

UNREPORTED

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

+ CS(OS) 1044/1997 and IA No.4515/1997

DATE OF RESERVE: April 24, 2008

DATE OF DECISION: July 21, 2008

MAYA DEVI & ANR. Plaintiffs

Through: Ms. Nandini Sahni, Advocate

versus

VASDEV GUPTA & ORS. Defendants

Through: None.

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

: **REVA KHETRAPAL, J.**

1. By the present suit, the plaintiffs seek a decree for declaration in their favour and against the defendants declaring that the defendants have no right, title or interest of any nature whatsoever in property No.C-37, Rajouri Garden, New Delhi and a decree for permanent injunction restraining the defendants from, in any manner, transferring, alienating or parting with the possession of the suit property.

2. Shorn of all detail, the relevant facts are as follows. The plaintiff No.1 (since deceased) was the wife while the plaintiff No.2 is the daughter of late Sardar Bakshish Singh. Late Sardar Bakshish Singh was the lawful, exclusive and absolute owner of the suit property, i.e., property No. C-37, Rajouri Garden, New Delhi. He died on 29th December, 1986. His wife Smt. Maya Devi (plaintiff No.1) also died on 25th September, 1998. Late Sardar Bakshish Singh, during his life time, executed a registered will dated 27th March, 1985 in favour of the plaintiff No.2, who is his youngest daughter.

3. The defendant No.1 was the tenant in the property bearing No. C-37, Rajouri Garden, New Delhi. By order dated 12.11.1987, the name of the defendant No.1 was deleted from the array of parties since possession of the suit property was, after a long drawn out legal battle, delivered by the defendant No.1 to the plaintiff Maya Devi. The defendant No.2 Smt. Krishna Kalia is the daughter of the plaintiff No.1 and the sister of the plaintiff No.2. The defendant No.3 Shri Ashish Virmani is the grand-son of the plaintiff No.1 and the nephew of the plaintiff No.2, being the son of Smt. Surinder Virmani. The defendant No.4 Smt. Surinder Virmani is the daughter of the plaintiff No.1 and the sister of the plaintiff No.2. The defendant No.5 (since deceased) was the son-in-law of the plaintiff No.1 and the brother-in-law of the plaintiff No.2 and the defendant No.6 (also deceased) was the grand-son of the plaintiff No.1 and the nephew of the plaintiff No.2, being the son of the defendants No.2 and 5.

4. As already stated, before his death, late Sardar Bakshish Singh had executed a registered will dated 27th March, 1985 whereunder the property in question was bequeathed absolutely to the youngest daughter Smt. Kamlesh Ahuja, the plaintiff No.2 herein. The defendants No.3 to 6 were allegedly disturbed about the fact that they had not been given any share in the property of late Sardar Bakshish Singh and conspired to forge and fabricate another will dated 25.10.1986. Thus, after the demise of late Sardar Bakshish Singh, while the plaintiff No.2 sought probate in respect of the registered will dated 27.03.1985 by filing proceedings in respect thereto, being Probate No.67/87, the defendants No.3 and 4 applied for letters of Administration of the alleged will dated 25.10.1986 and the said case was registered as Probate No.33/87.

5. By way of a common judgment dated 04.07.2005, this Court was pleased to allow Probate Petition No.67/87 whereby the plaintiff No.2 Smt. Kamlesh Ahuja was granted letters of Administration for the will dated 27th March, 1985. Probate Petition No.33/87 filed by the defendant No.3, Shri Ashish Virmani, on the basis of the forged and fabricated will of late Sardar Bakshish Singh dated 25.10.1986, was dismissed. The relevant portion of the said judgment is reproduced hereunder:

“50. Will dated 14.9.1977 has been drafted by late Shri Sohan Lal Sethi (Advocate) father of Sh. Ravinder Sethi, Sr. Advocate. Nandini Sahni, Advocate was associated in the chamber of Sh. Ravinder Sethi since well prior to 27.03.1985. Late Sh. Bakhshish Singh was in litigation with his tenant Sh. Vasudev.

Late Shri Sohan Lal Sethi and thereafter Sh.Ravinder Sethi were his lawyers, a fact evident from the record of C.R.No.527/95 of this court. It establishes a long standing client-lawyer relationship and trust. The will dated 27.03.1985 was kept by the deceased with his lawyer. If it was the result of undue influence exercised by Kamlesh Ahuja or was to provide her with a false sense of security, custody of the will would be with Kamlesh Ahuja. It was not. That the deceased kept the will in safe custody at the chamber of his long standing lawyer is indicative of the fact that he wanted the will to be well preserved. Undue influence is thus ruled out.

