

**Ms. Uma Ghatе vs.mr. Umesh Phalpher**

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**Court :** Delhi

**Decided On :** Dec-01-2016

**Appellant :** Ms. Uma Ghatе

**Respondent :** Mr. Umesh Phalpher

**Judgement :**

IN THE HIGH COURT OF DELHI AT NEW DELHI \$~ \* % Decided on :

01. 12.2016 + CS (OS) 579/2016 MS. UMA GHATE ..... Plaintiff Through: Ms.Manmeet Arora, Mr.Tarang Gupta and Mr.Devashish Chauhan, Advocates versus MR. UMESH PHALPHER ..... Defendant Through: Mr.Hrishipal Barvah, Advocate CORAM: HON'BLE MS. JUSTICE DEEPA SHARMA JUDGMENT1 The present suit has been filed by the sister of the defendant seeking partition of the estate of their late mother Ms.Kamal Phalpher. In the plaint it is submitted that the plaintiff and defendant are Class I legal heirs of their late mother. Their father died on 23.04.1991 and the mother expired on 09.09.2016 leaving behind the properties (movable and immovable) as enumerated in para 5 of the plaint. It is submitted that the mother of the plaintiff used to reside on the ground floor of the property bearing number 185, Jor Bagh, New Delhi (hereinafter referred to as Jor Bagh Property) CS (OS) No.579/2016 Page 1. before her demise and the plaintiff grew up in this house and resided with her mother till her marriage on 04.03.1990. After that although she had been living in her matrimonial home in Mumbai yet she used to regularly visit Jor Bagh property with her husband and daughter and was extremely close to her mother. Her mother was running her own kitchen during the

period 1987-2015 and defendant was not providing any assistance to her. In December, 2015 she developed viral fever and doctors suspected typhoid. Plaintiff came to Delhi to take care of her mother. She however, went into coma by 12.01.2016 and had to undergo brain surgery on 13.01.2016 and could not recover from her illness and ultimately expired on 09.09.2016. She had executed a Will dated 07.09.2011 whereby she had bequeathed the Jor Bagh property equally between the plaintiff and the defendant and also divided her remaining estate equitably between the parties and she was informed of the said Will by her mother during her illness. The defendant, however, did not accept the said Will and disputed its execution vide legal notice dated 23.09.2016 and e-mail dated 26.09.2016. Subsequently, vide a legal notice and e-mail he had alleged that their mother had executed a Will dated 20.12.2015 which is disputed by the plaintiff on the ground that mother being extremely unwell in the third week of December, 2015 and not CS (OS) No.579/2016 Page 2. being in sound and disposing state of mind during that period and could not have executed the said Will. The plaintiff has filed the suit for partition claiming intestate succession for the reason that the defendant has denied the Will dated 07.09.2011.

2. On the date, this suit was listed for hearing before this court the defendant was present on caveat. He contended that the suit is not maintainable. His contention is two-fold:-

"(a) that the plaintiff has admitted the execution of the Will dated 07.09.2011 by the deceased and hence cannot file a suit for partition on the basis of intestate succession and the option of election can be exercised only under the circumstances provided under Sections 180 to 186 of Indian Succession Act. The reliance is placed on the findings of Mani Mani & Ors. V. Mani Joshua 1969 (1) SCC828(b) that the suit is liable to be rejected since the plaintiff has not paid the sufficient court fee. An ad valorem court fee is required to be paid since she is not in possession of the property for which partition has been sought and in para 31 and 33 she has pleaded a clear case of ouster by the defendant. Reliance is placed on the finding of this court in various cases Smt.Prakash Wati vs. Smt.Dayawati AIR1991 Delhi 48, Nisheet Bhalla & CS (OS) No.579/2016 Page 3. Ors. Vs. Malind Raj Bhalla and Ors. AIR2007 Del 60, Col. (Retd) Anil Kumar

Bansal & Anr. Vs. R.K.Bansal & Ors 2013 (133) DRJ257 and Suresh Kapoor vs. Shashi Krishnan Lal Khanna (2015) 216 DLT273 3. Defendant has also furnished with the leave of the court his written submissions. Plaintiff did not wish to file any reply to the written submission and rest its case on pleadings.

