

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

% *Date of Decision: December 12, 2008*

+ **RFA 515/2004**

KRISHAN KUMAR GUPTA Appellant
Through: Mr. N.S.Jain, Advocate

versus

BISHAN KUMAR GUPTA & ORS. Respondents
Through: Mr. R.K.Shukla, Adv. for R- 5 & 7

CORAM :-

THE HON'BLE MR.JUSTICE PRADEEP NANDRAJOG

THE HON'BLE MR. JUSTICE J.R. MIDHA

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

Pradeep Nandrajog, J. (Oral)

1. Heard learned counsel for the parties.
2. The will Ex.D-5/DW-1 is determinative of the fate of the litigation between the parties.
3. Krishan Kumar Gupta son of late Kailash Wati filed a suit for partition of property bearing Municipal No.114 (New), 119 (Old), Chota Bazar, Shahdara, Delhi. The property consists of a parcel of land ad-measuring 30 square yards having two shops on the ground floor and a room each on the first and the second floor. Kailash Wati was the owner thereof. Claim was

that she died intestate.

4. Kailash Wati was blessed with seven sons and two daughters. Her husband survived her. Kailash Wati died on 6.1.1995. Her husband died on 14.4.1996. A will was set up in defence by Nawab Kumar Gupta and Rahul Gupta son of late Sh. Naresh Kumar Gupta. It be noted that Naresh Kumar Gupta is the son of Kailash Wati who was dead by the time litigation commenced. The will is dated 21.6.1993.

5. The will in question purports to be witnessed by Shrawan Kumar and Ramesh Vashisth who were examined as witnesses by the defendants who had set up the will. Both of them deposed about Kailash Wati being desirous of executing the will; reaching the office of the SDM, Seelam Pur for the will to be scribed; the scribing of the will under the purported directions of Kailash Wati; her executing the same; the two witnessing the same and thereafter the same being registered.

6. In view of the testimony of the attesting witnesses and the fact that the will is a registered document, finding returned is that the defence has succeeded. The result is the passing of the impugned judgment and decree dated 14.1.2003 dismissing the suit for partition.

7. Learned counsel for the appellant urges that three very material circumstances have been ignored by the learned

Trial Judge. The first is the incorrect recitals in the will that the property is on rent. Counsel states that the evidence which has come on record has established that two shops on the ground floor were in possession of the family members. One shop was in possession of the late husband of the deceased who was alive when she died. The other shop was in possession of two of her sons namely Nawab Kumar Gupta and Naresh Kumar Gupta. The first floor and the second floor was admittedly in possession of the daughter-in-law of the deceased Dr. Kanta Gupta wife of Sh. R.K.Gupta, the son of the deceased. Learned counsel further urges that the deceased was 75 years old and this circumstance i.e. her age had to be kept in mind while considering whether she was in a state of mind of being conscious of what she was doing. Lastly, counsel urges that the testimony of Krishan Kumar Gupta that Kailash Wati was an orthodox lady and was leading a pardanashin life and would never go outside the house without being accompanied by a male family member has gone unchallenged in cross examination. Learned counsel also points out the inartistic and inappropriate manner in which the will has been scribed by drawing our attention that though the bequest is recorded in favour of Naresh Kumar Gupta and Nawab Kumar Gupta but while referring to disinheritance it is recorded that the other legal heirs i.e. the two daughters Smt. Sushma and Smt.

Krishna stand disinherited. Counsel urges that the will does not expressly refer to the disinheritance of the other five sons.

8. For due execution of a will it is sufficient to establish that the testator has executed the will in a proper state of mind and being conscious of the contents of the document. A disproportionate bequest by itself is no ground to raise eyebrows. But, where lack of inimical relationship is not brought on record it certainly becomes a factor to be considered as to why should a testator denude all other children from the bequest while conferring the benefit only on two children. It may be an insignificant consideration, but has to be put in the cauldron of the facts while weighing the scales.

9. Incorrect recitals in a will raise a suspicion and has to be treated as a suspicious circumstance for the reason the owner of a property is presumed to know the affairs of his property and he who manages to procure a will would not be presumably knowing the niceties of the affairs of the property.

10. The old age of a person is by itself no ground to treat the same as a suspicious circumstance for the reason more often than not wills are executed by the aged and the infirm. Standard of awareness and being possessed of mental faculties would not have to be on the test of young persons.

11. Law requires a person to be in a testamentary state

of mind. What would be a testamentary state of mind?

12. It would be a state of mind where the testator of a will is in a position to understand his or her estate i.e. the nature thereof; the various interests in the estate; the power to recollect the names of the near and dear ones who would otherwise have an interest in the legacy. Lastly, the faculty to take a rational decision as to the consequences of the act of the testator.

13. In this context the unchallenged testimony of the plaintiff that his mother was a pardanashin lady and for said reason as also on account of her old age would not move out of the house without being accompanied by a family member assumes importance for the reason the two attesting witnesses were questioned whether the testator was accompanied by a family member when she visited the Court. Both responded in the negative.

14. How did the old lady reach the office of the Sub-Divisional Magistrate; identify a scribe; engage services of a lawyer; execute the will and get it registered? All remain a mystery.

15. The false recital in the will that the property is on rent also raises the eyebrows leading to an inference that the person who got the will scribed was not aware that the property

was in possession of the family members.

16. We allow the appeal and set aside the impugned judgment and decree dated 14.1.2003.

17. A preliminary decree is passed declaring the share of the plaintiff in the subject property to be $1/9^{\text{th}}$. The share of the other children is held to be $1/9^{\text{th}}$. Needless to state since one son of the deceased is dead his share would be that of his son i.e. the grandson of late Kailash Wati.

18. The suit is revived for further proceedings so that the property can be partitioned by metes and bounds or otherwise.

19. We have impressed upon learned counsel for the parties to sort out the dispute sitting in the drawing room of their house for the reason there are 9 claimants to the plot of a land ad-measuring 30 square yards. The share of each comes to 3.33 square yards.

20. Parties are directed to appear before the District and Sessions Judge at Tis Hazari on 13.1.2009. Successor Court would be identified before which the parties shall appear.

21. No costs.

22. TCR be returned forthwith.

PRADEEP NANDRAJOG, J.

J.R.MIDHA, J.

DECEMBER 12, 2008
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