

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

+ **RFA No.420/2001**

% **15th March, 2011**

SH. ANIL KUMAR GUPTA Appellant
Through: Mr. Dinesh Kumar Gupta, Adv.

VERSUS

SH. RAJ KUMAR GUPTA Respondent
Through: None.

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?
3. Whether the judgment should be reported in the Digest?

VALMIKI J. MEHTA, J (ORAL)

1. This RFA came up for hearing on 10.3.2011, on which date no one appeared for the respondent. Though, the appeal could have been decided on the said date however, counsel for the appellant volunteered to send notices both to the respondent and his counsel for today. The counsel for the appellant has filed before this court an affidavit showing that notices have been sent both by speed post and by courier to the respondent and his counsel. However, even today, no one appears for the respondent. I have therefore, heard the counsel for the appellant and am proceeding to dispose of the appeal.

2. The challenge by means of this regular first appeal under Section 96 of the Code of Civil Procedure, 1908, is to the impugned judgment dated 24.3.2001 of the trial court which dismissed the suit of the appellant/plaintiff for possession of one shop in the property bearing no.B-12, Shopping Centre, Commercial Market, Phase-I, Vivek Vihar, Delhi, which was shown in red in the site plan Ex.PW1/1 in the trial court record. The grandfather of the appellant Sh. Mittar Sain Gupta had executed a Will dated 19.12.1983 in favour of the appellant bequeathing to him the suit shop.

3. The appellant/plaintiff claimed ownership of the property stating that the Will was a registered Will in his favour executed by his grandfather Sh. Mittar Sain Gupta. In fact, pursuant to the Will, the appellant has started realizing rent from the other tenants in the property bearing no.B-12, Shopping Centre, Commercial Market, Phase-I, Vivek Vihar, Delhi, inasmuch as Sh Mittar Sain Gupta was owner not only of the suit shop, but also other shops falling in B-12, Shopping Centre, Commercial Market, Phase-I, Vivek Vihar, Delhi. Since, the respondent/defendant failed to vacate, the appellant/plaintiff terminated his license vide legal notice dated 19.7.1994 and to which, a reply was sent by the respondent/defendant dated 29.7.1994. The suit for possession ultimately came to be filed, in which, there was additionally claimed the relief of mesne profits.

4. The respondent/defendant contested the suit by claiming that the suit property was given to the defendant by Sh. Mittar Sain Gupta out of love and

affection. It was also alleged that the suit was not maintainable as the appellant/plaintiff had not obtained probate of the Will dated 19.12.1983.

The trial court, after pleadings were complete, framed the following issues:-

- I Whether the plaintiff is entitled to a decree of possession of the suit property? OPP
- II Whether the plaintiff is entitled to a decree in the sum of Rs.5,900/- on account of damages/mesne profits, as prayed for? OPP
- III Whether the plaintiff is entitled to future mesne profits and damages and at what rate and for which period? OPD
- IV Whether the suit is liable to be stayed in view of Section 10 of CPC?
- V Whether this suit has not been properly valued for the purposes of Court Fees and this court has no pecuniary jurisdiction to try the present suit? OPD
- VI Whether the suit is not maintainable as the plaintiff has not obtained probate of the alleged Will dated 19.12.1983.
- VII Relief.”

5. While dealing with issue no.1 as to whether the appellant/plaintiff was entitled to possession, the trial court disbelieved the evidence led for proving of the Will. The Will was not exhibited but only marked as 'X'. It is however noted by the trial court that the signatures of the deceased as also the attesting witnesses were duly identified by the appellant/plaintiff. It was also noted by the trial court that the attesting witness, Mr. Sukhbir Singh could not be called as the relations of the appellant with him were strained. Another important aspect is that the trial court has quite clearly noticed the

admission in the cross-examination of the respondent/defendant that the signatures on the Will were of the deceased Sh. Mittar Sain Gupta. There was therefore a categorical admission on behalf of the respondent that the Will contained the signatures of Sh. Mittar Sain Gupta. Further, respondent/defendant in his deposition also agreed that Sh. Mittar Sain Gupta was in a sound disposing mind at the time of making of the Will. I may note that no doubt the best way to prove a Will is to call an attesting witness, however, this aspect would not have too much bearing in the present case inasmuch as the respondent/defendant himself has admitted the signatures of Sh. Mittar Sain Gupta on the Will and also admitted that Sh. Mittar Sain Gupta was in a sound disposing mind when the Will was executed. Another important aspect which I must note is that with the present appeal an application under Order 41 Rule 27 being CM No.4808/2011 has been filed by the appellant along with which a certified copy of a judgment dated 10.2.2010 in suit no. 92/2009 titled as **Jado Prakash Gupta Vs. Bindo Devi and others** has been filed. I allow this application as the documents are unimpeachable documents being certified copies of judgments and depositions in the other litigation between the parties and is required for clarification/elucidation of the evidence in the case as also for interest of justice. The appellant was defendant no.3 in the said other suit. In the said suit 92/2009 between the parties to that suit and in which parties are also parties to the present appeal, there was an issue with regard to the existence of the will dated 19.12.1983 of Sh. Mittar Sain Gupta

