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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No.522/2000

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27th January, 2011

SHANKAR KUMAR

..... Appellant
Through: Mr. Rajiv K. Garg, Advocate with
Appellant in person.

VERSUS

RAM NARAIN

..... Respondent
Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of the present first appeal under Section 96 of the Code of Civil Procedure, 1908 is to the impugned judgment and decree dated 3.8.2000 whereby the suit for partition and rendition of account of the appellant/plaintiff was dismissed. The suit has been dismissed on the ground that the property belonged to the late grand-mother, Smt. Bhagirathi Devi, and Smt. Bhagirathi Devi had executed her Will dated 20th March, 1952 whereby the appellant was disinherited. The Trial Court after the issues were framed, decided the

relevant issues being Issues No.1 to 4 in paragraphs 6 and 7 of the impugned judgment which read as under:-

“Issues No.1,2,3 & 4

6. The plaintiff claim is that he was having 1/3rd share in this property. It is undisputed that the property in question originally belonged to Mrs. Bhagirathi Devi. The plaintiff has laid claim to 1/rd share on the ground that his father Ram Saroop used to collect the rent for and on behalf of three brothers and used to issue the rent receipt retaining the counter foils. Counter foils of the rent receipts are Ext. PW 1/1. This counter foils is of the year 1979 and on the top of the counter foil it is stated Mrs. Bhagirathi daughter of Dewan Chand. Under this it is stated that Joja Lal Munish Lal “malik Naydad”, Suputar Lal Ram Sarup, then name of three brothers i.e., Ram Narain, Krishan Kumar and Shankar Kumar is mentioned. There are other counter foils which are Ext. PW 1/D 1 which are much older than this. They are 1969 onwards and in these receipts the name of plaintiff and defendants have not been mentioned and only name of Bhagirathi and Lala Munshi Ram have been mentioned. Merely because the name of the plaintiff have been mentioned in two counter foils the plaintiff does not become co-owner of the property. The original owner was Mrs. Bhagirathi Devi and in case Bhagirathi Devi had left behind a Will, the property has to go in accordance with the Will. But in case she had died intestate all her legal heirs would be entitled to share in the property according to their rights of inheritance. The plaintiff in the replication denied the existence of Will. In his examination-in-chief before the Court, he stated he has no knowledge of the Will executed by his grand mother but he admitted in cross examination that in the Will of his grand father there was a reference of the Will of his grand mother. He further admitted that in the grand father Will it is mentioned that grand mother executed a Will on 20.3.1952. he admitted that he was having Hindi translation and copy of the original Will of his grand father Munshi Lal. He was asked to produce this translated document in the court and he produced the Hindu translation of the Will of his grand father and admitted that this Will was found by him in the papers of his father Ram Sarup. The Will of his grand father was in respect of property No.3323 about which no partition suit had been

filed by him. He admitted that his grand father had bequeathed property No.3322 in the name of his grand sons. He showed ignorance that his grand father had dis-inherited his father from his property.

7. This testimony of the plaintiff has to be looked into along with testimony of the defendant D.W 1 and DW 2. DW 1 in this written statement had taken a stand that grand mother had left behind a Will. In cross examination he stated that Will was in possession of defendant No.2. He also admitted that he had made a statement in the court in another case that he and defendant No.2 were co-owner of the property in question. Defendant No.2 testified that grand mother of the parties executed a Will dated 20th March 1952 in favour of defendant No.1 and 2. The grand father of the parties also executed a Will in respect of property No.3322, Mohalla Pipalmahadev Haus Qasi Delhi and in that Will he has mentioned about the Will of his wife. The will of his wife was in respect of property No.3605 to 3607. The original Will of grand mother of the parties was filed in another court in Suit No.149/87. The record of that suit was produced before this court by DW 4 Mohan Chand Record Clerk of the Court and certified copy of the Will is Ext. Dw 4/1. Translation of this Will is on record. A perusal of this Will of grand mother of the parties shows that at the time when the Will was executed, only defendants i.e. defendant no.1 and 2 had taken birth. They were her minor grand sons. Plaintiff had not taken birth and she bequeathed her property for the life time to these two defendants and after their life time the property was bequeathed to their sons absolutely. The grand father of the plaintiff also executed a Will which is admitted by the plaintiff. In this Will, copy of which has been filed by the plaintiff on record, he has very categorically stated that his wife was owner of property No. 3506 and 3607, the two shops along with first floor and she executed a separate Will and he therefore, had no right to deal with the property of his wife. He gave 1/3rd share in his own property to the parties and even at the time when he executed the Will, only two defendant had taken birth, but he, in his Will, specifically mentioned that if any other grand son takes birth he shall have equal right in this 1/3rd share. He expressed that he has no faith in his son i.e., father of the parties and did not bequeath anything in his favour.

The plaintiff was very well aware of this Will by which he had got right in the property No.3322 Gali Pipal Mahadev, Haus Qasi, Delhi and he, through the Will of his grand father had also come to know the existence of Will of his grand mother. No witness of the Will of his grand mother was alive when the question of proving of Will come, but the document is above 48 years old and it is in the custody of those in whose custody it should naturally be. The document is referred in the Will of grand father, therefore, I have no doubt in the genuineness of the Will of Smt. Bhagirathi Devi, whereby she bequeathed the property in question in favour of two defendants who were only known grand son to her at that time, for their life time. I, therefore, consider that plaintiff has no right on interest in the property in question. The property has to go in accordance with the Will and his claim over 1/3rd share in the property is misconceived. He is not entitled to any partition or for rendition of accounts. All the issues are decided against the plaintiff."

2. I do not find any illegality or perversity in the aforesaid findings and conclusions of the Trial Court. The certified copy of the Will has been duly exhibited as Ex.DW-4/1 in the statement of DW-4 who was the clerk who brought the file of the Suit No.149/1987 where the original Will was filed. The Trial Court has also relied upon the provision of Section 90 of the Indian Evidence Act 1872 which states that a document which is more than 30 years old, can be presumed to be correct and it need not be proved in any manner, as required in law. As per S.90 there is a presumption with regard to the due execution and attestation of a document which is 30 years old. I may also note that when this document was exhibited, no objection was raised to the exhibition of the document and, in fact, no cross-examination was done of DW4 in spite of opportunity being given.

There, therefore, cannot be any cavil to the proof of the Will of Smt. Bhagirathi Devi, the grand-mother, which has been exhibited as 'Ex.DW-4/1', and on the basis whereof, the appellant was disinherited and the suit was consequently dismissed. The Trial Court has also rightly held that the Will of Smt. Bhagirathi Devi was in the knowledge of the appellant all along as this Will of Bhagirathi Devi was mentioned in the Will of her late husband/grandfather of appellant and the appellant had way back initiated a litigation with respect to the Will of the grandfather.

3. In view of the above, I do not find any merit in the appeal which is, therefore, dismissed leaving the parties to bear their own costs.

CM Nos.1326/2000, 383/2003 and 1993/2003

4. Since the main appeal has been dismissed, all the aforesaid applications stand disposed of accordingly. The interim order passed on 18th November, 2003, stands vacated. Trial Court record be sent back.

JANUARY 27, 2011

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VALMIKI J. MEHTA, J.