4. The learned counsel for the plaintiff has argued that since the defendant has disputed the Will dated 07.09.2011, the only option open to the plaintiff is to file her case as if their mother had died intestate. It is urged that the provision of Section 180 is not applicable to intestate succession and is not applicable on the facts of this case. The plaintiff has placed reliance on cases of Vikram Singh & Anr. Vs. Ajit Inder Singh 210 (2010) DELHI LAW TIMES 145(DB), Parma Nand Ahuja vs. Satya Deo Ahuja & Ors. AIR 1973 Delhi 1990. It is also argued that the findings in the case of Mani Mani (supra) are not applicable on the facts of this case and the proposition of law in the said case is given on different set of facts and situations and circumstances.

5. It is further argued that the plaintiff is not liable to pay ad valorem court fee because she is in constructive joint possession of the undivided CS (OS) No.579/2016 Page 4. share in the suit property and she has continued to be in constructive possession of her undivided share in the said property and at no stage she was ousted of the property. The reliance is placed on the findings in the cases Krishna Gupta & Anr. Vs. Rajinder Nath & Co. HUF & Ors 198 (2013) Delhi Law times 85, Jagannatha Amin vs. Seetharama & Ors. (2007) 1 SCC 694 6. I have given due consideration to the arguments of learned counsels for the parties.

7. The first objection of the defendant is that the suit is barred under Section 180 of the Indian Succession Act because the plaintiff cannot choose to file the suit as if the mother had died intestate while she has herself averred in the plaint that the mother had executed a Will dated 07.09.2011.

8. It is a settled proposition of law that while considering an objection relating to the maintainability of a suit, the court has to consider only and only the averments in the plaint and decide whether in view of the disclosed facts and contentions in the plaint, suit is maintainable. Admittedly, the plaintiff in her suit has alleged that their mother had executed a Will dated 07.09.2011. She has also contended that

she sent a scanned copy of the Will through e-mail dated 12.09.2016 which was not replied by the defendant. CS (OS) No.579/2016 Page 5. The defendant instead, issued a legal notice dated 23.09.2016 wherein he denied the execution of the Will dated 07.09.2011. He also sent an e-mail dated 26.09.2016 wherein he had disputed the execution of the Will. It was in these circumstances that the plaintiff, despite the existence of the Will has been forced to file the present case under section 8 of Indian Succession Act. It is argued by learned counsel for the defendant that in view of Section 180 of the Indian Succession Act she cannot exercise this option and cannot negate the Will dated 07.09.2011. Upon this, learned counsel for the plaintiff has submitted that this provision of law has no application on the facts of this case.

9. Section 180 of the Indian Succession Act is reproduced as under:

180. Circumstances in which election takes place.-Where a person, by his will professes to dispose of some thing which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and, in the latter case, he shall give up any benefit which may have been provided for him by the Will.

10. In support of his argument, learned counsel for the defendant has relied on the proposition of law propounded in Mani Manis case (supra). Facts in that case were that X bequeathed A, B, C properties to X, Y, Z in 1935. He made two further Wills in January, 1943 and April, 1943. He CS (OS) No.579/2016 Page 6. executed a third and last will in May, 1943 and made mention in it of the two settlements and the two previous Wills and declared that the last Will would be final and operative. In the last Will, the properties C and part of property A were left to Y and there was no mention in the Will of the properties B which had been settled on Y in the 1935 Will. In that case Y had contended that B properties settled on him in 1935 vested in him and the properties settled on him in the last will of 1943 were independent and separate from B properties which was not subject matter of the last Will. On the other hand, X and Z contended that Y having accepted the benefit under the last will by taking the properties bequeathed to him had exercised his right of election to take properties under the Will and was precluded from asserting any

right on B properties given to him under 1935 Will. While the trial court had dismissed Y's suit laying claim to B properties settled on him in 1935, the High Court decided in favour of Y. The Supreme Court, however, set aside the order of High Court and upheld the order of the Trial Court and held that on construing the last Will, even though the testator omitted to include in the last Will the properties which had been given by him to Y in 1935 Will, but the testator had intended to include B properties in the Will of May 1943, by which he made bequest to X and Z. Y was thus put to election and could not claim properties B if he wished to take the benefit under Will of May 1943. It was under these circumstances, when the Will has been acted upon that the Court said the principle of election applies. The facts of that case are entirely different and no parallel can be drawn. The principle which is set out in this case is that once a right of election is exercised in respect of a benefit accrued under a Will, then a person is precluded to claim benefit over any of the property the beneficiary was holding under any other previous arrangement and which the testator omitted to mention in the said Will. When a Will has been acted upon, it was only then that the rule of election under Section 180 of Indian Succession Act applies.