and which is also the issue in the present appeal and suit. The court dealing with the said other suit in its judgment dated 10.2.2010 has held that the will was duly proved while dealing with issue no.2 and the relevant finding in this regard reads as under:-

7. ISSUE NO.2

The defendant no.3 had filed a suit for possession against plaintiff no.2 which was dismissed vide judgment dated 24.03.2001 in suit no.261/98 (418/94) by the court of Sh. Sunil Gaur Ld. ADJ, Delhi (as his lordship then was). The defendant no.3 has filed RFA before Hon'ble High Court and the same is pending. In the same suit the defendant no.3 who was plaintiff therein had prayed for decree of possession against the plaintiff no.2 herein on the basis of the will dated 19.12.1983. It was held that the defendant no.3 failed to prove the will in his favour and therefore the suit was dismissed. The question of the genuineness of the will was directly and substantially in issue in the said suit as well as in the present suit. This court had put a query to the Ld counsel for the parties whether the decision on the issue of genuineness of the will in the said would operate as res judicata. Both Ld counsel argued that section 11 CPC would not apply. Ld counsel for the plaintiffs fairly admitted that in view of the fact that RFA against the judgment dated 24.03.2001 in suit no.261/98 (418/94) is pending, the decision in the said suit on the point of Will, will not operate as res judicata in the present suit. Submission made by Ld. counsel for the plaintiff is correct and it is also supported by the commentary on this point by Mulla in his book CPC (abridged) 13th edition page 103 and 104. Therefore I proceed to decide the issue and the present suit. The Will dated 19.12.1983 in favour of the defendant no.3 is DW1/1. His contention is that on the same day Sh. Mitra Sain Gupta executed another registered will Ex.PW1/2 in favour of his daughter in law Smt. Yashoda W/o Sh. Ved Prakash in respect of property no. B 250, Vivek Vihar, Delhi. The defendant no.3 has also examined the witness from DDA as DW10 to show that the plaintiffs had the knowledge of Will Ex.DW1/2 and that plaintiff no.1 had also filed his affidavit Ex.DW10/3 in support of the said will. This evidence has been produced by the defendant no.3 to

show that Sh. Mitra Sain Gupta was in a fit mental condition on 19.12.1983 and that it is improbable for the plaintiff no.1 not to have knowledge of the other will i.e. Ex.DW1/1 when it was executed on the same day as Ex.DW1/2. Ld. counsel for the plaintiffs has argued that the evidence led in respect of property no.B 250 is beyond pleadings and is liable to be rejected. In this regard, Ld counsel has relied upon (2003) 4 SCC 161, (2006) 1 SCC 530, (1999) 4 SCC 403 and (2009) 2 SCC 613. I do not agree with the arguments of Ld counsel for the plaintiffs. The evidence produced by the defendant no.3 is to discredit the plaintiffs and it was not mandatory for him to incorporate these facts in his WS. Further whatever has come on record is not disputed except on the ground of being beyond pleadings. A party is supposed to approach the court with clean hands and the court would not reject an evidence on the ground of being beyond pleadings if it brings out the truth.

7. The Will Ex.DW1/1 was witnessed by Sh. Iqbal Bahadur Mathur Advocate and by Sh. Sukhbir Singh. As per section 68 the plaintiff had to examine one attesting witness. Sh. Iqbal Bahadur Mathur has expired and the defendant no.3 examined the other witness to will as DW6. DW6 has stated in his examination in chief that he signed on the will on the instruction of Sh. Mitra Sain Gupta. He has further stated that he had not seen whether Sh. Mitra Sain Gupta had already signed the will or not when his signatures was taken. There is no evidence to dispute the signature of Sh. Mitra Sain Gupta and the statement of PW6 shows that Sh. Mitra Sain Gupta desired to execute the will Ex.DW1/2. DW2 is Sh. Sadhu Ram Gupta. DW6 has stated that DW2 is the maternal uncle of the defendant no.3 and that he used to visit Sh. Mitra Sain Gupta. DW2 has stated that the will was executed and signed in his presence and he has identified the signatures on the will. Nothing has emerged in this cross examination to discredit him. The plaintiff no.2 has admitted in the other suit i.e. suit RBT no.91/09 titled Raj Kumar Gupta v. Bindo Devi in his cross examination as PW5 and DW6 in the present case is not having cordial relation with the family of defendant no.3. He also admitted while deposing on 21.05.05 that Sh. Sukhbir Singh (DW6) is hail and hearty. DW6 was examined in this case on 30.11.06. The ignorance shown by him in respect of the questions relating to will Ex.DW1/1 and the evasive answers given by him appear to be actuated due to the sour relation between him and the family of defendant

