

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

+ **CS(COMM) No. 1666/2016**

% **18th April, 2018**

M/s GUPTA INTERNATIONAL & ORS. Plaintiffs

Through: Mr. T.K. Ganju, Sr. Advocate
with Mr. Aquib Ali and Mr.
Manik Ahluwalia, Advocate

versus

ASHOK KUMAR SINGHAL & ANR. Defendants

Through: Mr. P.D. Gupta, Sr. Advocate
for D-2.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. This is a suit for possession, *mesne* profits, cancellation of documents etc filed by three plaintiffs. Plaintiff no.1 is a partnership firm M/s Gupta International. Plaintiff nos. 2 and 3, and who are husband and wife, are partners of the plaintiff no.1 partnership concern. Defendant no.1 is the erstwhile partner of plaintiff no.1/partnership firm, defendant no. 2 (also an erstwhile partner) is the transferee of the suit property being Shop No.4 (7ft.x

30ft.) and Shop No. 5 (9ft. x 30 ft.) with roof rights built on Plot nos. 31 and 32, out of Khasra No.4/2, Village Hastal, Delhi, in a colony known as Arya Samaj Road, Block No.-C, Uttam Nagar, New Delhi. By the suit, plaintiffs have prayed for declaration that plaintiffs are the joint owners of the suit property and that it should be declared that the documentation dated 3.7.2000 executed by defendant no.1 in favour of the defendant no.2 with respect to the suit property are null and void. A decree for possession is also prayed with respect to the suit property. Relief of grant of *mesne* profits/damages of Rs.1,65,000/- is prayed with further relief sought of *mesne* profits *pendente lite* and future till recovery of possession. Perpetual injunction is also prayed from restraining the defendants from further alienating etc of the suit property.

2. The case of the plaintiffs is that on 16.5.1998 a Partnership Deed was entered into between plaintiff no.2/ Smt. Bimla Gupta, defendant no.1/Sh. Ashok Kumar Singhal and defendant no.2/Smt. Bimla Aggarwal. This partnership was engaged in the business of export/import, trading/distribution in gold, bullion, jewellery or other items as may be mutually agreed upon. Defendant

no.1 was pleaded to be an active partner of the partnership firm for plaintiff no. 2 and defendant no. 2 being dormant partners. The suit property was purchased by the partnership firm on 22.1.1999 in terms of the Sale Deed dated 22.1.1999 for a total consideration of Rs.3,40,000/-. After the purchase of the suit property, it is pleaded that a new 3½ storied building was constructed on the plot. Defendant no.2 had expressed her desire to retire from the partnership firm, and hence she retired on 15.6.2000, as per the Retirement Deed entered into. In terms of the Retirement Deed, the defendant no.2 received a sum of Rs.73269.80/- in full and final settlement of all her claims in the assets of the partnership firm. This amount of Rs. 73269.80/- was paid to the defendant no.2 by means of a cheque. On account of retirement of defendant no.2 a new Partnership Deed dated 16.6.2000 was entered into between plaintiff no.2 and defendant no.1. During the continuance of this partnership, it is pleaded that defendant no.1 in a most dishonest manner and with conspiracy/collusion with defendant no.2 so as to deprive the rights of the plaintiff no.2 in the suit property unauthorisedly and acting against the terms of the partnership deed transferred to the defendant no. 2 rights in the suit property by means

of documentation dated 3.7.2000 for consideration of Rs.3,70,000/-.

The documentation dated 3.7.2000 executed by defendant no.1 in favour of defendant no.2 were registered Power of Attorney, Agreement to Sell and Purchase, possession letter, receipt, affidavit and a Will. It is pleaded that plaintiff no.2 had no knowledge of this alleged sale/transfer by the defendant no.1 in favour of defendant no.2.

Defendant nos. 1 and 2 are related to each other as brother-in-law and sister-in-law and who have caused the illegal transaction of transfer of the suit property and this transaction is void as against the plaintiffs. It was also pleaded that disputes had arisen between the parties in the year 2002 on account of defendant no.1 being removed from the directorship of a company M/s Gupta Jewellers Pvt. Ltd., and in which company the plaintiff nos. 2 and 3 were the other shareholders. The relationship between the parties therefore became strained and bitter.

