

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.453/2009 and CM No.13922/2009

ARUNA MALHOTRA Appellant
Through: Mr. Mohit Kumar, Adv.

versus

\$ CHETAN DAYAL & ORS. Respondent
^ Through: Mr. H.L. Tiku, Sr. Adv. with
Mr. Jagjit Singh Chhabra &
Mr. Thakur Sumit, Adv. for
Respondent No.1
Mr. Pankaj Singh for
Mr. A.C. Mishra, Adv. for
DDA

WITH

FAO(OS) No.465/2009 and CM No.14159/2009

ARUNA MALHOTRA Appellant
Through: Mr. Mohit Kumar, Adv.

versus

CHETAN DAYAL & ORS. Respondent
Through: Mr. H.L. Tiku, Sr. Adv. with
Mr. Jagjit Singh Chhabra &
Mr. Thakur Sumit, Adv. for
Respondent No.1
Mr. Pankaj Singh for
Mr. A.C. Mishra, Adv. for
DDA

WITH

FAO(OS) No.485/2009 and CM No.14716/2009

ARUNA MALHOTRA Appellant
Through: Mr. Mohit Kumar, Adv.

versus

CHETAN DAYAL & ORS. Respondent
Through: Mr. H.L. Tiku, Sr. Adv. with
Mr. Jagjit Singh Chhabra &

Mr. Thakur Sumit, Advs. for
Respondent No.1
Mr. Pankaj Singh for
Mr. A.C. Mishra, Adv. for
DDA

WITH

FAO(OS) No.486/2009 and CM No.14720/2009

ARUNA MALHOTRA Appellant
Through: Mr. Mohit Kumar, Adv.

versus

CHETAN DAYAL & ORS. Respondent
Through: Mr. H.L. Tiku, Sr. Adv. with
Mr. Jagjit Singh Chhabra &
Mr. Thakur Sumit, Advs. for
Respondent No.1
Mr. Pankaj Singh for
Mr. A.C. Mishra, Adv. for
DDA

Date of Hearing : November 23, 2009

% Date of Decision : December 23, 2009

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE SUNIL GAUR

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

VIKRAMAJIT SEN, J.

1. All the Appeals assail the common Order dated 11.9.2009 passed by the learned Single Judge in CS(OS) No.2318/2006. During the hearings of all these Appeals, it had been clarified that Mr. Basant Dayal, arrayed as Respondent No.2/Defendant No.2,

had executed a Power of Attorney in favour of his sister, Mrs. Aruna Malhotra, Appellant/Defendant No.1; that he has no interest adverse or inimical to those of Mrs. Aruna Malhotra; that there was a common counsel of the Appellant/Defendant No.1 and Defendant No.2/Respondent No.2, namely, Mr. Mohit Kumar. By Order dated 23.11.2009, in FAO(OS) No.453/2009 we had transposed the said Mr. Basant Dayal as Appellant No.2. We had also struck off Mr. D. Nelsen from the Array of Parties as he is no longer the tenant in possession of the suit premises. These Orders should be effectual in respect of all the Appeals.

FAO(OS)453/2009

2. This Appeal assails the Order passed with regard to IA No.1319/2008 filed by the Plaintiff/Respondent No.1 containing the following prayers:-

- (a) Proceed against the defendant no.1 and 2 for disobedience of the order of this Hon'ble Court and to punish the defendants No.1 and 2 and attach their properties; and
- (b) Against defendant No.1 and 2 from taking possession of front portion of the Property No.E-7/6, Vasant Vihar, New Delhi and
- (c) Against defendant No.1 from executing any lease deed qua any portion of the suit premises or dealing with suit property in any manner; and
- (d) Grant ex parte ad interim order in terms of the above.

- (e) Award compensation to the plaintiff against the defendants No.1 and 2 for breach of the order of this Hon'ble Court; and
- (f) Grant such other relief or pass any other order, which this Hon'ble Court may deem fit and appropriate in the facts and circumstances of the case.

