

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

+ **RFA No.291/2018**

% **23rd March, 2018**

ANIL JAIN & ORS. Appellants

Through: Mr. Amit Trikha, Advocate
with appellant no.1 in person.

versus

MOHINDER KUMAR JAIN & ORS. Respondents

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.11585/2018 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

**RFA No.291/2018 and C.M. Nos.11584/2018(stay) & 11586/2016
(exemption in filing certified copies of entire record)**

2. This Regular First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) by the plaintiffs in the suit impugning the judgment of the Trial Court dated 31.1.2018 by which trial court has dismissed the suit for partition filed by the

appellants/plaintiffs with respect to the suit property bearing no.22, Arihant Nagar, Punjabi Bagh West, New Delhi situated on a plot of 223.61 sq. yards.

3. As per the suit plaint, Sh. Shiv Charan Lal Jain and Sh. Kartar Chand Jain were real brothers. Appellants/plaintiffs and respondent no.8/defendant no.8 are Class I legal heirs of late Sh. Shiv Charan Lal Jain. Respondent nos. 1 to 7/defendant nos.1 to 7 in the suit are the legal heirs/children of Sh. Kartar Chand Jain. Sh. Shiv Charan Lal Jain was pleaded to be the absolute owner of the suit property by virtue of a Perpetual Sub-Lease Deed dated 23.5.1983 executed in his favour by the superior lessor/Delhi Development Authority (DDA). It was pleaded that it was Sh. Shiv Charan Lal Jain who had paid the entire consideration to the DDA for purchase of the suit property and that the suit property was also constructed by late Sh. Shiv Charan Lal Jain. Sh. Shiv Charan Lal Jain expired on 15.12.2009 and Sh. Kartar Chand Jain expired on 2.4.2007. It is further pleaded in the plaint that during his lifetime, Sh. Shiv Charan Lal Jain executed a registered Will dated 5.7.2006 whereby the parties to the suit had become owners of those shares as stated in the Will dated

5.7.2006. The appellants/plaintiffs pleaded that in spite of repeated requests to partition the suit property as per the last Will dated 5.7.2006 of Sh. Shiv Charan Lal Jain, respondents/defendants refused to do so and hence the subject suit was filed.

4. Respondent nos. 1 to 3/defendant nos.1 to 3 were the main contesting defendants who filed their written statement. Respondent no.8/defendant no.8 who is one other legal heir of late Sh. Shiv Charan Lal Jain, filed his separate written statement. The other defendants were either proceeded *ex-parte* or their defence was struck off. The defence of the respondent nos. 1 to 3/defendant nos.1 to 3 was that late Sh. Shiv Charan Lal Jain was not exclusive owner of the suit property because the suit property was jointly constructed by both the brothers, namely Sh. Shiv Charan Lal Jain and Sh. Kartar Chand Jain and both the brothers were joint owners of the suit property. It was pleaded that the Will relied upon by the appellants/plaintiffs was of no effect because Sh. Shiv Charan Lal Jain had on 17.11.1986 executed a registered Gift Deed/Ex.DW3/1 giving half undivided share in the suit property to his brother Sh. Kartar Chand Jain. It was therefore pleaded by the respondent nos. 1 to 3/defendant nos.1 to 3

that the Will dated 5.7.2006 of late Sh. Shiv Charan Lal Jain relied upon by the appellants/plaintiffs was of no effect in view of the registered Gift Deed dated 17.11.1986 executed by Sh. Shiv Charan Lal Jain.

