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**IN THE HIGH COURT OF DELHI**

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**RSA No.163-166/2006**

S.Rajinder Pal Singh & Ors. ....Appellants.  
through: Mr.R.K.Kashyap, Advocate.

VERSUS

Smt.Daljit Kaur ..... Respondent  
through: Mr.S.S.Mahavir, Advocate.

**DATE OF DECISION**

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25.03.2008

**CORAM:**

**Hon'ble Mr.Justice Pradeep Nandrajog**

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

: **PRADEEP NANDRAJOG, J.**(Oral)

1. Heard learned counsel for the parties.
2. Appellants filed a suit for possession and damages against Smt.Daljit Kaur, the respondent, in the instant appeal. They alleged that they were the owner of property No.C-394, Avantika, Rohini, Delhi-110085. They claimed ownership under a Will dated 26.11.1999 purported to have been executed by Late Smt.Narinder Kaur wife of Shri Pritam Anar Singh Dang.
3. It may be noted that plaintiff No.1 is the son of

Smt.Narinder Kaur. Second plaintiff is the wife of plaintiff No.1. Plaintiff Nos.3 and 4 are the daughters of plaintiff Nos.1 and 2.

4. It was stated in the plaint that the defendant/respondent Smt.Daljit Kaur was permitted to occupy a room, toilet and a bathroom on the ground floor of the property in question by Smt.Narinder Kaur. It was stated that the plaintiffs determined the said right of the defendant to continue to occupy the said portion of the house. On the allegation afore-noted suit for recovery of possession was filed.

5. It may be noted that Smt.Daljit Kaur is none other than the sister of plaintiff No.1 i.e. the daughter of Smt.Narinder Kaur.

6. In her written statement, Smt.Daljit Kaur disputed the Will relied upon. She stated that her brother had been disowned by her mother. She stated that her mother had allowed her to occupy a portion of the house. She asserted a right in the house.

7. On the pleadings of the parties 7 issues were framed. The same read as under:-

“1. Whether the suit is without any cause of action? OPD.

2. Whether the suit is not properly valued as so alleged in the P.O. No.3 of WS, if so, its effect? OPD.

3. Whether the suit is bad for non-joinder of the

parties? OPD.

4. Whether the will dated 26.11.1999 was executed by deceased Smt.Narinder Kaur in favour of the plaintiff? Is, its effect? OPP.

5. Whether plaintiffs are entitled for the recovery of the possession of suit property? OPP.

6. Whether the plaintiffs are entitled to damages from the defendant? If so, at what rate and what extent? OPP.

7. Relief.”

8. Needless to state issue No.4 was the main issue on which the fate of the litigation hinged. In view of the evidence led, learned Trial Judge recorded a finding that the Will in question Ex.PW-2/1 was duly proved. Accordingly, vide judgment and decree dated 14.10.2004 suit for possession was decreed and damages were awarded at the rate of Rs.2,000/- per month from 1.7.2001 till possession was handed over.

9. Smt.Daljit Kaur filed an appeal against the judgment and decree dated 14.10.2004. The same was registered as RCA No.58/2004.

10. For unexplainable reasons the learned Appellate Judge permitted Smt.Daljit Kaur to raise a plea that Smt.Narinder Kaur was not the owner of the suit property. The said plea has been dealt with and accepted by the learned Appellate Judge. The findings are as under:-

"I have considered the rival contentions raised by learned counsel for the parties. The polemical point involved in the present appeal is as to whether the respondent had become owner of the suit property by virtue of Will dated 26.11.1999, left by late Smt.Narinder Kaur. The learned Civil Judge ruled that the execution of the aforesaid Will has been proved beyond doubt and as such the respondents had become owner of the suit property and consequently decreed the suit. I do not see eye to eye with the view taken by learned Civil Judge. It cannot be gain-said that in a suit for possession based on title, as happened in the present case, the plaintiff is duty-bound to establish his ownership rights of property in dispute. Admittedly, the property in question belonged to DDA. The entire case is silent as to who was the first allottee of the suit property by way of Will left by late Smt.Narinder Kaur, it needs to be substantiated that Smt.Narinder Kaur had got ownership rights with regard to the suit property.

I have shifted the entire records of trial court with great circumspection but failed to find out any iota of evidence such as record or allotment letter issued by the DDA in respect of suit property in favour of late Smt.Narinder Kaur or someone else. Thus, it remains a mystery as to how the suit property belonged to Smt.Narinder Kaur. Unless late Smt.Narinder Kaur had any proprietary rights to the suit property, in my view she had absolutely no right to bequeath the same by way of Will in favour of the plaintiff. On the same principle she was unable to pass on a better title in favour of the plaintiff than she herself had. The authorities cited on behalf of the respondent do not come to his rescue because all the authorities cited by respondent talk about litigation based on previous possession whereas, the first para of the plaint filed by respondent makes it crystal clear that he sought possession of suit property being owner on the basis of Will dated 26/11/99 hence, the observation made by learned Civil Judge that respondent had become owner of the suit property on the basis of the Will is not based on any material and is a perverse one. Accordingly, the observation made by learned Civil Judge on this score is set aside. The result is that the

appeal is accepted. The impugned judgment dated 14/10/04 passed by learned Civil Judge being perverse one is hereby set aside. Parties are left to bear their own costs. File be consigned to RR."

11. Suffice would it be to record that the brother and sister were not at variance on the issue that their mother was the owner of the property in question. In the written statement by Smt.Daljit Kaur she nowhere disputed the title of her mother to the suit property. She never pleaded that her mother could not bequeath the suit property as her mother was not the owner thereof. She only challenged the Will.

12. Needless to state since title of the mother to the suit property was not disputed by Smt.Daljit Kaur obviously no issue was required to be framed on the title of Late Smt.Narinder Kaur to the suit property. Indeed, none was framed.

13. From nowhere has the learned Appellate Judge raised an issue; permitted to raise an issue, which was not the subject matter of the pleadings of the parties.

14. The position therefore is that the First Appellate Court having completely misdirected the inquiry the impugned judgment and decree dated 4.3.2006 disposing of RCA No.58/04 is required to be set aside. The first appeal has to be restored for adjudication on merits. I do so for the reason the

learned Appellate Judge has not considered the objections raised in the appeal pertaining to the finding recorded by the learned Trial Judge that the Will Ex.PW-2/1 is the last legal and valid testament of the deceased Smt.Narinder Kaur.

15. No substantial question of law has been framed by me for the reason the impugned judgment passed by the learned First Appellate Judge is being set aside and the matter is being remanded for fresh adjudication.

16. The appeal stands disposed of setting aside the impugned judgment and decree dated 4.3.2006 passed by Shri K.S.Mohi, Additional District Judge, Delhi disposing of RCA No.58/04. The said appeal is restored for decision on merits.

17. Needless to state, learned Appellate Judge would take note of the instant decision while deciding the appeal.

18. Parties are directed to appear before the learned Additional District & Sessions Judge on 12.5.2008. They would thereafter appear before the Court concerned where the appeal is listed after restoration.

19. No costs.

20. TCR be returned forthwith through a special messenger.

March 25, 2008  
d.k.bainsla

**PRADEEP NANDRAJOG, J.**