As on 30.6.2002, the defendant no.1 retired from the partnership firm being the plaintiff no.1 and a new partnership deed was entered into between plaintiff no.2 and plaintiff no. 3 (who are husband and wife) to run the business of the plaintiff no.1. In the plaint, it is pleaded that plaintiffs were never aware of the illegal transaction of the transfer of

the suit property by the defendant no.1 in favour of defendant no.2 on 3.7.2000, and it is pleaded that the plaintiffs came to know of the illegal transactions only on or about 19.3.2002. Accordingly, the subject suit has been filed seeking the aforestated reliefs of declaration, possession, *mesne* profits and injunction.

3. Defendants contested the suit by filing their separate written statements. However, the substance of both the written statements is same. It is the case of the defendants that the transactions or transfer of rights in the suit property dated 3.7.2000 was valid and with the knowledge and consent of the plaintiff no.2. It is the case of the defendants that plaintiff no.2 was not a dormant partner because plaintiff no.2's husband had also been looking after the business of the partnership firm. It was pleaded that the suit property was not transferred in an unauthorized manner and against the terms of the partnership deed and the provisions of the Partnership Act. It was pleaded that the suit property was legally and validly transferred for a sum of Rs.3,70,000/-, and which was purchased only one year earlier in the year 1999 for a sum of Rs.3,40,000/-. It is the case of the defendants that the suit property was sold after a mutual discussion

and plaintiff no.3 was also consulted by the plaintiff no.2 before agreeing to the transferring of rights in the suit property in favour of defendant no.2. The amount of the sale consideration received from the defendant no.2 by the partnership firm was deposited in the bank account of the partnership firm. The *factum* of sale was duly reflected in the Balance Sheets of the firm which were filed before the Income Tax and Sales Tax Authorities. These Balance Sheets show the existence of property in the financial year ending 31.3.2000 as that of the firm and thereafter of being sold and not existing in the Balance Sheets for the next financial year ending 31.3.2001. All these Balance Sheets were signed by the plaintiff no.2. Accordingly, the suit was prayed to be dismissed.

4. The following issues were framed in this suit on 13.12.2005:-

- “1. Whether this court has pecuniary jurisdiction to entertain and try the present suit?
2. Whether the suit is bad for misjoinder of parties?
3. Whether the defendant no.1 sold and transferred the suit property to the defendant no.2 without authority, consent and knowledge of plaintiff no.1?
4. Whether after the purchase of the suit property, a new three and a half storeyed building was constructed by the erstwhile partnership firm? If so, its effect.
5. Whether the plaintiff no.2 was a dormant partner? If so, its effect.

6. Whether the plaintiff is entitled to decree of possession, mesne profits, declaration, permanent injunction and cancellation, as prayed for in the plaint?"

Issue Nos. 1 and 2

5. The issue nos. 1 and 2 are not pressed on behalf of the defendants and therefore are not called for decision.

Issue no. 3

6. The main issue to be decided is issue no.3 and the same is now taken up for decision.

7. On behalf of the plaintiffs, it is argued that there is no consent or permission of the plaintiff no.2 to the defendant no.1 for transferring of rights in the suit property in terms of the documentation dated 3.7.2000. It is argued that plaintiff no.2 never agreed to transfer the suit property to the defendant no.2 as is pleaded to be the case of the defendant no.1. It is argued that Section 19(2)(g) of the Partnership Act, 1932 is a complete answer to the illegal transaction done by the defendant no.1 in collusion with the defendant no.2 on 3.7.2000 because an implied authority of a partner in a partnership firm does not extend to transferring any immovable property of the firm. As regards the signing of the Balance Sheets in

the financial years ending 31.3.2000 and 31.3.2001, plaintiffs have argued that plaintiff no.2 used to sign documents in good faith prepared by the Chartered Accountant with respect to the accounts of the firm including Balance Sheets, and therefore the Balance Sheets of the financial years ending 31.3.2000 and 31.3.2001 should not be read against the plaintiff no.2. Incidental to this aspect it is argued that in the two balance sheets of the aforesaid two years, there was no reference of the suit property by any specific number and therefore plaintiff no.2 missed out this aspect and hence was in ignorance including on account of signing of the balance sheets in good faith.