11. The plaintiff has relied on the case *Parmanand Ahuja (supra)*. The brief facts in that case were that the appellant Parmanand Ahuja instituted a suit against his two step brothers, a step sister and step mother for partition of his share in the business and properties etc. belonging to his deceased father. In that suit, the appellant had stated that his father had executed a Will 16.10.1956 but he had chosen to put his claim of 1/5th share in the property under the law of inheritance and did not claim the benefits under the Will. The Court framed the following issue: CS (OS) No.579/2016 Page 8. Para 11. xxxxxx xxxxxx xxxxxx 5. Whether the suit on bases of Hindu Law or Hindu Succession Act is not maintainable because of the allegation that the deceased left a will?.

12. The Single Judge however dismissed the suit on Issue no.5 holding that Section 8 of Hindu Succession Act would apply to a male Hindu who dies without leaving a valid Will and where there is a valid Will, the property cannot devolve under Section 8 of Hindu Succession Act. The Division Bench in that case set aside the findings of the court and held that, the appellant was entitled in law to

confine his claim on the basis of Hindu Succession Act. The proposition of law propounded in this case is that even if there is a will the plaintiff can choose to confine his relief under Section 8 of Hindu Succession Act.

13. The plaintiff has also relied on the Division Bench's judgment of this court in Vikram Singh's case (supra). In Vikram Singh's case (supra) one Sh.Gurcharan Singh died in June, 1968 leaving behind his wife Ms.K.Gurcharan Singh, son Col.Inderjeet Singh and daughter Anant Verinder Singh as legal heirs. Mother inherited 2/3rd share and two siblings 1/3rd each. On the demise of their mother on 09.01.2001, two siblings CS (OS) No.579/2016 Page 9. executed a Memorandum of Family Settlement on 09.04.2001 acknowledging each having half share in the property. The partition of the property was sought and late Col.Inderjeet Singh sought an interim injunction against his sister from alienating the suit property apprehending that she was trying to sell the same. In that case, the defense was taken that Kartar Gurcharan Kaur had executed a will dated 15.06.1990, however, the court found that the two siblings have expressly recorded in the deed of family settlement that Ms.Anant Verinder Singh gives up her claim under the Will. The plea taken on behalf of Ms.Anant Verinder Singh is that if owner of the property makes a bequest the legal heirs by consent cannot alter the bequest. The court held as under:

34. The later argument overlooks that there exists in law a doctrine of election. It means that if two or more rights are available to a party on the same subject, it would be open to a party to elect which one right it would like to avail of. Upon the death of a person if there is a bequest by way of a Will, the legal heirs can elect whether to proceed to inherit the estate of the deceased as per the Will or inherit the estate as legal heirs and successor-in-interest of the deceased. 14. The findings in the above two cases are on the facts which are more akin to the facts of this case. Thus the plaintiff is within its right to choose to come for partition under Hindu Succession Act instead of claiming her CS (OS) No.579/2016 Page 10. rights under the Will dated 07.09.2011. The suit therefore, is maintainable.

15. The second argument of the defendant is that the plaintiff is liable to pay the ad valorem court fee on the value of Rs.50,00,00,000/- at which she has valued

the suit on the ground that in para 31 and 33 she has pleaded ouster from the property by defendant. Learned counsel for the plaintiff argues that Para 31 and 33 of the plaint cannot be read in isolation and whole of the plaint is to be considered by court before reaching to any conclusion and urges that even in para 31 and 33 the plaintiff has not pleaded ouster/exclusion.

16. Section 7 of the Court Fees Act deals with the computation of fees payable in suits. The relevant portion of Section 7 is reproduced herebelow:

"7. Computation of fees payable in certain suits:-

"The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:-

"..... (iv) In suits- ..... to enforce a right to share in joint family property - (b) to enforce the right to share in any property on the ground that it is joint family property; ..... according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. CS (OS) No.579/2016 Page 11.