5. After pleadings were completed, trial court framed issues and parties led evidence, and these aspects are recorded in paras 14 to 17 of the impugned judgment and these paras read as under:-

“14. After completion of pleadings, vide order dated 12.12.2012, the following issues were framed:-

1. What is the share of the parties in the suit premises? (Onus on the parties)
 2. Whether the “Will” dated 5th July 2006 executed by late Sh. Shiv Charan Lal Jain is a legal and valid document? (OPP)
 3. Whether the suit is not maintainable in view of the registered gift deed dated 17th November 1986 executed by late Sh. Shiv Charan Lal Jain in favour of Sh. Kartar Chand Jain, the predecessor-in-interest of the defendant nos.1-3? (OPD 1-3).
 4. Whether the gift deed dated 17th November 1986, purportedly executed by late Sh. Shiv Charan Lal Jain in favour of the predecessor-in-interest of the defendant Nos.1-3 is a legal and valid document? (OPD 1-3).
 5. Relief.
15. Plaintiffs and defendants no.1 to 3 have examined 4 witnesses each in their respective evidence. Defendant no.8 has examined 2 witnesses in her evidence. Witnesses of both the parties were cross examined by each other’s counsels.

PLAINTIFF’S EVIDENCE:-

16. PW-1 is Sh. Sunil Kumar Jain and PW-2 is Sh. Aman Jain. Both these witnesses were the attesting witnesses on the “Will” Ex.PW-1/1. PW-3 is Sh. Anil Kumar Jain, plaintiff no.1 himself. PW-4 is Sh. Purshottam Pandey, witness from Sub-Registrar Office, who has proved the “Will” dated 05.07.2006. PW-1 to PW-3 have filed their affidavits in evidence. PW-3 has reiterated and reaffirmed the same facts in the affidavit as stated by him in the plaint. PW-1 and PW-2 both are attesting witnesses to the “Will” dated

05.07.2006. They both have stated in their affidavits in evidence that they are attesting witnesses to the "Will" and the "Will" was executed by late Sh. Shiv Charan Lal Jain in their presence. PW-4 has brought the original "Will" dated 05.07.2006, available in the record of Sub-Registrar, executed by late Sh. Shiv Charan Lal Jain and same has been proved by him as Ex.PW-1/1.

DEFENDANTS' EVIDENCE:-

17. Defendants no.1 to 3 have examined the following four witnesses in their evidence:-

DW-3 is defendant no.1 himself. He has been wrongly numbered as DW3 instead of DW1. He has filed his affidavit in evidence, in which, he has reiterated and reaffirmed the same facts as stated in the written statement.

DW-2 is Sh. Anoop Singh from Sub-Registrar Office, Kashmiri Gate, who had brought the original record of gift deed dated 17.11.1986 and has proved the said gift deed as Ex.DW-3/1.

DW-3 is Sh. Rajiv Mudgal, who has proved the original account opening form and statement of bank account jointly opened by late Sh. Shiv Charan Lal Jain.

DW-4 is Sh. U.S. Negi from DDA, who has proved the conveyance deed dated 21.10.1999 in respect of the suit property in the joint name of Sh. Shiv Charan Lal Jain and Sh. Kartar Chand Jain. This DW has placed on record letter/notice dated 04.11.1986 Ex.DW-4/A.

Defendant no.8 has examined two witnesses in her evidence.

D8W-1 is the defendant no.8 herself and D8W-2 is her daughter Neha Jain. Both these DWs have also filed their affidavit in evidence, in which, they have reiterated and reaffirmed the same facts as stated in the written statement of defendant no.8."

6. In my opinion, trial court has rightly held that in view of Gift Deed dated 17.11.1986 which is proved as Ex.DW3/1, late Sh. Shiv Charan Lal Jain remained only half undivided owner of the suit property because half undivided ownership rights in terms of the registered Gift Deed dated 17.11.1986 were given by Sh. Shiv Charan Lal Jain to his brother Sh. Kartar Chand Jain. Once the gift deed is proved and hence late Sh. Shiv Charan Lal Jain was only half

undivided owner of the suit property at the time of his death on 15.12.2009, his Will dated 5.7.2006 dividing the suit property in a particular manner was of no effect inasmuch as Sh. Shiv Charan Lal Jain could have made at best the Will only with respect to his half undivided ownership rights in the suit property. This issue of gift deed was issue no.4 before the trial court and trial court has rightly held this issue in favour of the respondent nos. 1 to 3/defendant nos.1 to 3 in terms of the following observations:-