8.(i) On behalf of the plaintiffs evidence is led of the plaintiff no.3 as PW-1 who has deposed as per his pleadings, and an employee of the firm Sh. Hussain Mondal as PW-2. PW-2 has deposed with respect to the balance sheets etc of the partnership firm being prepared by the Chartered Accountant and the plaintiff no.2 thereafter signing in the encircled portions i.e it is sought to be argued that PW-2 has deposed with respect to the plaintiff no.2 signing the balance sheets in good faith without reading the same.

(ii) On behalf of the plaintiffs reliance is also placed upon the contradictions in the evidence of DW-1 by arguing that on 12.8.2010 DW-1 deposed with respect to plaintiff no.2 and plaintiff no.3 being present in the office of the Sub-Registrar whereas in the cross-examination of D2W1 Sh. Subhash Aggarwal the husband of defendant no.2 it is stated that except Sh. Ashok Kumar Singhal/defendant no.1 and the plaintiff no.2 herein, no one else was present in the Sub-Registrar office. Accordingly, it is argued that defendants should be disbelieved on account of this contradiction and inconsistency.

9. It is also argued on behalf of the plaintiffs that defendant no.2 has not stepped into the witness box and therefore a presumption must be drawn in favour of the plaintiffs because defendant no.2 is the most affected person because documents dated 3.7.2000 in her favour would be cancelled. To draw a presumption against the defendant no.2 reliance on behalf of the plaintiffs is placed upon Para 16 of the judgment of the Supreme Court in the case of ***Vidhyadhar Vs. Manikrao & Anr. AIR 1999 SC 1441*** and in which para it is stated that where a party to a suit does not appear in the witness box to state

his case on oath and therefore does not offer himself to be cross-examined, presumption would arise that the case set up by such a person is not correct. On behalf of the plaintiffs reliance is placed upon the judgment of the Supreme Court in the case of ***Janki Vashdeo Bhojwani & Anr. Vs. Indusind Bank Ltd. & Ors. 2005 Vol. 107 (2) Bom. L.R. 28 (SC)*** to argue that a power of attorney holder who has no knowledge of facts of the case cannot depose and that the husband of defendant no.2 who has deposed as D2W1, his testimony is of no value in the eyes of law because he is not aware of the facts of the case. At this stage itself it bears note that this argument if accepted even goes against the plaintiffs because the plaintiff no.2 has not deposed but on her behalf her husband the plaintiff no.3 has deposed.

10. On behalf of the plaintiffs reliance is also placed upon the judgment of the Supreme Court in the case of ***Bina Murlidhar Hemdev Vs. Kanhaiyalal Kokram Hemdev AIR 1999 SC 2171***, Para 46 thereof, to argue that in this judgment Supreme Court has, in spite of a wide power given to a partner under a partnership deed to do everything with respect to the management of the affairs of the partnership firm, yet, it was held that such power would not include

power to transfer any immovable property, and any transfer of immovable property otherwise done by the partner would be illegal and hit by the provision of Section 19 (2)(g) of the Partnership Act.

11.(i) In my opinion, issue no.3 has to be held in favour of the defendants. The reasons are stated hereinafter. The issue is that whether or not plaintiff no.2 gave her consent for transfer of the suit property of the partnership firm on 3.7.2000 to the defendant no.2. If there is no consent or agreement of plaintiff no.2 with the defendant no.1, then the transaction of transfer of rights in the suit property by the documentation dated 3.7.2000 will have to be held to be illegal but in case the defendants have succeeded in proving consent and agreement of the plaintiff no.2, then the transfer of the suit property by the documentation dated 3.7.2000 in favour of defendant no.2 would become valid. Let us examine the issue as to whether defendants have proved the existence of consent and agreement of plaintiff no.2 to transfer rights in the suit property to the defendant no.2 in terms of the documentation dated 3.7.2000.

(ii) I may note that the legal position, and as conceded on behalf of both the parties, is that no written document or written signed

document is required to show existence of consent and that consent can always be inferred from the evidence which is otherwise led.