17. Section 8 of Suits Valuation Act, 1887 prescribes that in all the suits other than those referred to in Section 7 paragraphs (v), (vi), (ix) and (x) clause (d) of Court Fees Act, the court fee is payable ad valorem i.e. on the value, determined for the purpose of jurisdiction 18. The scheme for computation of court fee payable in the suits covered by several sub sections of Section 7 was considered by five judges in S. Rm. Ar. S. Sp. Sathappa Chettiar v. S. Rm. Ar. Rm. Ramanathan Chettiar, AIR 1958 SC245 The court observed as follows: to value "If the scheme laid down for the computation of fees payable in suits covered by the several sub-sections of section 7 is considered, it would be clear that in respect of suits falling under sub-section (iv), a departure has been made and liberty has been given to the plaintiff to value his claim for the purposes of court-fees. The theoretical basis of this provision appears to be that in cases in which the plaintiff is given the option to value his claim, it is really difficult the claim with any precision or definiteness. Take for instance the claim for partition where the plaintiff seeks to enforce his right to share in any property on the ground that it is joint family property. The basis of the claim is that the property in respect of which a share is claimed is joint

family property. In other words, it is property in which the plaintiff has an undivided share. What the plaintiff purports to do by making a claim for partition is to ask the court to give him certain specified properties separately and absolutely on his own account for his share in lieu of his undivided share in the whole property. Now it would be clear that the conversion of the plaintiff's alleged undivided share in the joint family property into his separate share cannot be easily valued in CS (OS) No.579/2016 Page 12. terms of rupees with any precision or definiteness. That is why legislature has left it to the option of the plaintiff to value his claim for the payment of court-fees. It really means that in suits falling under section 7(iv)(b) the amount stated by the plaintiff as the value of his claim for partition has ordinarily to be accepted by the court in computing the court-fees payable in respect of the said relief. In the circumstances of this case it is unnecessary to consider whether, under the provisions of this section, the plaintiff has been given an absolute right or option to place any valuation whatever on his relief."

19. This judgment was followed in Commercial Aviation and Travel Company vs. Vimla Pannalal AIR 1988 SC1636 In these cases the court took the view that since the conversion of the plaintiffs undivided share in the joint family property into his separate share cannot be easily valued in terms of rupees with precision and definiteness and since the court itself is unable to determine the correct value of the relief, it cannot direct the plaintiff to correct the valuation as Order 7 Rule 11 (b) contemplates correct valuation and not approximate correct valuation and as such correct valuation of the relief has to be done by the court and if the same cannot be done, order 7 Rule 11 (b) will not be applicable.

20. It is well settled proposition in law that in a suit for partition where a joint possession is pleaded by the plaintiff on the basis that he/she is a co- owner in law, then the court fee payable under Article 17 (vi) of Schedule CS (OS) No.579/2016 Page 13. II of the Court Fee Act on the presumption of joint possession of the plaintiff even if she/he is not in actual possession. This court in Nisheet Bhallas case (supra) after considering the findings in the case Neelavathi vs. N.Natarajan AIR 1980 SC691 Master Kunal v. Harsh Dev Shinghari, AIR2003 Delhi 441, Prakash Watis case (supra) and Supreme Court judgment in Kamleshwar Kishore Singh vs. Paras Nath Singh AIR 2002 SC233 culled out the



following principles:

9. Following principles can be culled out from the aforesaid judgment : (a) in order to decide the question of Court-fee, averments made in the plaint are to be seen and decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on merits; (b) the general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved; and (c) to continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. It is also not necessary that he should be getting a share or some income from the property so long as his right to a share and his nature of the property as joint is not disputed, the law presumes that he is in joint possession unless he is excluded from such possession.

10. Relying upon this judgment, this Court in Master Kunal (AIR2003 Delhi

441) (supra) held that proper Court-fee had been paid. That was also a suit for partition and rendition of accounts and plaintiff has pleaded joint ownership and joint possession.