no.3. It is to be noted that DW6 has not categorically denied the suggestion that he visited the office of the sub Registrar IV for attestation and registration of the Will. It is not disputed that Sh. Mitra Sain Gupta was the owner of property no.B 12 Vivek Vihar, Delhi. Sh. Mitra Sain Gupta executed another will Ex.DW1/2 on the same day and the same has been acted upon with the help of plaintiff no.1. Therefore it can be inferred that Sh. Mitra Sain Gupta was in a fit mental condition to execute the will Ex.DW1/1 and there is no suggestion by the plaintiffs to the contrary. No other will of Late Sh. Mitra Sain Gupta in respect of the suit property has been produced or proved. No circumstances have been brought forward by the plaintiffs which can invalidate the will Ex.DW1/2 under the provision of Indian Succession Act. Therefore in view of the above discussion it is held that Sh. Mitra Sain Gupta executed a valid will Ex.DW1/1 in favour of defendant no.3 in respect of the property no.B 12,Vivek Vihar, Delhi and by virtue of the said will the defendant no.3 has become the owner of the said property after the death of Sh. Mitra Sain Gupta. The issue is accordingly decided in favour of defendant no.3.”

Learned counsel for the appellant states that the appellant has not received any notice of any appeal filed by the respondent herein (and who was the plaintiff in the said suit no.92/2009) challenging the judgment dated 10.2.2010.

6. In view of the above, I hold that the trial court has committed a clear cut illegality and perversity in holding that the Will dated 19.12.1983 of Sh. Mittar Sain Gupta was not proved. I, therefore, hold that the Will dated 19.12.1983 of Sh. Mittar Sain Gupta is proved and the same be now read in evidence and be marked as Ex.PX-1. The reason for holding that the Will stands duly proved besides the admission of the respondent/defendant is also that the appellant/plaintiff had acted upon this Will and was realizing

rents from the other tenants of the property and which was not objected to by anyone. Further, the decision in the said suit dated 10.2.2010 will operate as res judicata against the respondent/defendant.

7. I also note that the stand of the respondent/defendant that he had become the owner of the property as Sh. Mittar Sain Gupta had given the property to him out of natural love and affection would not give right title and interest to the respondent/defendant of the suit shop inasmuch as an immovable property as per Section 17 (1) (b) of the Registration Act, 1908 could only be transferred by means of a registered document, and it was not the case of the respondent/defendant that the suit shop was transferred to him by a registered instrument executed by Sh. Mittar Sain Gupta.

8. Another reason for decree of the suit for possession and mesne profits against the respondent/defendant would be that the appellant/plaintiff would be at least a co-owner of the suit property. The respondent/defendant would not be a co-owner because his father is very much alive and till his father is alive, the respondent/defendant cannot claim any ownership interest in the property. The only ownership interest claimed by him in the suit shop was by way of transfer of property in his favour by Sh. Mittar Sain Gupta out of natural love and affection and which argument I have held rejected in view of Section 17 (1) (b) of the Registration Act, 1908.

9. The appellant/plaintiff has also claimed mesne profits at Rs.50 per day i.e. Rs.1,500/- per month. This aspect has been deposed to by the

appellant/plaintiff when he appeared in the witness box as PW-1. I note that in the cross-examination of PW-1, a suggestion has been given that the shop in question could fetch a rent of Rs.5000/- per month, showing that the respondent/defendant himself seemed to suggest that the monthly rent of the suit shop would be Rs.5000/- per month.

10. In view of the above, I accept the appeal. The suit for possession of the appellant/plaintiff with respect to shop shown in red in Ex.PW1/1 forming part of the premises B-12, Shopping Centre, Commercial Market, Phase-I, Vivek Vihar, Delhi, is decreed against the respondent/defendant. Taking all aspects into consideration, I also award a sum of Rs.1500/- per month as mesne profits to the appellant/plaintiff and against the respondent/defendant pendente lite and future till possession is delivered to the appellant/plaintiff of the suit shop. Decree sheet be prepared. Trial court record be sent back.

MARCH 15, 2011
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VALMIKI J. MEHTA, J.