3. As is discernible from the impugned Order dated 11.9.2009, Late Shri Dayal Chand Kaith (Shri D.C. Kaith) was a lessee under the Delhi Development Authority of E-7/6, Vasant Vihar, New Delhi. He had executed a Registered Gift Deed dated 3.6.1974, gifting his half-share over the land in favour of his daughter, Mrs. Aruna Malhotra, the Appellant before us in all these Appeals. No partition, however, took place. The construction on the plot was let-out to the Sarabhai Group and the rent was shared by Late Shri D.C.Kaith and the Appellant. The property was vacated in 1995 and thereafter Mrs. Aruna Malhotra started residing in the rear portion of the said house while the front portion in the First Floor and the Servant Quarters above the Garage was let-out jointly by her and her father, Shri D.C. Kaith. It appears that Shri D.C. Kaith may have executed several Wills including those dated 21.12.1995, 9.8.1996 and 4.2.1997; he died on 3.12.1997. According to the averments made in the Plaint, the Plaintiff and Defendant No.2, Mr. Basant Dayal became 1/4th owner of the undivided share in the said house. The Plaintiff is the nephew of Mrs. Aruna Malhotra and

Mr. Basant Dayal. Plaintiff, Mr. Chetan Dayal, being the son of their sibling, Mr. Roop Dayal, the other son of Mr. D.C. Kaith.

4. It appears that on 28.1.1999, Mrs. Aruna Malhotra, as the Attorney of Mr. Basant Dayal, filed a Suit seeking a declaration that the Will dated 21.2.1997 is not genuine. The counterblast is the filing of a Suit dated 25.1.1999 in Chandigarh stating that Will dated 4.2.1997 is the last Will of Shri D.C. Kaith; consequential relief has also been prayed for by the Plaintiff/Respondent No.1. This Suit was decreed by the Judgment dated 30.7.2004 of the Civil Judge, Chandigarh, whereby the Will dated 4.2.1997 was declared to be the last and final Will of Late Shri D.C. Kaith. However, the relief of partition of the said property, as well as a share of the rents received therefrom, was declined. Interestingly, the Appellant, as well as Mr. Basant Dayal, did not assail that Decree. The present Suit came up for hearing on 15.12.2006, on which date the learned Single Judge passed an *ex parte* order restraining Mrs. Aruna Malhtora and Mr. Basant Dayal from alienating, selling or parting with possession of the suit property or from inducting any other person in any part thereof. It was soon thereafter that the tenant quit the premises. In the hearing held on 23.5.2008, the learned Single Judge recorded the Consent Arrangement between the present adversaries to the effect that the front portion of the suit property, then lying vacant, be let-out. It next transpires, as pleaded in IA No.9024/2008, that Mrs. Aruna Malhotra had

identified the tenant for the front portion, but the Plaintiff objected to the letting. It was in these circumstances that a Local Commissioner was appointed who, in his Report dated 21.8.2008, disclosed that the British High Commission had offered to rent the suit premises for Rupees 2,00,000/- per month for a period of three years. This tenancy did not come to fruition *inter alia* since Mrs. Aruna Malhotra had held herself out to be the owner. Eventually, IA No.13906/2008 was filed by the Plaintiff under Order XXXIX Rules 1, 2 and 2A of the Code of Civil Procedure, 1908 ('CPC' for short). On 24.12.2008, the learned Single Judge appointed a Local Commissioner to visit the suit premises whose Report indicated that the front portion of the suit property was occupied by the family of Mrs. Aruna Malhotra's daughter, namely, Mrs. Komal Malhotra, her husband Mr. Parul Soni alongwith their two children. The Local Commissioner has also recorded the voluntary statement of Mrs. Komal Malhotra, daughter of Mrs. Aruna Malhotra that Mrs. Komal Malhtora and her family were residing in the rear portion of the suit property till 25.10.2008.

5. The learned Single Judge has applied the ratio of *Sujit Pal – vs- Prabir Kumar Sun*, AIR 1986 Calcutta 220 as well as *Delhi Development Authority –vs- Skipper Construction Co.(P) Ltd.*, (1996) 4 SCC 622. The learned Single Judge has noted the admission of Mrs. Aruna Malhtora to the effect that she had inducted her daughter and her family into the front portion of the

suit property contrary to the interim Orders passed in the earlier proceedings of the Suit. It is evident that Mrs. Aruna Malhotra had endeavoured to justify her action by drawing support from the Wills dated 21.12.1995 and 8.9.1996, both of which mention the Gift Deed executed in her favour. She has also sought to rely on an Affidavit dated 9.9.1993 of Late Shri D.C. Kaith asseverating that the front portion of the suit property was gifted by her father to her as also that the residential construction has been carried out from her funds; that she was paying the House Tax, Water and Electricity bills.