11. On the other hand in Smt. Prakash Wati's case (AIR1991 Delhi

48) (supra), this Court considered the effect of CS (OS) No.579/2016 Page 14. the aforesaid Supreme Court judgment and came to the conclusion that since in the said case from the consideration of the pleadings in the plaint it was clear that plaintiff was never in physical possession of any portion of the property, ad valorem Court-fee was to be paid. It would be apposite to reproduce para 4 of the said judgment, which makes the following reading: Counsel for the plaintiff has made reference to Jagdish Pershad v. Jyoti Preshad 1975 Rajdhani LR203 wherein it has been laid down that keeping in view the peculiar facts of the case that where the plaintiff claims to be in joint possession of the property of which partition is sought, the plaintiffs is to pay fixed Court-fee as per Article 17(vi) in Schedule II. There is no dispute about this proposition of law. Counsel for the plaintiff has then placed reliance on , Air 1980 SC691, wherein the Supreme Court has laid down that it is settled law that the question of Court- fee must be

considered in the light of the allegation made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on merits. It was held that the general principle of law is that in the case of co-owners the possession of one is in law the possession of all unless ouster or exclusion is proved. I think these observations of the Supreme Court go against the case of the plaintiff because in the present case reading of the whole of the plaint makes it clear that the plaintiff is alleging ouster from possession and thus, the plaintiff has to pay ad valorem Court-fee on the value of her share. 21. While considering the liability of the plaintiff to pay court fee, the courts are to consider only the averments made in the plaint. Its truthfulness or falsity is not the question which required to be gone CS (OS) No.579/2016 Page 15. into at all. All the contentions of plaint have to be taken as gospel truth. This court in Jagdish Pershad v. Jyoti Preshad 1975 Rajdhani LR203 had observed as under: As already noted above for determining the court-fees payable on the plaint only the allegations of the plaint are to be taken into consideration. The court is not required to examine the truthfulness of the said allegation. . xxxxx xxxxx xxxxx There is a catena of authorities in support to the proposition that in a suit for partition of joint family property by metes and bounds when the plaintiff alleges to be in possession, either actual or constructive, of a portion of that property, the Court-fee payable is as prescribed by Article 17 (vi) of Schedule II of the Act as in such a suit what is sought is a change in the mode of enjoyment of the property and not to enforce a right to title of his share in the property. In such a case the relief is merely for change of joint enjoyment of the property into separate enjoyment and as such the suit is incapable of valuation. 22. In the case of Saroj Salkan vs. Cap Sanjeev Singh & Ors. 155 (2008) DLT300 a Division Bench of this Court had held that :-

"13. It is settled law that in a suit for partition, the court fees to be paid if joint possession is pleaded by the plaintiff on the basis that he is the co-owner of the property sought to be partitioned, fixed court fees would be payable under Article 17(vi) of Schedule II of the Court Fees Act presuming the joint possession of the plaintiff even if the plaintiff is not in actual possession. It is because of the reason that in the case of co-owners, the possession of one is in law possession of all, unless from the averments in the plaint read as a whole, a clear case of ouster is

made and in that situation the plaintiff is liable to pay ad- valorem court CS (OS) No.579/2016 Page 16. fees on the market value of this share as provided under Section Act notwithstanding the fact that it is also pleaded that the plaintiff was in constructive possession. the Court 7(iv)(b) of Fees

(Emphasis added)

23. The settled law is that in a joined property possession of one is possession of all in law even if the person is not in actual possession unless the exclusion or ouster is pleaded. So the question is, does the averments in the plaint when read as a whole shows that the plaintiff has pleaded ouster/exclusion from the joint possession of the property. The defendant has submitted that para 31 and 33 of the plaint clearly show that the plaintiff has claimed complete exclusion from the suit properties. Para 31 and 33 are reproduced as under:

31. That concerned from this appalling behaviour of the Defendant, the Plaintiff met the Defendant and asked for her rightful share in the aforesaid properties and partition of the suit properties by metes and bounds. To the utter shock of the Plaintiff, the Defendant refused to acknowledge her request, insulted her and told her to never visit the Suit Properties ever again. The Plaintiff is not in possession of any documents of the Suit Properties except for Jor Bagh property as mentioned hereinabove. The Defendant represented to the Plaintiff that he intends to sell some of the Suit Properties and not give the share of the Plaintiff from the sale proceeds.