(iii) In my opinion, that the consent and agreement of the plaintiff no.2 existed is firstly seen from the documentation being the Balance Sheets of the partnership firm of the financial years ending 31.3.2000 and 31.3.2001, proved and exhibited as DW1/X1(colly). A reading of the Balance Sheet of the financial year ending 31.3.2000 of the partnership deed shows that under the head of Fixed Assets both a shop account and a car account is shown. The shop account is shown to be of an amount of Rs.3,67,500/-. Admittedly, the suit property was the only fixed asset of the partnership firm being an immovable property and therefore, shop account entry in the balance sheet of the financial year ending 31.3.2000 would naturally only refer to the suit property. As on the financial year ending 31.3.2000, therefore, the suit property is shown to be the property of the partnership firm, however when we read the Balance Sheet of the next financial year ending 31.3.2001, it is seen that the shop account under the heading of fixed assets is no longer shown as existing and in fact in the Profit and Loss Account for this financial year ending 31.3.2001, there is an

entry of profit and loss of the building for a sum of Rs.2,500/- that the shop was sold and profit on sale was Rs. 2500/-. Therefore, there is a clear difference between the two Balance Sheets of the financial years ending 31.3.2000 and 31.3.2001 because in the first Balance Sheet the shop is shown as a fixed asset of the partnership firm whereas in the Balance Sheet of the subsequent financial year ending 31.3.2001 along with the Profit and Loss Account of that year, shows that the shop account under the heading of fixed asset no longer existed i.e the firm did not have any immovable property with the fact that there is an entry of profit and loss of the building in the Profit and Loss Account for a sum of Rs.2500/- showing the shop was sold. At the cost of repetition, it is noted that admittedly the partnership firm had only one immovable property being the suit property and therefore once an entry of the suit property existed under the head of fixed assets and thereafter did not exist, and that both the Balance Sheets and Profit and Loss Account of the consecutive years are admittedly signed by the plaintiff no.2, therefore it has to be held that the suit property was transferred with the consent of and agreement with the plaintiff no.2 of the defendant no.1.

(iv) I reject the argument urged on behalf of the learned senior counsel for the plaintiffs that since there is no number mentioned of the suit property in the Balance Sheets and Profit and Loss Accounts because these documents do not contain exact postal address of an immovable property, because in the present case there was only one immovable property of the partnership firm, and therefore the entry of a shop account in the Balance Sheet of financial year ending 31.3.2000 can only refer to the suit property and the non-existence of such an entry of fixed asset of the shop account in the Balance Sheet of the financial year ending 31.3.2001 shows that the partnership firm had transferred the suit property. Therefore, once these Balance Sheets are proved to have been signed by the plaintiff no.2, besides the signatures also existing on these Balance Sheets of the defendant no.1 and the Chartered Accountant, such facts and documents are sufficient for this Court to hold that the transfer of the suit property by the defendant no.1 in favour of defendant no.2 *vide* documentation dated 3.7.2000 was with the consent of and as per an agreement with the plaintiff no.2.

12. On behalf of the plaintiffs it was argued that the plaintiff no.2 used to and had signed the Balance Sheets of the financial years ending 31.3.2000 and 31.3.2001 in good faith without reading the same, however learned senior counsel for the plaintiffs has failed to show me any averment in the pleading/replication filed by the plaintiffs that the plaintiff no.2 has signed the relevant Balance Sheets in good faith and without reading the same. In fact, there is even no such evidence led on behalf of the plaintiffs specifically deposing that the two balance sheets were signed in good faith without reading the same by the plaintiff no.2. Though learned senior counsel for the plaintiffs has sought to rely upon Para 12 of the affidavit by way of evidence filed by PW-1 Sh. Om Prakash Gupta/plaintiff no.3 and the husband of plaintiff no.2, however this Para 12 only contains a general deposition that the defendant no.1 was presumed to carry business in an honest manner in good faith but that the defendant no.1 turned out to be dishonest person and which averments can in no manner said to be denial of the specific averments made by the defendant no.1 in his written statement that the plaintiff no.2's consent is shown by signing of the aforesaid two relevant Balance Sheets and Profit and Loss