51. I accordingly hold that the will dated 27.03.1985 is the last legal and valid testament of late Sh.Bakhshish Singh and the same was duly executed by him without any pressure undue influence or coercion.

52. The will dated 27.03.1985 does not appoint any executor. Kamlesh Ahuja is therefore entitled to Letters of Administration with will annexed. Ordered accordingly.

53. Probate Case No.33/87 is dismissed.

54. Probate Case No.67/87 is allowed as per para 52 above.

55. Registry to draw up the instrument of Letter of Administration with will dated 27.03.2005 annexed on obtaining valuation report. Administration and surety bond dispensed with as Kamlesh Ahuja is the sole beneficiary.

56. No Costs.”

6. Subsequent thereto, by an order dated 18.10.2005 passed in IA No.5701/2005 in the present suit, the prayer of the plaintiff for deletion of the names of the defendants No.5 and 6 from the array of parties was allowed on the ground that after the demise of the defendants No.5 and 6, the right to sue survived to the defendant No.2, who was already a party on the record. The defendant No.2 was, however, was proceeded ex part on 12.11.1997. On 27th February, 2007, the defendants No.3 and 4, the only defendants left to contest the suit, were also proceeded ex part and issues were framed. The said order reads as

under:-

“%27.02.2007

Present: Ms.Nandini Sahni, Advocate for the plaintiff.

+CS(OS) No.1044/97

Since 10th May, 2006 the defendant nos. 3 & 4 were granted last opportunity to file their statement of admission/denial of documents of the plaintiffs, subject to costs of Rs.4,000/-. The said defendants have not conducted the admission/denial of documents filed by the plaintiff and have also not paid the costs. They have repeatedly taking adjournments by citing variety of reasons.

In view of the conduct of the defendant nos. 3 & 4, their right to conduct admission/denial of the plaintiff's documents is closed and the documents filed by the plaintiff are deemed to be admitted qua defendant nos. 3 & 4.

The following issues are framed:-

- 1. Whether defendants no.3 & 4 have no right, title or interest in property bearing No. C-37, Rajouri Garden, New Delhi? OPP*
- 2. Whether in view of judgment dated 4.7.2005 in Probate No. 33/87 and Probate No.67/87, plaintiff no.2 is entitled to a decree of declaration, permanent injunction and mandatory injunction against the defendant nos.3 & 4 as prayed for in the plaint? OPP*
- 3. Relief.*

The plaintiff may file its list of witnesses within 2 weeks and affidavit by way of evidence of its witnesses within 4 weeks. In case the plaintiff needs to summon any witnesses steps would be taken by the plaintiff within 3 weeks. Defendant nos. 3 & 4 are not present even on the second call. They are proceeded ex-parte.

List the matter before Joint Registrar for cross-examination of the plaintiff's witnesses on 5th July, 2007.”

7. On 05.07.2007, the plaintiff No.2 examined herself and her evidence was recorded and the documents proved by her were exhibited. Since none appeared

from the side of the defendants No.3 and 4 for the cross-examination of the plaintiff, the evidence of the plaintiff was closed and the suit set down for hearing arguments.

8. In the course of arguments, Ms. Nandini Sahni, the learned counsel for the plaintiffs placed reliance on the judgment of this Court dated 04.07.2005 in Probate Case Nos.67/87 and 33/87 in respect of will dated 27.03.1985 to contend that the factum of ownership of late Sardar Bakshish Singh of the suit property was never in challenge as is evident from the issues framed in the said Probate Petitions on 18.02.1993, which read as follows:

- “1. Whether will dated 27th March, 1985 is the last valid will of late Shri Bakshish Singh?*
- 2. Whether late Shri Bakshish Singh executed another will dated 25th October 1986?*
- 3. On proof of issue No.2 whether the will dated 25th October, 1986 is a forged will as alleged by respondent No.2,3, 5 & 7?*
- 4. Whether the Probate Petition No.33/87 as framed is maintainable?*
- 5. Is the petitioner entitled and should he be granted probate?*
- 6. Relief.”*

9. According to the learned counsel for the plaintiffs, the recital in the will dated 27.03.1985 that the testator Sardar Bakshish Singh was the absolute and exclusive owner of house bearing No.C-37, Rajouri Garden, New Delhi, having acquired and/or built the abovesaid property with his self-earned funds was, therefore, never in dispute.