6. Even in these circumstances, the learned Single Judge, by means of the impugned Order, has concluded that inasmuch as the front portion has been occupied by Mrs. Komal Malhotra and her husband, Mr. Parul Soni and their two children, the first Order dated 15.12.2006 has been violated. The learned Single Judge has adverted to the Order dated 23.5.2008 and to its character of being a Consent Order. The learned Single Judge has concluded that the act of Mrs. Aruna Malhotra was in flagrant violation of the Order dated 15.12.2006. Even so, keeping the age of Mrs. Aruna Malhotra in view (70 years), only a "sound warning" has been recorded which, as subsequent events disclose, has been contemptuously ignored. The direction in the impugned Order to the effect that Mrs. Komal Malhotra, Mr. Parul Soni and their two children "should vacate the front portion of the suit property and

restore the possession of the suit property to the same position as on the date when the interim Orders dated 15.12.2006 and 24.10.2008 were passed within one week from today” has been disobeyed. The impugned Order also directs Mrs. Aruna Malhotra to deposit Rupees 2,00,000/- per month, being the rent offered by the prospective tenant, from the date when Mrs. Komal Malhtora was inducted in the front portion of the suit premises, that is, from 25.10.2008 within a period of four weeks. Both these directions have not been complied with.

7. We find no error in the impugned Order. It is palpably clear that the front portion of the house was not in the possession either of Mrs. Aruna Malhotra or of Mr. Basant Dayal or of Mrs. Komal Malhtora, Mr. Parul Soni and their two children. We are dealing with educated people who are quite capable of understanding the parameters and implications of Orders passed on 15.12.2006. It is of no assistance or significance that the front vacant portion has been occupied by Defendant No.1/Appellant’s daughter and her family. It nevertheless violates the interim Orders which prohibited inducting any person in any part thereof. We are additionally of the view that the action of Mrs. Aruna Malhtora of handing over possession of the front portion to her daughter and her family has the effect of parting with possession thereof, even if it does not partake of the character of a letting. The tolerance of the Court process is more often than not abused as is evident from this case.

A vain and idle attempt has been made by learned counsel for the Appellant to justify the contemptuous action of the Appellant. The Plaintiff/Respondent has not filed an Appeal against the impugned Order inasmuch as it refrains from punishing Mrs. Aruna Malhotra. Therefore, it may be inappropriate for us to expand upon the said Order and impose on Mrs. Aruna Malhotra a sentence which we think is called for in the interest of justice, and the efficacy of judicial verdicts. We, however, reiterate the direction given by the learned Single Judge, namely, that Mrs. Komal Malhotra, Mr. Parul Soni and their children must vacate the front portion of the suit property and restore the possession thereof to the same position as it was on 24.10.2008 within one week from today, failing which Mr. Chetan Dayal shall be entitled to take police assistance to get them along with their belongings removed from the front portion of the suit property so that it is restored to its vacant state. In addition, Mrs. Aruna Malhotra is directed to deposit within thirty days with the Registrar-General a sum of Rupees 28,00,000/-, that is, Rupees 2,00,000/- per month with effect from 25.10.2008.

8. The Appeal is dismissed with costs of Rupees 25,000/-. Pending application also stands dismissed.

FAO(OS) 465/2009

9. This Appeal assails the composite Order dated 11.9.2009 passed by the learned Single Judge in IA No.3338/2007 filed by the Appellant/Defendant No.1 under Order VII Rule 11 of the CPC for

dismissal of the suit as being barred by law – as per Order II Rule 2 and Section 213 of the Indian Succession Act, 1925. The facts mentioned above have been reiterated in the Application. A mention has also been made of a Will dated 4.2.1997 by which the remaining half of the rear portion of the suit property was allegedly bequeathed to the Appellant and Mr. Basant Dayal. We note that if this Will is given effect to, it will result in one of the children of Shri D.C. Kaith, namely, Shri Roop Chand, being disinherited, for which no valid explanation has been proffered by the Appellant. To the contrary, we have been informed that the Plaintiff, Mr. Chetan Dayal, had donated some of his bodily organs to his Late grandfather, Shri D.C. Kaith which may have been the foundation for his grandfather bequeathing 1/4th of his share in his favour. We are, however, neither concerned with this aspect of the case nor are we required to give any finding in this regard.

10. The Civil Suit, bearing No.38/1999 filed by Mr. Chetan Dayal before the Civil Judge, Chandigarh, seeking a declaration to the effect that the Will dated 4.2.1997 was the last Will of Late Shri D.C. Kaith has also been adverted to. The Application itself extracts the relevant portion of the Judgment/Decree passed by the Chandigarh Court in the following words – “As far as partition of Delhi property i.e. H.No.E-7/6, Vasant Vihar, New Delhi is concerned for that Chetan Dayal is at liberty to file a suit where the property situated and as far as the direction sought by Chetan

Dayal regarding his share of rent is concerned, in the absence of any evidence that relief also goes against Chetan Dayal". It is evident that liberty to initiate fresh action had been granted by the Civil Judge, Chandigarh and, therefore, the prayer with regard to partition contained in the Suit is maintainable.