Accounts. It was necessary for the plaintiffs to at least make a clear cut deposition of plaintiff no.2 having signed the two Balance Sheets etc without reading and in good faith, but neither in the deposition of PW-1/plaintiff no.3 or Sh. Hussain Mondal/PW-2, an employee of the firm, it is at all deposed that plaintiff no.2 signed the two Balance Sheets in good faith without reading the same. In the deposition of PW-2 Sh. Hussain Mondal it is only stated that the balance sheets used to be prepared by the Chartered Accountant and the plaintiff no.2 used to sign the same at the encircled place, but there is no averment at all of the plaintiff no.2 signing the balance sheets in good faith without reading the same. In my opinion, therefore plaintiffs have in fact, neither pleaded nor even orally deposed that plaintiff no. 2 had signed the two Balance Sheets etc in good faith without reading the same and therefore the knowledge of the transaction of transfer of the property as shown in the balance sheet cannot be imputed to the plaintiff no.2.

13. Learned senior counsel for the plaintiffs argued that the Balance Sheets will not show consent as on 3.7.2000 and consent/agreement must be shown as on 3.7.2000, however this

argument in my opinion has no legs to stand upon because once there is no written document containing the consent/agreement of plaintiff no.2, then whether or not consent/agreement existed has to be inferred from the evidence led in the case and for this purpose court is entitled to see conduct of the parties and thus of the plaintiff no.2 signing two separate Balance Sheets etc showing firstly the existence and thereafter the transfer of the suit property, and therefore, the defendants are justified in arguing that there is clear cut knowledge/consent of or agreement with the plaintiff no.2 for transferring of the suit property by defendant no.1 in favour of defendant no.2 otherwise the Balance Sheets etc ending 31.3.2001 would not have been signed by the plaintiff no.2.

14.(i) The issue with respect to knowledge, consent and agreement of plaintiff no.2 to transfer the suit property by the defendant no.1 in favour of the defendant no.2 also becomes clear from a Memorandum of Settlement dated 18.6.2002/Ex. PW1/DC entered into between plaintiff no.2, plaintiff no.3 and defendant no.1. This Memorandum of Settlement is an admitted document and this Memorandum of Settlement shows an exhaustive agreement between

the parties to settle all their disputes which existed with respect to the company M/s Gupta Jewellers Pvt. Ltd. and the partnership firm of M/s Gupta International/plaintiff no.1. Para 6 of this Memorandum of Settlement showing the retirement of defendant no.1 from the partnership firm and receiving Rs.75,000/- for full and final settlement of his claims in the partnership firm and the Retirement Deed of a partnership firm to be signed thereafter reads as under:-

"6. That in settlement of his outstanding balance in Capital Account of partnership firm M/s Gupta International, I-44, IInd Floor, Arya Samaj Road, Uttam Nagar, New Delhi 110059 a sum of Rs. 5,27,050.92 has been paid in cash and a sum of Rs.75,000/- (Rupees Seventy Five Thousand only) has been paid vide Cheque No. 942511 dated 4.8.2002 drawn on Canara Bank, Uttam Nagar, New Delhi in full and final settlement of all his claims in upto date profits goodwill and other assets of the firm. A separate Retirement cum partnership deed is being executed by Mr. Ashok Kumar Singhal, Bimla Gupta and Sh. Om Prakash Gupta.”
(emphasis added)

(ii) The aforesaid Para 6 of the Memorandum of Settlement dated 18.6.2002 has to be read with the Deed of Retirement-cum-Partnership dated 30.6.2002 entered into about 12 days later between the defendant no.1, plaintiff no.2 and plaintiff no.3 and this Deed of Retirement-cum-Partnership clearly shows that the accounts of the partnership firm were taken and defendant no.1 received a sum of Rs.75,000/- for his share in the partnership firm i.e accounts being

taken means the books, Balance Sheet and Profit and Loss Account of the firm was looked into by the plaintiff no.2 and which documents showed that the shop fixed asset account of the firm which existed as on 31.3.2000 stood closed as on 31.3.2001 with in fact the Profit and Loss Account showing a profit of Rs. 2500/- on sale of the suit property. This Deed of Retirement-cum-Partnership is an admitted document and is exhibited as Ex.P-6/PW1/10. The relevant paras 4 and 5 of this Retirement-cum-Partnership Deed read as under:-

“4. The Retiring Partner confirms that as a result of accounts being taken a sum of Rs.75,000/- is due and payable to him in lieu of his share, title and interest in the said partnership business including its assets and goodwill he has no other claim against the Continuing Partners in respect of the said Firm.