“Issue No.4: Whether the gift deed dated 17th November 1986, purportedly executed by late Sh. Shiv Charan Lal Jain in faovur of predecessor-in-interest of the defendant Nos.1-3 is a legal and valid document? (OPD 1-3)

Both these issues are interconnected, therefore, taken up together for consideration. The onus of proof to prove both these issues was upon the defendants no.1 to 3. The plaintiffs are seeking partition on the basis of Will dated 5.7.2006 purported to be executed by Late Sh. Shiv Charan Lal Jain. The defendants have stated that Late Sh. Shiv Charan Lal Jain executed the gift deed dated 17.11.1986 in favour of Sh. Kartar Chand Jain, predecessor in interest of the defendants in respect of half undivided share of the suit property, therefore, Late Sh. Shiv Charan Lal Jain had no authority or right to execute the Will dated 5.7.2006 in respect of entire property. The plaintiffs in para no.8 of the plaint as well as in the para no.7 of affidavit in evidence of PW-3/plaintiff no.1 and also in his cross examination has admitted execution of Gift Deed dated 17.11.1986 by his late father late Shri Shiv Charan Lal Jain in favour of late Sh. Shiv Charan Lal Jain (sic:Kartar chand Jain). Moreover, plaintiffs are seeking partition on the basis of the “Will” dated 05.07.2006 Ex.PW1/1. The said “Will” also finds mention about the Gift Deed dated 17.11.1986. In Clause (1) of the said “Will”, it is specifically mentioned that half undivided unspecified share of the suit property has been gifted by late Shri Shiv Charan Lal Jain to Shri Kartar Chand Jain by way of registered Gift Deed dated 17.11.1986. It is a admitted case of the plaintiffs that half undivided unspecified share in the suit property was gifted by late Shri Shiv Charan Lal Jain to his younger brother late Shri Kartar Chand Jain. It is a settled

law that a fact or a document admitted by the opponent party is not required to be proved by way of formal evidence by a party relying upon the said document or the fact. Still, the defendants have proved the Gift Deed dated 17.11.86, by examining DW2 in their evidence. DW2 had brought the original Gift Deed from the Sub Registrar Officer, Kashmiri Gate and proved it as DW3/1. The defendants have also examined DW4 from DDA, Vikas Sadan Delhi, to prove the conveyance deed dated 22.10.1999, jointly in the name of late Shri Shiv Charan Lal Jain and Late Shri Kartar Chand Jain. DW4 had brought the original conveyance deed dated 22.10.1999 Ex. DW4/B jointly in the name of late Shri Shiv Charan Lal Jain and Late Shri Kartar Chand Jain. The conveyance deed dated 22.10.99 was executed in pursuance of gift deed dated 17.11.86. By the execution of conveyance deed dated 22.10.99, it is manifest that late Shri Shiv Charan Lal Jain had acted upon the gift deed and same was also accepted by Shri dKartar Chand Jain. In the cross-examination of defendant no. 1, suggestions were put to him by the plaintiff's counsel that suit property was purchased from the joint family funds. Building plan was also sanctioned in the joint names of Sh. Kartar Chand Jain and Sh. Shiv Lal Charan Jain. All these suggestions to defendant no. 1 in his cross-examination from the plaintiff's side show that plaintiff is also admitted that Sh. Kartar Chand Jain and Sh. Shiv Charan Jain acted upon the gift deed dated 17.11.1986 and they both were the joint owners of half undivided share each of the suit property. As per settled proposition of law, the donar remains with no rights over the subject matter of the gift once the gift is accepted by the donee. Late Shri Kartar Chand Jain accepted the gift during his lifetime, hence, the gift of half undivided share of suit property by late Shri Shiv Charan Jain was complete and he left with no rights on the half undivided share of the suit property. From the material on record, it is evident that the gift deed dated 17.11.86 executed by late Shri Shiv Charan Lal Jain in favour of late Shri Kartar Chand Jain is a valid and legal document. After the execution of said gift deed, Shri Shiv Chanran Lal Jain had no right or authority to execute the 'Will' in respect of entire suit property when he himself was the owner of only half undivided/unspecified share of the suit property on the date of execution of "Will" dated 05.07.2006. Shri Shiv Charan Lal Jain had no right to specify the shares of the parties in the suit property by way of any document/ "Will".

