW-3/1 in the name of Subhash Alagh, and deposed about the payment of ₹1,50,000/- by a foreign draft dated April 18, 2002 favouring Ashok Alagh. DW-4 Gunjan Kumar Singh, Assistant Branch Manager (Sales) LIC, proved the statement Ex.DW-4/1 of payment of commission to Neelam Alagh, she being an LIC agent. DW-5 N P Kasushik had proved the mutation of property in favour of the brothers and deposed that the ground floor continues to be in the joint names. DW-6 Tarun Kumar Dutt, Operation Officer of Standard Chartered Bank brought the statement of account of Subhash Alagh and Neelam Alagh for the period from 20.02.2002 to 20.04.2005 and produced 12 original cheques, photocopies exhibited as Ex.DW-6/1 collectively; the certified copy of statement of account Ex.DW-6/2 in the name of Subhash Alagh and Neelam Alagh, but could not say as to who had withdrawn the amounts of 12 cheques. However, a bare perusal of the copies of said cheques would reveal that said amounts were withdrawn by Subhash Alagh or Neelam Alagh themselves. DW-7 Manoj Prasad, Single Window Operator, United Bank of India had brought the certified copy of cheque No.005712 dated October 05, 2005 of ₹2,50,000/- Ex.DW-7/A favouring Puja Tuli and the copy of the cheque Ex.DW-6/1, favouring Kanchan Tuli.

9. Dismissing the suit, the reasoning of the learned Single Judge could be crystallized as under:-

(a) family settlement dated February 18, 1999 Ex.PW-1/DW was entered into between the parties whereby the appellant had agreed to receive the value of his half share in the suit property at the market rate at the time of settlement;

(b) the market value of the suit property at the time of settlement was agreed to be ₹20,00,000/-;

(c) the appellant executed a power of attorney dated February 18, 1999 Ex.PW/DW/X in favour of his sister Kanchan Tuli to receive the value of his share in suit property;

(d) Subhash Alagh had paid an amount of ₹12,57,778/- to the appellant or to his attorney namely Kanchan Tuli and her family members, the detail of the amounts paid being proved as Ex.DW-1/2;

(e) there could have been no other reason for Subhash Alagh to make huge payments to Kanchan Tuli or her family members except on account of the value of half share of the appellant in the suit property; and

(f) the appellant is guilty of concealment as he had failed to disclose the payments made to him, including that of ₹70,000/- and ₹1,50,000/-, in his account and has also concealed about the family settlement dated February 18, 1999 and about power of attorney dated February 18, 1999.

10. The agreement Ex.PW-1/DW records that the value of the property would be ascertained and the payment would be made by Subhash to the appellant after six months but not beyond one year. It also records that Subhash

Alagh may reimburse the appellant for his share in the suit property either by selling the flat or the appellant's share in the said flat.

11. Admittedly, there is no document on record which notes the valuation of the suit property being actually determined by the brothers. The evidence led by the respondents to prove the value of the property is the valuation report dated May 15, 1999 Ex.DW-1/6. Notwithstanding the author of the report not making himself available for cross-examination, there is intrinsic evidence of the report being a contrived document. It notes Neelam Alagh to be the wife of late Subhash Alagh whereas Subhash Alagh had expired in the year 2005. It also describes her to be an owner of the suit property which rather shows that it was prepared after the death of Subhash Alagh and not in the year 1999 as claimed.

12. The alternative reasoning given by the learned Single Judge flows from an alleged admission made by the appellant in the plaint qua the value of the suit property for ₹30,00,000/- when the suit was instituted in the year 2006.

13. There is ex-facie misreading of the pleading. The plaint reads as under:-

> *13. That seeing no alternative, the plaintiff repeatedly requested Shri Subhash Alagh to partition the suit property by metes and bounds after he failed to pay the plaintiff, the prevalent market value of his share in the suit property till April, 2004, which was in no case less than ₹30,00,000/- (Rupees Thirty Lacs only) in April, 2004, but the value of property has rapidly increased thereafter, which in no case is less than ₹50,00,000/- (Rupees Fifty lacs only) at present. Thereafter, the plaintiff again requested Shri Subhash Alagh to partition*

the suit property in first week of May, 2005 which also proved futile."

14. The pleading is to the effect that appellant's half share in the property is valued as of the year 2004 in sum of ₹30,00,000/-. Meaning thereby the value of the property as per the appellant would be ₹60,00,000/-.