10. Referring to paragraph 2 of the written statement filed by the defendants No.3 and 4, the learned counsel also pointed out the categorical admission made by the defendants No.3 and 4 that the will dated 27.03.1985 was executed by late Bakshish Singh, (though it was stated by them that the same was not executed by him voluntarily or out of his free consent, and that is why it was superseded by him during his life time by his will dated 25.10.1986). As regards the bequest of the suit property in favour of the plaintiff Mrs. Kamlesh Ahuja by the aforesaid will, and the further recital that none of the remaining heirs shall have any right, title or interest of any kind whatsoever in the said property, the learned counsel for the plaintiffs urged that the letters of Administration having been granted by this Court by its judgment dated 04.07.2005 in favour of the plaintiff No.2 Mrs. Kamlesh Ahuja, and the said order having been upheld by the Division Bench of this Court, it is crystal clear that the defendants have no right, title or interest in the property in question.

11. In the above context, the learned counsel also pointed out that the learned Single Judge has categorically held that the will dated 27.03.1985 is the last legal and valid testament of late Sardar Bakshish Singh and the same was duly executed by him without any pressure, undue influence or coercion, which finding of the learned Single Judge was upheld by the Division Bench. Two appeals, being FAO(OS) No.372/2005 and FAO(OS) No.402/2005 to challenge the order dated 04.07.2005 dismissing Probate No.33/87 filed by the defendant No.3 herein, Shri

Ashish Virmani through his mother Smt.Surinder Virmani, the defendant No.4 herein, and allowing the Probate Petition filed by the plaintiff No.2, being Probate No.67/87 were filed. Both the said appeals were dismissed by a Division Bench of this Court on 16.08.2007. The relevant portion of the said order is reproduced hereunder:-

“10. The Will dated 27th March, 1985 exhibited as Ex.P-1 has been witnessed by Sh.Ujagar Singh and Sh.Jugal Kishore Kohli both resident of House No.6772/2, Block No.10, Gali No.3, Dev Nagar, New Delhi. Whereas Will dated 25th October, 1986 has been attested by one Mr. Sat Prakash resident of Trilok Puri and Mr.Prem Prakash Ghai resident of Lajpat Nagar, New Delhi. Sh. Prem Prakash was examined as PW1. He has admitted that he knew Dr. Virmani through Mr.G.K.Kalia husband of Smt. Krishna Kalia through daughter of the deceased. He admitted that he has a shop at Lajpat Nagar, New Delhi and Dr. Virmani had a Clinic at Lajpat Nagar at a distance of 300 yds. from his shop. He also admitted that in the past he was functioning as a property broker and had assisted Dr. Virmani in acquiring the premises at Lajpat Nagar from where clinic was being run. He claimed that he knew Mr. Bakshish Singh but on being questioned stated that he does not remember the name of his wife. The other attesting witness Mr.Sat Prakash in his cross examination admitted that he was in business as a contractor in building private houses since 1975 and that he knew Mr. G.K.Kalia as he had constructed houses for 5-6 friends of Mr.G.K.Kalia and he had admitted that he had constructed the house for Dr.Virmani.

11. Having gone through the records, we are of the considered opinion that the Will dated 27th March, 1985 is the last Will of the testator which is legal and valid. In that view of the matter, the learned Single Judge was justified in granting probate in favour of Ms. Kamlesh Ahuja by accepting the Will dated 27th March, 1985. We also uphold the decision of the learned Single Judge dismissing the probate petition in respect of the alleged Will dated 25th October, 1986. Accordingly the Appeal is dismissed with costs.”

12. Ms. Sahni, the learned counsel for the plaintiffs also referred to the affidavit filed by PW1 Mrs. Kamlesh Ahuja by way of examination in-chief and the documents tendered in evidence by her, viz., the certified copy of the order dated 04.07.2005 which is exhibited as Exb.P-2/1; the letter dated 19.02.1987 written by Smt. Surinder Virmani to the MCD not to mutate the suit property in favour of the plaintiff exhibited as Exb.P-2/2; the certified copy of the order dated 07.04.1995 exhibited as Exb.P-2/3; the certified copy of the will dated 27.03.1985 executed by late Sardar Bakshish Singh exhibited as Exb.P-2/4; the certified copy of the letter dated 24.01.1987 and the no objection given by the plaintiff No.2 exhibited as Exb.P-2/5; the certified copy of the CFSL report dated 20.01.1995, in respect of will dated 25.10.1986, exhibited as Exb.P-2/6; the certified copy of the affidavit of Mrs. Maya Devi in Probate No.33/87 exhibited as Exb.P-2/7; the certified copy of the affidavit of the defendant No.1 in Probate No.33/87 exhibited as Exb.P-2/8; the certified copy of the notice dated 15.07.1987 exhibited as Exb.P-2/9; and the certified copy of the order dated 27.03.1993 passed by the Additional Rent Controller exhibited as Exb.P-2/10; the death certificate of late Sardar Bakshish Singh exhibited as Exb.P-2/11; and the certified copy of the order dated 23.08.1997 exhibited as Exb.P-2/12.