5. The Continuing Partners have paid the said sum of Rs.75,000/- to the Retiring Partner vide Cheque No. 942511 dated 4th August, 2002 in full and final settlement of his share in said business including its assets & goodwill.” (emphasis added)

(iii) The subject transaction which is impugned by the plaintiffs is dated 3.7.2000 and this aforesaid Retirement-cum-Partnership Deed is dated 30.6.2002 i.e almost around two years later and in this document executed two years later, it is specifically stated that the accounts of the partnership firm have been taken whereby defendant no.1 will receive a sum of Rs.75,000/- in full and final settlement and therefore before arriving at a full and final settlement surely all the accounts of

the partnership firm including its Profit and Loss accounts Balance Sheets etc would have been examined and these Profit and Loss Accounts and Balance Sheets which have already been referred to above show that the suit property had already been transferred.

(iv) I may note that the Balance Sheet and Profit and Loss Account of the financial year ending 31.3.2001 is dated 10.6.2001 i.e plaintiff no.2 had signed the same on 10.6.2001, and therefore when accounts would have been taken later on at the time of execution of the Retirement-cum-Partnership Deed on/dated 30.6.2002 i.e after one year later then the plaintiff no.2 signing the Balance Sheet and Profit and Loss Account for the financial year ending 30.3.2001 on 10.6.2001 would have categorical knowledge of the transfer of property, otherwise there would have been no question of accounts having been taken before signing of the Retirement-cum-Partnership Deed dated 30.6.2002 Ex. P-6/PW1/10.

(v) It is also relevant to note that as per the plaint plaintiffs had claimed that they had come to know of the illegal transaction dated 3.7.2000 on 19.3.2002 (Para 11 of the plaint) and this Retirement-cum-Partnership Deed Ex.P-6/PW1/10 is executed about three

months later on 30.6.2002 and therefore if the plaintiff no.2 had come to know of the illegal transaction dated 3.7.2000 on 19.3.2002 then there was no reason why the plaintiff no.2 and the plaintiff no.3 would have signed the Retirement-cum-Partnership Deed dated 30.6.2002 that all accounts of the partnership firm were taken and consequently defendant no.1 will receive a sum of Rs.75,000/- from the partnership firm in full and final settlement of his claims.

15. Learned senior counsel for the plaintiffs has very vehemently argued that the defendant no.1 as DW-1 in his cross-examination on 12.8.2010 has admitted that plaintiff no.3/husband of plaintiff no.2 refused sign the documentation dated 3.7.2000 as he was a government servant and also that the plaintiff no.2 has also refused to sign the documentation dated 3.7.2000 as a witness, and it is argued that clearly if the defendant no.1 admits that the plaintiff nos. 2 and 3 had refused to sign the documents, hence there cannot be consent and agreement of plaintiff no.2 to the subject transaction dated 3.7.2000. However in my opinion I cannot read this statement made by defendant no.1 as DW-1 of plaintiff nos. 2 and 3 not signing the documentation dated 3.7.2000 as if this is conclusive on the issue that

plaintiff no.2 did not consent to and agree to transfer of the suit property in terms of the documentation dated 3.7.2000 because at best such deposition will show refusal of signing but that would only mean that there would exist a reason to not sign but that would not necessarily show lack of consent or agreement of the plaintiff no.2 to documentation dated 3.7.2000. Also if on 3.7.2000 itself allegedly the plaintiffs had objected to the transaction then how can the plaintiffs claim alleged knowledge of the transaction dated 3.7.2000 only on 19.3.2002 (Para 11 of the plaint) and that too after signing the Balance Sheet etc of the firm ending 31.3.2001 on 10.6.2001, the Memorandum of Settlement on 18.6.2002 and Retirement-cum-Partnership Deed on 30.6.2002.