15. Thus, taking judicial notice to conclude that the share of the appellant was ₹10,00,000/- in the year 1999 was without any cogent basis, when the appellant himself in his affidavit Ex.PW-1/A had deposed that a final agreement was yet to be entered to assess and arrive at the market value of the suit property and that it was never entered into. Neither the market value of the suit property was ever assessed nor the agreement dated February 18, 1999 was ever acted upon. It is rather strange that the respondents did not prefer to cross examine the appellant on this crucial issue and whereas Neelam Alagh on April 28, 2012 had deposed as under:-

> *"My husband got the valuation done. I do not know whether my husband had ever sent any written communication in this respect or otherwise informing him about the valuation so done. My husband had never informed me about such valuation given to the plaintiff ever."*

16. Hence, arriving at an imaginative figure of ₹10,00,000/- by the learned Single Judge to be the share of the appellant as on February 1999 and to hold the settlement dated February 18, 1999 was really a settlement by means of payments of the market price payable with respect to the appellant's share in the suit property was misreading of evidence. The deposition of Neelam Alagh recorded on April 28, 2012 rather clarify that the appellant was never

communicated of any valuation or fixation of the market price of the suit property.

17. The learned Senior counsel for the appellant then argued that the Power of Attorney dated February 18, 1999 exhibited as Ex.PW/DW/X never authorized Kanchan Tuli to receive the value of his share in the suit property. The learned Single Judge has dealt with this argument as follows:-

> *"....Para 3 of the GPA dated February 18, 1999 leaves no manner of doubt that Kanchan Tuli was authorized by the plaintiff to receive amounts on behalf of the plaintiff on account of the Will of the father Shri Gulzari Lal Alagh. Admittedly, the suit property devolved upon the plaintiff and late Subhash Alagh as per the Will dated 15.07.1986 of Shri Gulzari Lal Alagh and therefore whatever payments which Kanchan Tuli received with respect to the share of the plaintiff was as per the share of the plaintiff as per the Will as regards the suit property and therefore, payments received by Ms.Kanchan Tuli would very much be authorized payments by late Subhash Alagh to the plaintiff through Ms.Kanchan Tuli and her family members."*

18. Before adverting to the contentions raised, we need to refer to the relevant clauses of the Power of Attorney dated February 18, 1999 – Ex.PW/DW/X. The same are:-

> *"1. The attorney is authorised to institute and file any papers or any application in any court of law in India in respect of succession certificate or probate relating to my father late Sh. Gulzari Lal Alagh who expired on 25th of June, 1991.*
>
> *2. xxxx xxxx xxxx*

3. To receive any amount on my behalf from the Will of my late father Sh. Gulzari Lal Alagh and give the discharge receipt in lieu of.

xxxx xxxx xxxx

5. To receive any dividend from the shares or debentures or bounds of Indian Company established in India. ……

xxxx xxxx xxxx

7. To represent my case of property No.N-215, Greater Kailash-1, New Delhi in the office of Asstt. Commissioner of House tax Municipal Corporation of Delhi, New Delhi to sign any document to apply for mutation of above property to do any compromise in respect of any disputes of the house tax of the above property. .....

8. To file my return of income tax and sign any other papers on my behalf in the income tax Deptt. ……

9. To make an application in the office of Joint Chief Controllers of Imports & Exports, New Delhi in respect of import licence or licences of Dryfruits or of any other items. …….

xxxx xxxx xxxx"

19. The Power of Attorney above refers to a Will dated July 15, 1986 executed by late Gulzari Lal wherein he had bequeathed his movable assets to his legal heirs in the manner below:-

> *"….That after my death the ground floor of the building N-215, Greater Kailash – I, New Delhi -110048 including fixtures, furnitures and household goods will be equally shared between 2 sons Sh.Ashok Alagh and Subhash*

Alagh since 1st floor is already owned by Shri Ramesh Alagh and the upper storey by Shri Bhushan Alagh.

That from out of the finance I leave behind at the time of death; the funds to be spent on rites to be performed according to our Hindu religion and the balance to be shared by my legal heirs as under:- 30% to each of the daughters viz Smts.Kanchan and Shashi loss 10% to each of the sons viz S/Sh.Bhushan Alagh, Ramesh Alagh, Ashok Alagh and Subhash Alagh. Ornaments have been disposed off."