13. The learned counsel for the plaintiffs has also drawn my attention to paragraphs No.11 to 13 of the affidavit by way of evidence of PW1 Smt. Kamlesh

Ahuja (Exb.PW-1/A), which read as under:-

“11. That I state on 27.3.1985 my father had executed another registered will. This was the last and valid will of my father. This will was drafted by Ms. Nandni Sahni, advocate in the month of March 1985. At the time of execution of the will, I did not know Ms. Nandni Sahni. My father knew her and he had given instructions to Ms. Nandni Sahni, advocate to draft his will in March 1985.

12. That I state on 16.1.1987 I had received a letter from Ms.Nandni Sahni, Advocate, calling upon us to appear before her in chamber No.204, Lawyers Chamber, Delhi High Court, New Delhi for opening the sealed cover containing the will dated 27.3.1985 of my father.

*13. That I state that the said will was opened by her in my presence and in the presence of my sisters and mother. The contents of the will was read out to us by Ms.Nandni Sahni, advocate. A copy of the will was given to each one of us by Ms. Nandni Sahni, advocate. **None of the persons present raised any objection to the will of my father.** No mention of any other will was made by any party on that day. My mother, myself and my sister Krishna Kalia had given to her in writing a “No Objection” for the will of my father dated 27.3.1985.”*

14. From the aforesaid, in my view, it clearly emerges that the suit property was the absolute and exclusive property of late Sardar Bakshish Singh, who died on 29th December, 1986 after having bequeathed his property in favour of his youngest daughter Mrs. Kamlesh Ahuja, the plaintiff herein. This Court having held in its decision dated 4th June, 2005 that the plaintiff is entitled to the grant of letters of Administration, having granted probate in her favour, and the said decision having been upheld by the appellate court, the validity of the will itself stands conclusively established.

15. In the context of the maintainability of the instant suit after the grant of

probate of the will dated 27.03.1985 in favour of the plaintiff No.2, reference was made by Ms. Sahni to a judgment of the Supreme Court in ***Kanwarjit Singh Dhillon vs. Hardy Singh Dhillon and Ors.*** reported in ***2008 I AD (S.C.) 498.***

A question had cropped up in the said case in a suit for declaration and permanent injunction, in respect of certain properties situate within the jurisdiction of the Punjab and Haryana High Court, as to whether after the grant of probate of the will executed by one Sardar Kirpal Singh, the Civil Court had no jurisdiction to proceed with the suit for declaration and permanent injunction and accordingly the suit should be dismissed. The High Court held that the probate having been granted by the competent Probate Court and affirmed by the Supreme Court, the Civil Court had no jurisdiction to proceed with the suit, which was not maintainable. A special leave petition having been filed against the aforesaid order of the High Court in respect of which leave was granted, the Supreme Court considered the aforesaid aspect and in paragraphs No.9 and 10 of its judgment came to the following conclusions:-

“9. It is true that probate of the Will executed by late S.Kirpal Singh has been granted by the competent probate court which relates to the suit properties. But we have to look into the allegations made in the plaint. The plaint clearly states that the civil suit was for a declaration to the effect that the suit properties were joint Hindu family properties of the HUF of which the appellant and his two brothers Hardy Singh Dhillon and Harbans Singh Dhillon, mother Surjit Kaur and unmarried daughter Amarjit Kaur were the members. Consequential relief for permanent injunction was also sought restraining the respondent No.1 from alienating the suit properties, in any

manner, whatsoever. Besides claiming that the suit properties were the joint family properties, it was also averred in the plaint that late S.Kirpal Singh was the Karta of the aforesaid HUF and by utilizing the income from their ancestral agricultural land had acquired various properties including the suit properties.