33. That the Plaintiff has come to know that the Defendant is seeking to exclude the Plaintiff from her rightful CS (OS) No.579/2016 Page 17. interest in third party inheritance and is making efforts to exclusively sell and/or create the Suit Properties. Incalculable injury will be occasioned to the Plaintiff and the litigation will get protracted if the Defendant, by holding himself to be the owner of the Suit Property, illegally disposes off the Suit Property(s) to a third party; or in any manner does or initiates any act or makes any representation or issues letter with respect to the Suit Property(s) by holding himself to be the owner of the Suit Property(s) to any third parties, including the statutory authorities, tenants etc. Accordingly the Plaintiff is entitled to a decree of permanent injunction thereby

restraining the Defendant, his agents and representatives from selling, assigning, alienating, creating third party interest or in any other way transferring or parting with possession of share of Plaintiff in the Suit Properties to any third person. The Plaintiff is also entitled to a decree of permanent injunction thereby restraining the Defendant, his agents and representatives from holding himself out as a sole owner of the estate of Late Ms. Kamal Phalpher or doing any act, deed, matter or thing as an owner of the estate of Late Ms. Kamal Phalpher and from making representation(s), issuing any letter(s) in relation to the estate of Late Ms. Kamal Phalpher, to any third person to any third parties, including the statutory authorities, tenants etc. The Plaintiff further apprehends that the Defendant might fudge the true accounts of rental income being received by the Defendant from the Vadodara Property to the detriment of the Plaintiff and deny her rightful share in the said rental income. Accordingly, the Plaintiff is also entitled to a decree of mandatory injunction in favour of the Plaintiff and against the Defendant directing the Defendant to pay to the Plaintiff her share of monthly rental income received by the Defendant from the Vadodara Property and produce the true accounts of the rental income being received by the Defendant by leasing the entire Vadodara Property. The Plaintiff also apprehends that the Defendant may create third party interests in the Vadodara Property thereby CS (OS) No.579/2016 Page 18.

24. defeating the rights of the Plaintiff in the Vadodara Property. Incalculable injury will be occasioned to the Plaintiff and the litigation will get protracted if the Defendant, by holding himself to be the owner of the Vadodara Property, illegally disposes off the Vadodara Property to a third party. Accordingly, the Plaintiff is entitled to a decree of permanent injunction thereby restraining the Defendant, his agents and representatives from selling, assigning, alienating, creating third party interest or in any other way transferring, mortgaging or parting with possession of share of Plaintiff in the Vadodara Property to any third person. It is also a settled proposition of law that the ouster or exclusion cannot be inferred by picking up certain sentences or expressions from the plaint. The plaint should contain clear and specific averment to the effect that the plaintiff had been excluded from joint possession to which they are entitled in law. The impression and meaning that emerges on reading the whole of the plaint is relevant.

25. These paragraphs therefore cannot be read in isolation. The plaintiff has shown the details of the property owned by her mother in para 5 of the plaint. She has also pleaded in the plaint that she had been visiting her mother who was staying in the property No.185, Jor Bagh, New Delhi where they had shifted when she was 12 years old and continues to stay there till she got married on 04.03.1990. She started living in her matrimonial home but she was regularly visiting the Jor Bagh property with her husband and CS (OS) No.579/2016 Page 19. daughter and belongings of her and her husband and daughter such as clothes, documents, books, music collection are still lying in the said house.

26. The relevant paragraphs of the averments made by the plaintiff in the plaint are as under:

8. That Late Ms. Kamal Phalpher had undivided share in the Ground Floor of property bearing No.M-10, Greater Kailash-2, New Delhi. Late Ms. Kamal Phalpher had also inherited a share in the First Floor of property bearing No.M-10, Greater Kailash-2, New Delhi. Late Ms. Kamal Phalpher also has share in the basement of property bearing No.M-10, Greater Kailash-2, New Delhi. The said properties were co-owned by Late Ms. Kamal Phalpher with the Plaintiff and Defendant. The undivided share of Late Ms. Kamal Phalpher in the said property is the subject matter of the present suit. The aforesaid properties are collectively referred to as the "GK Properties" hereinafter.

9. That Late Ms. Kamal Phalpher also had a share comprising of 317 sq. feet situated in premises bearing No.205, Ashoka Estate, Barakhamba Road, New Delhi. The said share of Late Ms. Kamal Phalpher is the subject matter of the present suit. The aforesaid properties is referred to as the "Barakhamba Property" hereinafter.