20. During arguments, counsel for plaintiffs challenged the execution of gift deed dated 17.11.86, by submitting that the gift deed in respect of the suit property could not be executed by late Shri Shiv Charan Lal Jain as the suit property was lease hold property and the lessee without permission of the appropriate authority had no right to execute any transfer document of the lease hold property. This argument of Id. Counsel has no merit, since, firstly the gift deed has not been challenged by the plaintiffs in the main suit rather plaintiffs themselves have put their

reliance on the gift deed executed by their late father Shri Shiv Charan Lal Jain. Otherwise also, the defendants have proved the permission sought by late Shri Shiv Charan Lal Jain from DDA in order to execute the gift deed in favour of Late Shri Kartar Chand Jain. The said permission is in the form of letter dated 4.11.86 sent by DDA to late Shri Shiv Charan Lal Jain. DW4, had proved the said sanction/permission by bringing original of the said letter as Ex.DW4/A.30.

21. Ld. Counsel for plaintiffs also argued that as per own case of the defendants late Shri Kartar Chand Jain paid the consideration to late Shri Shiv Charan Lal Jain for execution of the gift deed. This argument of plaintiffs counsel also does not hold any water since the defendants have nowhere stated that any consideration was paid by late Shri Kartar Chand Jain to late Shri Shiv Charan Lal Jain for execution of gift deed but defendants have stated that money was contributed by late Shri Kartar Chand Jain in construction of the suit property. Any amount contributed by late Shri Kartar Chand Jain in construction of the suit property by no stretch of imagination can be said as consideration for execution of gift deed.

In view of aforesaid discussion, issue no. 3 and 4 are decided in favor of defendants and against the plaintiffs.” (underlining added)

7.(i) Counsel for the appellants/plaintiffs argued that in the perpetual sub-lease executed by DDA in favour of Sh. Shiv Charan Lal Jain there was a specific Clause 6(a) that Sh. Shiv Charan Lal Jain would not transfer the property without taking prior permission of the superior lessor/DDA and the respondent nos. 1 to 3/defendant nos.1 to 3 had failed to prove any permission granted by the DDA to Sh. Shiv Charan Lal Jain to execute the Gift Deed dated 17.11.1986/Ex.DW3/1, and therefore, this registered Gift Deed Ex.DW3/1 could not have conferred title upon Sh. Kartar Chand Jain and on his death to the respondent nos. 1 to 3/defendant nos.1 to 3.

(ii) I cannot agree with this argument urged on behalf of the appellants/plaintiffs for three reasons. Firstly, the appellants/plaintiffs did not have *locus standi* to question the legality or otherwise of the gift deed inasmuch as it was DDA only who could have objected to the transfer of the half undivided interest in the suit property by the registered Gift Deed dated 17.11.1986, and DDA has in fact not objected to this transaction but on the contrary has executed the Conveyance Deed dated 22.10.1999 jointly in favour of late Sh. Shiv Charan Lal Jain and Sh. Kartar Chand Jain. Secondly in my opinion, the execution of the conveyance deed by DDA jointly in favour of Sh. Shiv Charan Lal Jain and Sh. Kartar Chand Jain shows a clear permission by DDA for Sh. Shiv Charan Lal Jain to transfer his half ownership rights in the suit property to Sh. Kartar Chand Jain. Thirdly, in my opinion any transfer of rights in the suit property by Sh. Shiv Charan Lal Jain to Sh. Kartar Chand Jain in terms of the Gift Deed dated 17.11.1986 was not a void transaction but only a voidable transaction i.e voidable at the instance of DDA who could have refused to accept and recognize the same and question the same, but as stated above, in fact DDA has acted upon the gift deed and thus