11. Even otherwise, the contentions raised before us which pertain to the non-maintainability of the Suit must be rejected because of some other arguments of the Appellant. In *Amardeep Singh -vs- State*, 125(2005) DLT 627, a learned Single Judge of this Court, after a discussion of several precedents, declined to stay the probate proceedings even though the Civil Court in Panchkula had previously been moved, for the reason that that Court had no jurisdiction to deliver any pronouncement in the nature of probate. In ordinary parlance, probate means the official proving of a Will (C.O.D.); Black's Law Dictionary defines probate as – "the judicial procedure by which a testamentary document is established to be a valid Will; the proving of a Will to the satisfaction of the Court". A Civil Court does not have jurisdiction in this regard. Accordingly, on the strength of *Kiran Singh -vs- Chaman Paswan*, AIR 1954 SC 340 the Judgment delivered by the Civil Judge, Chandigarh would be without jurisdiction and, therefore, a nullity, the invalidity of which could be set-up whenever and wherever it is sought to be enforced. In *Chiranjilal Shrilal Goenka -vs- Jasjit Singh*, (1993) 2 SCC 507 their Lordships went to the extent of clarifying that the

Probate Court has exclusive jurisdiction over authentication of Wills and this being the position, neither the Civil Court nor the Arbitrator, even with the consent of parties, had no jurisdiction to adjudicate upon the proof or validity of a Will; and if such a decree came to be passed by these *fori* it would be a nullity and this question of invalidity could be raised even at the execution stage. In *Athmanathaswami Devasthanam -vs- K. Gopalaswami Ayyangar*, AIR 1965 SC 338, the Supreme Court had again clarified that “the Court has no jurisdiction over the subject matter of the suit and it cannot decide any question on merits. It can simply decide on the question of jurisdiction and coming to the conclusion that it had no jurisdiction over the matter had to return the plaint”. Therefore, even though the Plaintiff may have earlier approached the Civil Judge, Chandigarh for the grant of probate, this action would be non-est and of no legal efficacy or any bearing on any subsequent litigation. The principles of Order II Rule 2, nay any other provisions, would, therefore, not act as an impediment or obstacle or jural infirmity.

12. We find no error in the impugned Order in terms of which the Application under Order VII Rule 11 came to be dismissed. The Appeal being devoid of merit is dismissed with costs of Rupees 15,000/-. Pending application also stands dismissed.

FAO(OS) No.485/2009

13. This Appeal assails the dismissal of IA No.4419/2009 under Section 151 of the CPC filed by the Appellant wherein the Appellant had prayed to the Court to “dispose of IA Nos.5104/2007 and 10400/2008 as withdrawn”. The prayers contained in IA No.5104/2007 is for the modification of the injunction Order dated 15.12.2006 so as to allow the induction of a tenant in the front portion of the suit premises in the erstwhile tenancy of Defendant No.3. The application was filed on 1.5.2007 and was sought to be withdrawn by IA No.4419/2009 which was filed in March, 2009. Obviously, the application had been proffered in order to circumvent the Plaintiff’s action for the committal of the Appellant for having violated the Court Orders. The learned Single Judge has correctly appreciated the purpose of this application inasmuch as he has noted that the prayers therein were for letting the front portion of the suit premises to a tenant, the very portion of which has now been occupied by the Appellant’s daughter and her family. The intention behind the application was to shroud the palpable and obvious violation of Court Orders.

14. Appeal is dismissed with costs of Rupees 5,000/-. Pending application also stands dismissed.

FAO(OS) No.486/2009

15. The prayer in this Appeal is for setting aside the impugned Order to the extent that it allows IA No.2098/2009 filed under

Order XXXIX Rules 2 and 2A read with Section 151 of the CPC filed by the Plaintiff/Respondent. The prayer in this application was for the issuance of direction to the Appellant and Defendant No.2 to restore the *status quo ante* in respect of the front portion of the suit property as on 23.5.2008 and for deposit of the rental at the rate of Rupees 2,00,000/- per month. This aspect of the Appeal has already been dealt with above. In order to remove any doubts, we reiterate our direction to the Appellant to ensure that Mrs. Komal Malhotra, Mr. Parul Soni and their children should vacate the front portion of the suit property within one week and further to deposit the sum of Rupees 28,00,000/- with the Registrar-General of this Court within thirty days from today.

16. Appeal is dismissed with costs of Rupees 3,000/-. Pending application also stands dismissed.

17. Trial Court record be sent back to the Record Room.

(VIKRAMAJIT SEN)
JUDGE

December 23, 2009
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(SUNIL GAUR)
JUDGE