10. The High Court by the impugned order, relying on a decision of this Court in the case of **Smt Rukmani Devi and Ors. Vs. Narendra Lal Gupta** [1985(1) SCC 144] affirmed the order of the civil court by holding that a probate granted by a competent probate court was conclusive of the validity of the Will of late S. Kirpal Singh until it was revoked and no evidence could be admitted to impeach the said Will except in a proceeding taken for revoking the probate. According to the High Court, a decision of the probate court would be a judgment in rem which would not only be binding on the parties to the probate proceeding but would be binding on the whole world. Upon the aforesaid finding, the High Court had affirmed the order of the Civil Court holding that the suit must be dismissed in view of the fact that the probate court had already granted probate in respect of the Will executed by late S.Kirpal Singh relating to the suit properties. We are not in a position to agree with the views expressed by the High Court in the impugned order nor are we in agreement with the order passed by the Civil Court. As noted herein earlier, the suit for declaration of title and injunction has been filed by the appellant inter alia on the allegations that the suit properties are joint family properties of the HUF of which the appellant and his two brothers Hardy Singh Dhillon and Harbans Singh Dhillon, mother Surjit Kaur and unmarried daughter Amarjit Kaur are members. It has also been claimed by the appellant in the suit that by utilizing the income from the ancestral agricultural land, various properties including the suit properties were acquired. Such being the allegations made in the plaint which can only be decided on trial after parties are permitted to adduce evidence in respect of their respective claims, it is difficult to hold that only because probate of the Will of late S.Kirpal Singh has been granted, the suit for title and injunction must be held to be not maintainable in law. **It is well settled law that the functions of a probate court are to see that the Will executed by the testator was actually executed by him in a sound disposing state of mind without coercion or**

undue inference and the same was duly attested. It was, therefore, not competent for the probate court to determine whether late S.Kirpal Singh had or had not the authority to dispose of the suit properties which he purported to have bequeathed by his Will. The probate court is also not competent to determine the question of title to the suit properties nor will it go into the question whether the suit properties bequeathed by the Will were joint ancestral properties or acquired properties of the testator.”

16. Applying the ratio of the aforesaid judgment of the Supreme Court in ***Kanwarjit Singh Dhillon (supra)***, the grant of probate in favour of the plaintiff cannot be decisive of the title of the testator in the suit properties, which can only be decided by the Civil Court on evidence. This being the position, it is incumbent upon this Court to take into consideration the testimony of the plaintiff herein, who examined herself as PW1 for the purpose of proving the issues framed by this Court on February 27, 2007. As noticed above, PW1 Smt. Kamlesh Ahuja has filed a detailed affidavit to discharge the onus placed upon her of proving the issues framed by this Court and has also proved on record the documents mentioned hereinabove, which clearly establish the title of the testator late Sardar Bakshish Singh. It also stands clearly established therefrom that late Sardar Bakshish Singh, who was the sole and absolute owner of the suit property, had bequeathed the same in favour of the plaintiff by his last will and testament dated 27.03.1985. Despite grant of opportunity to the ex parte defendants No.3 and 4 to cross-examine the plaintiff, they did not choose to do so. The said defendants also failed to file their statements of admission/denial of the

documents of the plaintiff. This Court, therefore, has no hesitation in holding that the defendants No.3 and 4 have no right, title or interest in the property bearing No. C-37, Rajouri Garden, New Delhi and in view of the judgment dated 04.07.2005 in Probate No.33/87 and Probate No.67/87, the plaintiff No.2 is entitled to a decree of declaration, permanent injunction and mandatory injunction against the defendants No. 3 and 4 as prayed for in the plaint. The plaintiff has succeeded in discharging the onus placed upon her of proving the issues while the defendants No.3 and 4 have miserably failed to rebut the evidence adduced by her. Accordingly, the plaintiff is held entitled to the relief claimed by her by filing the present suit.

17. In view of the above, a decree with costs is passed in favour of the plaintiff No.2 and against the defendants No.3 and 4 declaring that the defendants No.3 and 4 have no right, title or interest of any nature whatsoever in the property No. C-37, Rajouri Garden, New Delhi and the plaintiff No.2 is the exclusive and absolute owner of the said property. A decree for permanent injunction is also passed in favour of the plaintiff No.2 and against the defendants No.3 and 4 restraining the defendants from, in any manner, transferring, alienating or parting with the possession of the suit property in favour of any third party. The defendants No.3 and 4 are also restrained from obstructing the plaintiffs, their representatives, family members, etc. from ingress and egress of the suit property in order to enable the plaintiff No.2 to use and occupy the suit property as prayed

for by her. The decree sheet be prepared accordingly.

18. CS(OS) 1044/1997 and IA No.4515/1997 stand disposed of in the above terms.

REVA KHETRAPAL, J

JULY 21, 2008

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