acquiesced to the transaction of the Gift Deed dated 17.11.1986 inasmuch as DDA has executed the Conveyance Deed dated 22.10.1999 in favour of Sh. Shiv Charan Lal Jain and Sh. Kartar Chand Jain.

8.(i) Learned counsel for the appellants/plaintiffs argued that the gift deed is not valid because it is not proved to have been attested by the attesting witness. In my opinion however this argument has no effect once the indubitable position has come on record that DDA has executed a Conveyance Deed dated 22.10.1999 jointly in favour of Sh. Shiv Charan Lal Jain and Sh. Kartar Chand Jain, and therefore, making Sh. Shiv Charan Lal Jain and Sh. Kartar Chand Jain half undivided co-owners each of the suit property.

(ii) Also I do not think that once Sh. Shiv Charan Lal Jain during his lifetime, not only being a party to the Conveyance Deed dated 22.10.1999 accepting half ownership of his brother Sh. Kartar Chand Jain, but also the fact that Sh. Shiv Charan Lal Jain in his lifetime never questioned the gift deed, therefore now his legal heirs being the appellants/plaintiffs cannot question the gift deed as per Articles 58 and 59 of the Limitation Act, 1963, whereby limitation of three years

is provided to question a document and the Gift Deed in this case is dated 17.11.1986 and Sh. Shiv Charan Lal Jain died much later on 15.12.2009 i.e after approximately 23 years and once Sh. Shiv Charan Lal Jain did not question the validity of the gift deed and sought its cancellation within the permissible period of limitation under Articles 58 and 59 of the Limitation Act the appellants/plaintiffs who are claiming through Sh. Shiv Charan Lal Jain accordingly are also barred by limitation to question the validity of the Gift Deed dated 17.11.1986. All Courts are empowered to *suo moto* take notice of provisions of the Limitation Act in view of Section 3 of the Limitation Act. Argument of the appellants/plaintiffs to challenge the gift deed therefore is without merit and is rejected.

9.(i) Learned counsel for the appellants/plaintiffs argued that the Conveyance Deed dated 22.10.1999 is not binding because this conveyance deed is not registered, however, a reading of the conveyance deed which is filed at pages 229 to 232 of this appeal paper book shows that the Conveyance Deed is duly registered before the Sub-Registrar at Serial no.4894 in Additional Book no. I Volume no.147 at pages 126 to 127. This Court can take judicial notice of the

stamps of the Sub-Registrar because of Section 58 of the Indian Evidence Act, 1872.

(ii) In any case, I fail to understand any validity of the argument urged on behalf of the appellants/plaintiffs to challenge the conveyance deed on the ground that it is not registered because only the parties to a document can challenge the same that the same is invalid allegedly on account of lack of registration, and that neither DDA nor the two brothers Sh. Shiv Charan Lal Jain and Sh. Kartar Chand Jain who are parties to this document have ever challenged this conveyance deed right from the date it was executed on 22.10.1999 and till the present proceedings were initiated in the year 2011. As already stated above, once Sh. Shiv Charan Lal Jain during his lifetime did not challenge the conveyance deed, the appellants/plaintiffs who are legal heirs of Sh. Shiv Charan Lal Jain and claim through Sh. Shiv Charan Lal Jain cannot challenge the conveyance deed.

10. There is no merit in the appeal. Dismissed.

MARCH 23, 2018
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VALMIKI J. MEHTA, J