10. That Late Mr. Janak Raj had also left behind an agricultural land near Mehrauli, New Delhi in favour of his wife. Late Ms. Kamal Phalpher. Late Ms. Kamal Phalpher had during her lifetime sold the said property for a valuable consideration. Further, the sale proceeds were utilized by Late Ms. Kamal Phalpher to buy office premises admeasuring 2100 sq. ft. in premises bearing No.III, 112, 113 and 114 as well as 50% of Office Premises bearing No.119, 120 &

121 on the First Floor of Marble Arch in Vadodara, Gujarat. The office premises were bought jointly CS (OS) No.579/2016 Page 20. in the name of the Plaintiff, Defendant and Defendant's wife Ms. Rita Phaipher. The Plaintiff, Defendant and Defendant's wife Ms. Rita Phaipher enjoyed the usage of the said property and the rental income generated from these office premises. It is pertinent to mention that the Defendant used to collect the rent of the said property and remit to the Plaintiff her share separately. Since November 2005, the Plaintiff has not received any amount towards the said rent on the pretext that the same is utilized for maintaining the ground floor of the Jor Bagh Property as it was well known to the parties that after the demise of late Ms. Kamal Phaipher the ground floor would be inherited by the Plaintiff as per the wishes of the parents of the parties. After Late Kamal Phaipher's demise, the rent for the tenancy month commencing from September 2016 should be duly paid to the Plaintiff. The Plaintiff's share in the said rent has been the Defendant. Therefore, through the present suit. Plaintiff also seeks rendition of accounts by the Defendant regarding the amounts received by him from the said property. After rendition of true accounts. Plaintiff is entitled to 1/3<sup>rd</sup> share in the rental income received by leasing the entire property in Vadodara since September, 2016 till date and pendent lite rental income till realization, with pendent lite interest of 18% from September 2016 onwards. The aforesaid property is referred to as "Vadodara Property" hereinafter. illegally withheld by 27. She has also clearly stated that the original title documents of Jor Bagh property were handed over to her by her mother while the documents of the other properties were in possession of the defendant. She seeks indulgence of the court in directing the defendant to produce the same. She has also clearly averred that when her mother had fallen ill in December, CS (OS) No.579/2016 Page 21. 2015 she came to stay with her in Delhi and stayed in Jor Bagh property and employed nurses at their house in Jor Bagh property.

28. In para 31 and 33 on which the plaintiff has relied, she has sought her rightful share and sought partition of the property by metes and bounds and she mentioned of the insult inflicted upon her by the defendant and the threat given to her. She also apprehended that the defendant was in the process of selling out all the properties without giving her share to her. She claims that defendant is seeking to exclude the plaintiff from her rightful inheritance and making effort to

create third party interest which was likely to cause incalculable injury to her. The defendant has failed to point out that the averments made in para 31 and 33 leads to the conclusion that the plaintiff has pleaded exclusion from the suit property. Rather reading of these paragraphs show that she apprehended that if partition by metes and bounds not done and her portion of the property is not handed over to her of which she is the joint owner, the defendant might dispose of the properties and create third party interest in the properties. This apprehension cannot be considered as the pleadings of complete exclusion from the suit property. She has expressed her apprehension that if her rights are not protected in the jointly owned properties, the defendant might exclude her from her rightful CS (OS) No.579/2016 Page 22. ownership to half share in jointly owned properties. The defendant has relied on the findings in Nisheet Bhallas case (supra), Suresh Kapoors case (supra) and Col. (Retd) Anil Kumar Bansals case (supra). The findings in all these cases have been given on peculiar facts of those cases where on the averments in the plaint the court reached to the conclusion that the plaintiff had pleaded exclusion from the property to be partitioned and directed the plaintiff to pay the ad valorem court fee.

29. In Nisheet Bhallas case (supra), the court had averred that from the averments in the plaint the fact that emerges were that the plaintiff was not in possession of any portion of the suit property and the entire property was in possession of defendant and relied on the averments in para 3 and 5 of the application under Order XXXIX Rule 1 and 2, which are reproduced as under: 3. That the said property is in the use and occupation of the defendants and they are enjoying the income being received from the said property.