16. Reliance placed by the learned senior counsel for the plaintiffs upon the judgment of the Supreme Court in the case of ***Bina Murlidhar (supra)*** is misconceived because the ratio of the judgment in ***Bina Murlidhar's*** case (*supra*) pertains to implied authority of a partner not existing for the carrying on a business of a partnership firm by transferring the property of a firm and the ratio does not in any

manner apply where when one of the partners by consent of the other partner(s) transfer the property of a firm.

17. Reliance is placed by the learned senior counsel for the plaintiffs upon the judgment of the Supreme Court in ***Janki Vashdeo Bhojwani (supra)*** that the evidence of D2W1 being the husband of the defendant no.2 cannot be looked at because he has had no personal knowledge of the facts of this case and therefore the plaintiffs have succeeded in proving their case, however this argument is without merit not only because the defendants have not led as evidence of only the husband of the defendant no.2 as a witness but the defendants have also led the evidence of the defendant no.1 and who is very much a party to the entire transaction of transfer of the suit property dated 3.7.2000 with respect to the issue of existence of knowledge, consent and agreement of plaintiff no.2 for the subject transaction dated 3.7.2000 but also that the issue of knowledge, consent and agreement of the plaintiff no.2 is being decided by this Court also on the basis of the documentary evidence being the two Balance Sheets etc of the financial years ending 31.3.2000 and 31.3.2001 which have been proved and exhibited as Ex.DW1/X1(colly), Retirement-cum-

Partnership Deed dated 30.6.2002/Ex.P-6/PW1/10 and Memorandum of Settlement dated 18.6.2002 as Ex.PW1/DC.

18. For all the aforesaid reasons and discussions given it is held that transfer of the suit property by defendant no.1 in favour of defendant no.2 was with the knowledge, consent and agreement with the plaintiff no.2.

19. Learned senior counsel for the plaintiffs had also placed reliance upon the judgment of the Supreme Court in the case of ***Suraj Lamp Industries Pvt. Ltd. Vs. State of Haryana (2012) 1 SCC 656*** to argue that since the documentation dated 3.7.2000 is neither stamped nor registered, therefore, defendant no.2 cannot seek any rights in the suit property on the basis of these documents, however this argument urged on behalf of the plaintiffs is without substance because the ratio of the judgment in the case of ***Suraj Lamps Industries Pvt. Ltd. (supra)*** specifically states that rights which are created by parties under the document being an agreement to sell in the nature of part performance would be valid if it satisfies the requirement of Section 53-A of the Transfer of Property Act, 1882 and also that a power of attorney given for consideration is irrevocable under Section 202 of

the Indian Contract Act, 1872 , and in the present case, it is seen that the documentation has been executed on 3.7.2000 before Section 53-A of the Transfer of Property Act was amended by Act 48 of 2001 w.e.f 24.9.2001, and thus the Agreement to Sell dated 3.7.2000 did not have to be registered and stamped, and which registration and stamping would have been required only if this Agreement to Sell in the nature part-performance would have been executed after 24.9.2001. For same reasoning the registered power of attorney dated 3.7.2000 will have the benefit of Section 202 of the Indian Contract Act being irrevocable as having been given for consideration. This aspect I have dealt with in detail in the judgment in the case of ***Shri Ramesh Chand Vs. Suresh Chand and Anr., 188 (2012) DLT 538***. The relevant paras of this judgment are paras 1 to 3 and these paras read as under:-

“1. This Regular First Appeal was dismissed by a detailed judgment on 28.2.2011. A Special Leave Petition was filed in the Supreme Court against the judgment dated 28.2.2011 and the Supreme Court has remanded the matter back for a fresh decision by its order dated 31.10.2011. The order of the Supreme Court dated 31.10.2011 is based on the issue of the Supreme Court passing the judgment in the case of ***Suraj Lamps & Industries Pvt. Ltd. Vs. State of Haryana and Anr. 183 (2011) DLT 1 (SC)***, and as per which judgment the Supreme Court overruled the Division Bench judgment of this Court in the case of ***Asha M. Jain Vs. Canara Bank 94 (2001) DLT 841***. Since the judgment of this Court dated 28.2.2011 had relied upon the Division Bench judgment in the case of ***Asha M. Jain (supra)***, and which judgment was over ruled the Supreme Court in the case of ***Suraj Lamps & Industries Pvt. Ltd. (supra)***, the matter was therefore

remanded back to this Court.