20. A conjoint reading of these two documents would reveal that the Power of Attorney was given by the appellant to Kanchan Tuli, primarily, to enable her to apply for a succession certificate or to receive dividends or the amount under the Will; to give a discharge receipt thereof and to apply for mutation of the suit property. Admittedly, Kanchan Tuli had executed an affidavit Ex.P8 and an Indemnity Bond Ex.P9 on behalf of the appellant for mutation of the suit property. Thus, a simple reading would reveal that it was for the purpose other than as alleged by the respondents and so clarified by the appellant in answer to a query on November 11, 2009 wherein he had deposed as under:-

*"**Question** Whether in your GPA dated 18-2-1999, you have authorized your sister Mrs.Kanchan Tuli to receive any amount on your behalf?*
***Answer** Yes, I have. Vol. I had given this authorization in respect of my shares and debentures, for tax returns, for export licence and for MCD purpose.*

It is incorrect to suggest that by my GPA dated 18-2-1999, I had authorized my sister Kanchan Tuli to receive any amount on my behalf on the basis of Will of my father."

21. The learned Senior counsel for the appellant then argued that the learned Single Judge had wrongly held that the respondents had proved the payments of the amount of ₹12,57,778/- to the appellant relying upon the entries in the counter foil of cheque books Ex.DW-1/3 to Ex.DW-3/K, such entries being in the hand writing of late Subhash Alagh. The appellant argued that the learned Single Judge erred in holding that since there was no business relations or any other commercial relations between Subhash Alagh and Kanchan Tuli, so the payments made to Kanchan Tuli or to her family members or their company would only and only be for and on behalf of the plaintiff and that such payments contained in chart Ex.DW-1/2 stood proved through the counter foil of the cheque books, by the statement of account of Standard Chartered Bank and by the passbook of the account of Subhash Alagh with United Bank of India. The learned counsel further argued that the learned Single Judge was wrong in holding that the additional payment of ₹2,57,778/- would obviously be on account of interest/extra payment for the delay in making the payments.

22. In support of his argument, the learned counsel for the appellant had referred to the affidavit Ex.PW-1/A of the appellant wherein he had deposed as under:-

> *"I did not receive any amount in terms of the agreement dated 18.02.1999 and against the value of my share of the suit property from my brother Shri Subhash Alagh, other than two following payments;*
>
> *a) Payment of Rs.1,50,000/- (Rupees One Lac Fifty Thousands only) through cheque No.301283 dated 18.04.2002 drawn on HSBC Bank;*

b) Payment of Rs.70,000/- in cash in pounds on 02.01.2000 through my sister Smt.Shashi Trikha."

23. Further on November 11, 2009 the appellant had reiterated his stand by deposing:-

> *"It is incorrect to suggest that I had received an amount of Rs.12,57,778/- from my late brother pursuant to family settlement dated 18-2-1999. I had only received two payments one of Rs.1,50,000/- by cheque from my brother and other of Rs.70 thousand by way of cash from my sister Shashi Trikha. I did not give any power of attorney to my sister Shashi Trikha to receive any amount on my behalf from my late brother. It is correct that I had not mentioned aforesaid payments in my plaint."*

24. Even Kanchan Tuli – PW-2 had denied having received any payment on behalf of her brother. She in her affidavit Ex.PW-2/A had rather deposed that eight payments totaling to ₹4,25,266/- as shown to have been made to her by Subhash Alagh are all wrong and false. Even in her cross examination recorded on November 16, 2009 she had denied having received such sums from Subhash Alagh.

25. Now, the respondents have sought to prove the payments made to the appellant with reference to the writings of the deceased in the counterfoil. Save and except two cheques dated September 12, 2005 and October 05, 2005 paid to Kanchan Tuli and Puja Tuli and a cheque dated April 18, 2002 making direct payment to Ashok Alagh, which payment Ashok Alagh admits, payments under the other cheques are by drawing the cheque on self. The writing on the counterfoil is : self Satish Tuli/Watchdog/Kanchan Tuli. We reproduce the data concerning payments in a tabular form. It reads:-