5. The Defendants are, now, taking advantage of their use and occupation of the said property, in a wrong and illegal manner, attempting to dispose of or otherwise create third party interest and/or otherwise part with possession of the property or any part thereof to some third parties. However, in this case defendant has failed to point out any averment which shows that plaintiff has pleaded exclusion or ouster. CS (OS) No.579/2016 Page 23.

30. In Suresh Kapoors case (supra) the court held that the plaintiff had admitted in the plaint that neither he nor his mother were in physical possession of the suit property while other legal heirs of Mrs. Gullo Devi Malhotra except Bimla Devi and her two sons were never in possession and never realized any rent from the property. It was also stated that Bimla Devi never rendered any account either to the plaintiff or Gullo Devi Malhotra rather the bank account of Gullo Devi Malhotra in which the rent was to be deposited was closed by late Bimla Devi and court held that for decades after the death of late Beli Ram Malhotra in 1973 it were Bimla Devi and her children who were in possession of the property or who were letting out of the property and were keeping rental income to themselves and stated that earlier ouster and exclusion from the possession can safely and certainly be inferred from the plaint and therefore the plaintiff was held liable to pay ad valorem court fee. In Col. (Retd) Anil Kumar Bansals case (supra), the court reached to the conclusion that bare perusal of the averments revealed that the plaintiff was neither in actual and physical possession nor there was any symbolic possession of the suit property and therefore they were held liable to pay ad valorem court fee. CS (OS) No.579/2016 Page 24.

31. The plaintiff has enumerated the properties In para 5 of the plaint in which she is co-owner, which is reproduced as under:

5. That Late Ms. Kamal Phalpher died on 09.09.2016 leaving behind an estate (as known to the Plaintiff) comprising of movable and immovable properties enlisted herein below: a) Immovable property admeasuring 374.89 sq. yards situated at property bearing No.185, Jor Bagh, New Delhi, (residential house) b) Undivided share in Immovable commercial property situated at M-10, First Floor, Greater Kailash-2, New Delhi. c) Undivided share in Immovable commercial property situated at M-10, Ground Floor, Greater Kailash-2, New Delhi. d) Undivided share in Immovable commercial property situated at M-10, Basement, Greater Kailash-2, New Delhi. e) Immovable property situated at premises bearing No.205, Ashoka Estate, Barakhamba Road, New Delhi, comprising of share equal to 317 sq. feet. f) The personal effects including sarees, shawls and jewellery of Late Ms. Kamal Phalpher. g) The items, paintings, etc. at the Ground Floor of the residential property, 185 Jor Bagh, New Delhi. fixtures, household furniture, CS (OS)



No.579/2016 Page 25. h) Bank Account(s) and locker(s) held singly and jointly in the name of Late Ms. Kamal Phalpher. i) All other movable and immovable properties held by Late Ms.Kamal Phalpher.

32. In the present case the plaintiff has clearly stated that she was visiting and occupying along with her mother the property of 185, Jor Bagh where she was residing with her mother since childhood till her marriage and thereafter had been visiting her mother with her daughter and husband and that personal belongings of her husband as well as her daughter were still lying in the suit property. It is also important to note that their mother till she was alive, was the sole owner of the property. It was only on her demise on 09.09.2016 that properties devolved on parties and they became joint owner of the properties. Immediately on demise of their mother the plaintiff had implored the defendant to honor the Will dated 07.09.2011, but defendant disputed the Will vide legal notice dated 23.09.2016 and e-mail dated 26.09.2016. The plaintiff has approached the court immediately. The plaintiff has categorically averred that she even after her marriage continued visiting Jor Bag property with her family where her mother lived till her demise and her and her familys personal belongings are still lying. There is certainly no averment in the plaint to suggest ouster or exclusion. CS (OS) No.579/2016 Page 26.

33. The plaintiff continues to be joint owner of the properties and hence in constructive possession of the same and therefore she is not required to pay ad valorem court fee. The arguments of defendant fail on both counts. The suit is maintainable.

34. The matter be put up for completion of pleadings and admission/denial of the documents on 12.01.2017 before the Joint Registrar. Parties are directed to appear before him.

35. List before the Court on 11.04.2017. I.A.14239/2016 (for exemption) Exemption is allowed subject to just exceptions. Application stands disposed of. DEEPA SHARMA (JUDGE) DECEMBER01 2016 rb CS (OS) No.579/2016 Page 27.