2. Before I proceed to dispose of the appeal, and which would turn substantially on the judgment in the case of *Suraj Lamps & Industries Pvt. Ltd. (supra)*, it is necessary to reproduce certain paras of this judgment of the Supreme Court, and which paras are paras 12, 13, 14 and 16, and which read as under:-

“12. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of Transfer of Property Act and will not confer any title nor transfer any interest in an immovable property (**except to the limited right granted under Section 53A of Transfer of Property Act**). According to Transfer of Property Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of Transfer of Property Act enacts that sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

Scope of Power of Attorney

13. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see Section 1A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time **unless it is made irrevocable in a manner known to law**. Even an irrevocable attorney does not have the effect of transferring title to the grantee. In *State of Rajasthan v. Basant Nehata* this Court held:

“A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favor of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.

Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the done to act on his behalf. **Except in cases where power of attorney is coupled with interest**, it is revocable. The done in exercise of his power under such power of attorney

only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee.”

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

Scope of Will

14. A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivo. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the life time of the testator. It is said that so long as the testator is alive, a will is not be worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. (see Sections 69 and 70 of Indian Succession Act, 1925). Registration of a will does not make it any more effective.

16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of 'GPA sales' or 'SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of Section 53A of the Transfer of Property Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales.”

(emphasis added)

3. A reference to the aforesaid paras shows that unless there is a proper registered sale deed, title of an immovable property does not pass. The Supreme Court has however reiterated that rights which are created pursuant to Section 53A of the Transfer of Property Act, 1882 dealing with the doctrine of *part performance* (para 12), an irrevocable right of a person holding a power of attorney given for consideration coupled with interest as per Section 202 of the Contract Act, 1872 (para 13) and devolution of interest pursuant to a Will (para 14). Therefore,

no doubt, a person strictly may not have complete ownership rights unless there is a duly registered sale deed, however, certain rights can exist in an immovable property pursuant to the provisions of Section 53A of the Transfer of Property Act, 1882, Section 202 of the Contract Act, 1872. There also takes place devolution of interest after the death of the testator in terms of a Will.”

20. Issue no.3 is accordingly decided in favour of the defendants and against the plaintiffs.

Issue No.4

21. As regards issue no.4 as to whether a new 3 ½ storeyed building was constructed on the suit plot by the partnership firm after the purchase of the suit property on 22.1.1999 when the suit property was purchased by a sale deed, it is seen that no documentary evidence whatsoever has been led by any of the parties and only evidence led is a self-serving few lines deposition of PW-2 in Para 5 of his affidavit by way of evidence that the old shops were demolished and thereafter a new 3 ½ storeyed building was constructed over the suit plot. Self-serving averments cannot help to prove this issue because if after all the property would have been reconstructed, and for which definitely a few lacs of rupees would have been spent, documentary evidence ought to have been led with respect to from where this money was

sourced and what is the documentary proof, how money was spent for purchase of materials, goods etc for reconstruction of the shops on the suit plot, and for all these reasons it is therefore held that it cannot be held by this Court that old shops on the suit plot were demolished and thereafter the property re-constructed by the partnership firm. This issue is therefore decided accordingly.

Issue no.5.

22. Issue no.5 pertains to whether plaintiff no.2 was or was not a dormant partner, and in this regard it is observed that irrespective of whether or not plaintiff no.2 was or was not dormant partner, the issue to be decided is actually whether or not the suit property was transferred in terms of the documentation dated 3.7.2000 with the knowledge, consent and agreement of plaintiff no.2, and which issue has already been decided above in favour of the defendants, and therefore, the dormancy or otherwise of the plaintiff no.2 in the partnership firm M/s Gupta International as on 3.7.2000 would not in any manner alter any conclusion with respect to the relevant issue no.3. Issue no.5 is decided accordingly.

Issue no.6 (Relief)

23. In view of the aforesaid discussion plaintiffs are not entitled to the reliefs claimed in the suit. Suit is accordingly dismissed, leaving the parties to bear their own costs.

APRIL 18, 2018
ib/Ne

VALMIKI J. MEHTA, J