“***DETAILS OF AMOUNT PAID TO PLAINTIFF***

S. No.	***Date***	***Bank Name***	***Cheque No.***	***To***	***Amt***
1	*04/11/99*	*United Bank of India*	*895041*	*Kanchan Tuli*	*10,000/-*
2	*25/10/99*	*Anz Bank*	*643868*	*Kanchan Tuli*	*70,000/-*
3	*17/07/00*	*ANZ Bank*	*590505*	*Kanchan Tuli*	*12,000/-*
4	*03/08/00*	*ANZ Bank*	*590514*	*Kanchan Tuli*	*15,000/-*
5	*22/11/00*	*ANZ Bank*	*952330*	*Satish Tuli*	*20,000/-*
6	*19/12/00*	*ANZ Bank*	*952336*	*Kanchan Tuli*	*18,266/-*
7	*13/03/01*	*Standard Chartered*	*943378*	*Watch Dog*	*18,132/-*
8	*24/05/01*	*ANZ Bank*	*952343*	*Kanchan Tuli*	*20,000/-*
9	*18/01/02*	*Standard Chartered*	*934562*	*Satish Tuli*	*20,270/-*
10	*11/02/02*	*Standard Chartered*	*934574*	*Satish Tuli*	*20,000/-*
11	*11/02/02*	*Standard Chartered*	*934575*	*Satish Tuli*	*20,000/-*
12	*22/22/02*	*Standard Chartered*	*934551*	*Ashok Alagh*	*22,000/-*
13	*18/03/02*	*Standard Chartered*	*934559*	*Satish Tuli*	*21,000/-*
14	*15/05/02*	*Standard Chartered*	*934573*	*Satish Tuli*	*20,500/-*
15	*02/07/02*	*Standard Chartered*	*773326*	*Watch Dog*	*24,380/-*
16	*02/08/02*	*Standard Chartered*	*773339*	*Satish Tuli*	*24270/-*
17	*18/09/02*	*Standard Chartered*	*183927*	*Satish Tuli*	*22270/-*
18	*20/12/02*	*Standard Chartered*	*002726*	*Satish Tuli*	*19000/-*

19	*25/01/03*	*Standard Chartered*	*014480*	*Satish Tuli*	*22270/-*
20	*27/02/03*	*Standard Chartered*	*014495*	*Satish Tuli*	*22270/-*
21	*25/07/03*	*Standard Chartered*	*051302*	*Satish Tuli*	*24270/-*
22	*03/10/03*	*Standard Chartered*	*565070*	*Watch Dog*	*41,880/-*
23	*16/01/04*	*Standard Chartered*	*051317*	*Kanchan Tuli*	*30,000/-*
24	*02/01/00*	*Cash in Pounds*		*Through sister in UK*	*70,000/-*
25	*18/04/02*	*HSBC Bank*	*301823*	*To Ashok Alagh*	*1,50,000/-*
26	*12/09/05*	*Standard Chartered*	*307235*	*Kanchan Tuli*	*2,50,000/-*
27	*05/10/05*	*United Bank of India*	*5712*	*Puja Tuli*	*2,50,000/-*
			Total		***12,57,778/-***

26. The details of the amounts shown above pertain to the entries made by Subhash Alagh in the record slips/counter foil of the cheque books Ex.DW-1/3 to Ex.DW-1/3K. As per the entries, the cheques bearing Nos.895041, 643868, 590505, 590514, 952336, 952343, 051317, 307235 were all drawn on self and for Kanchan Tuli; whereas the cheques bearing Nos.952330, 934562, 934570, 934575, 773339, 183927, 002726, 014480, 014495, 051302 were all drawn on self and for Satish Tuli; and whereas cheques Nos.943378, 565070 and 773326 were for self and for Watchdog Company. All these cheques were self cheques and none of these cheques had any concern with the payments made to the appellant or on his behalf to Kanchan Tuli or her husband or her daughter or to M/s Watchdog Company. A bare perusal of the photocopies of 11 such cheques bearing Nos.952330, 952336, 952343, 660074, 660075, 773339,

183936, 014480, 014495, 051302, 565070, proved as Ex.DW-6/1 (Colly) as shown in table Ex.DW-1/2, reveal that such self serving cheques were withdrawn either by Subhash Alagh or by his wife Neelam Alagh. Moreover, PW3 Anupam Kumar, the Senior Accountant of M/s Watchdog had denied receipt of any payment by his company through the cheque Nos.943378, 773326 and 565070.

27. The odd figures of ₹18,266/-, ₹18,132/- and ₹20,270/- etc. also baffle the Court. If ad-hoc payments are made under an agreement to pay ₹10,00,000/- by a brother to the brother, payments in round figures would be accepted.

28. Here we would rather refer to a letter dated December, 2003 written by Subhash Alagh to the appellant, proved as Ex.PW-1/2 and to the deposition of Neelam Alagh, recorded on April 28, 2012. The true transcript of the letter is as under:-

> *"I am sending you some documents. Please note that the one with the affidavit is only for use it you are available in India. The other one is for use when you are allowed (plain Paper). The plain paper one is to be attested for your signatures by Indian Embassy or High Commission in U.K. This is important to get the loan. Another problem is original Sale Deed is required which is lying with Ramesh. Without Original Sale Deed, no loan is expected to be sanctioned. But still we are trying our last without original sale deed. Also do not forget the case is still in court for which it will be clear in 3 months time which way we are making. Also if I do not get loan this year, I have to try in March or April, with bigger Income Tax Return. The year ending is March every year. Things are not as easy you are thinking. Also I have the plan how I have the return the monthly installment. Everything is depending on luck. At present the income is zero from long time. It is even*

difficult to run the house. You seem to be important for something which is not easily available. Let us do our best."

29. The statement of Neelam Alagh/DW-1 recorded on April 28, 2012 is also as under:-

> *"My husband never told me about the existence of GPA or that he has paid any amount to Kanchan Tuli in terms of the said GPA. My husband did not tell me anything about the payments or as to in whose favour or name, such payments were made. (Vol. As my husband did not permit me to interfere into his family affairs.) My husband did not make any payment in my presence.*
>
> *My husband had never given me any details of the payments. I do not know whether my husband had ever informed the plaintiff in writing or otherwise discussed with the plaintiff as to whether the entire payment to the tune of 50% stands made. (Vol. they used to converse / argue in this respect)I have not placed any document evidencing the payment of 50% of the plaintiff.*
>
> Further, her reply to a question is as under:-
>
> ***Question*** *Whether Satish Tuli, Puja Tuli, or M/s Watchdog whose name find mentioned in Ex.DW1/2 were ever authorized by the plaintiff for receiving any money from your husband as against the share to the tune of 50%. If yes, kindly given the details?*
>
> ***Ans**. There was no such authority."*

30. A combined reading of the letter Ex.PW-1/2 as also the deposition of Neelam Alagh recorded on April 28, 2012 would reveal that neither she was aware if her husband had made payments to Kanchan Tuli in terms of the General Power of Attorney as none of such payments were ever made in her

presence nor her husband had ever given her detail of such payments. Rather the financial condition of Subhash was a mess as his income was zero for quite some time and it was difficult for him to even run his house. As per the respondents, an amount of ₹5,07,778/- had gone to the appellant by then and if it was true, the natural conduct of Subhash would have been to refer such payments in his letter Ex.PW-1/2 but rather he shared only his plight and talked of applying for loan. It appears that despite the time schedule being fixed in settlement dated February 18, 1999 neither the value of suit property could be ascertained nor paid in full, hence the amounts of ₹70,000/- and ₹1,50,000/- so paid till April, 2002 stood forfeited.

31. Thus, on scrutiny of the evidence, one fails to understand if the family settlement was recorded in writing then why the market value of the property was also not noted formally. Admittedly, the appellant was paid an amount of ₹1,50,000/- by cheque then what was the necessity to make subsequent payments to his attorney. Why not the balance payments were sent directly to the appellant? Now, if the case of the respondents is that Kanchan Tuli had the power to receive payments on behalf of her brother, then why the receipts of the amounts paid was not obtained from her and then why the payments were made to her family members and why the self cheques were issued in the name of her husband Satish Tuli, or in the name of her daughter - Puja Tuli, or in favour of their Company - M/s Watchdog. Rather, 11 cheques Ex.DW-6/A (Colly) as noted above, were encashed by Subhash Alagh and his wife themselves. Moreso, why such amounts were paid in odd figures. All these acts are against the normal behavior of a prudent man. The respondents have failed

to answer these questions in the trial despite the burden being upon them. Hence, issues No.2 & 3 are decided against the respondents. Consequently, the judgment and decree dated September 30, 2015 is set aside.

32. The appeal thus is allowed and a preliminary decree for partition of the ground floor of N-215, Greater Kailash-I, New Delhi is passed in favour of appellant and against respondents. The suit is restored for further proceedings qua appointment of the local commissioner for partition of the property by metes and bounds and also for holding an enquiry for the accounts to be rendered. A decree of permanent injunction is also passed as prayed for in the plaint.

33. Parties to bear their own costs in appeal.

34. Costs imposed vide impugned judgment in sum of ₹2,50,000/- which has been deposited by the appellant in this Court would be returned to the appellant together with such interest which has accrued thereon.

35. Parties to appear before the Roster Bench for directions on March 16, 2017.

(YOGESH KHANNA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

MARCH 01, 2017
M/VLD