

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

% *Date of Judgment: 11.03.2011*

+ **RSA No.160/2010 & CM Nos. 15733-34/2010**

SH. SHYAM LAL MEHTA (SINCE DECEASED THROUGH HIS
LEGAL REPRESENTATIVES) Appellant
Through: Mr. C.S. Bhandari.

Versus

LATE SMT. RAM DITI (SINCE DECEASED THROUGH HER LEGAL
REPRESENTATIVES) Respondent.
Through: Nemo

CORAM:
HON'BLE MS. JUSTICEINDERMEET KAUR

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

INDERMEET KAUR, J. (Oral)

1. This appeal is directed against the impugned judgment and decree dated 25.02.2010 which had endorsed the findings of the trial Judge dated 19.12.2005 whereby the suit filed by the plaintiff Smt. Ram Diti seeking permanent and mandatory injunction against her defendant son had been decreed in her favour.

2. The plaintiff Ram Diti claimed to be the owner of the premises No. A-9 forming part of land Rect. No. 38, Killa No. 22 (38/22) situated at Kundan Park, Khureji Khas, Illaqa Shahdara. She had purchased this property vide registered sale deed dated 08.09.1965. Thereafter she had raised constructions upon it. The defendant is her real son; he was a Government Servant posted at

Bihar. The defendant had been harassing the plaintiff to extract
RSA No.160/2010

money from her. On 01.08.1985, the defendant asked the plaintiff for the original sale deed on the ground that he required it for an electricity connection; she was returned only a photocopy of the same. On 05.08.1985, the defendant came with some unknown persons wherein the plaintiff learnt that the defendant is intending to sell the property. This was reiterated on 07.08.1985. The defendant has no right in the suit property. In spite of requests, the defendant did not resist from interfering in the peaceful possession of the plaintiff. Present suit for mandatory and permanent injunction was filed with a direction to the defendant to hand-back the original sale deed dated 08.09.1965 to her as also not to alienate/dispose of the suit property.

3. The defendant in the written statement had objected to the locus-standi of the plaintiff to file the present suit. It was stated that the defendant is the real owner of the property having purchased it out of his own funds although it was in the name of his mother. He denied that he intended to sell the property.

On the pleadings of the parties, the following three issues were framed:-

- "1. Whether the plaintiff is entitled to relief of injunction as prayed for? OPP.*
- 2. Whether the plaintiff is entitled to relief of mandatory injunction as prayed for? OPP.*
- 3. Relief. "*

4. In the course of the trial on 21.12.1987, the plaintiff had expired. She had left behind a Will. Vide order dated 20.07.2001, the legal representative Smt. Swaraj Kumari Dutta was brought on record. This application was disposed of on 20.07.2001. Admittedly no appeal or revision has been filed against the said order. It has

since attained finality. It is also not the case of the defendant that the order on this application was passed in his absence; order dated 20.07.2001 has recorded the presence of counsel for both the parties.

5. On the basis of oral and documentary evidence which included three witnesses on behalf of the plaintiff and six witnesses on the defendant, the suit of the plaintiff was decreed. The witness examined on behalf of the plaintiff was the legal representative of the plaintiff Smt. Swaraj Kumari Dutta. She was the daughter of the deceased. She had reiterated the averments made in the plaint. The registered sale deed by virtue of which the plaintiff had become the owner of the suit property had been proved as Ex. PW-3/1. The record had been summoned from the office of Sub-Registrar to prove this document. PW-1 had come into the witness box to show the report lodged by the erstwhile plaintiff namely Smt. Ram Diti against her son. The registered sale deed of the deceased had been proved as Ex. PW-3/1. In defence six witnesses had been produced. After appreciating the evidence and the preponderance of probabilities, the suit of the plaintiff was decreed. It was held that the document of title Ex. PW-3/1 had clinched the title of Smt. Ram Diti.

6. Both the courts below had returned a concurrent finding on this score.

7. This is a second appeal. On behalf of the appellant, only one contention has been raised. It is pointed out that the Will of the deceased could not have been proved in the absence of the attesting witness not having come into the witness box. The application under Order 22 Rule 3 of the Code of Civil Procedure

(hereinafter referred to as the 'Code') was only procedural in nature and did not in fact decide the rights of the parties; judgment being perverse on this score is liable to be set aside.

8. Substantial questions of law have been embodied on page D of the memo of appeal. They read as under:-

- "1. Whether, after the death of original plaintiff, the right to sue survives in favour of his or her legal heirs in respect of suit for permanent injunction?*
- 2. Whether the deceased Sh. Shyam Lal Mehta was the actual owner of the suit property being the only earning member in the joint family and that his mother Smt. Ram Diti was only the BENAMI owner and hat whether the courts below have properly considered/appreciated the evidence as per law?*
- 3. Whether the will dated 20.05.1986 which is Ex. PW-2/4 on record is forged, fabricated and manipulated and whether the same bears the signatures and thumb impression of Smt. Ram Diti or not and whether PW-2 Smt. Swaraj Kumar impersonated in place of her deceased mother in getting the will registered?*
- 4. Whether the Will can be proved by a clerk from the office of Sub-Registrar and not by an attesting witness as in this case, no attesting witness has been produced by the respondents?*
- 5. Whether the procedural order passed on application under Order 22 Rule 2 & 3 CPC of substitution of legal heirs on the basis of alleged will by the Court is sufficient to discharge the onus to prove the Will by the opposite party?*
- 6. Whether the procedural order passed for substitution of legal heirs on the basis of alleged will of which even no notice is given to the deceased appellant, dispenses with the proof of will by attesting witnesses?*
- 7. Whether the courts below failed to consider the law laid down by the Apex Court reported in AIR 2003 SC Case 761 as well as reported in (2001) 7 SC 503 for the proof of Will by the attesting witnesses which has resulted into miscarriage of justice to the appellants?*
- 8. Whether the courts below have failed to consider the documentary evidence as per law?"*

9. Admittedly, Ex. PW-3/1 was a registered sale deed in favour of Smt. Ram Diti, the original plaintiff. This document has not now been assailed. Substantial question of law No. 2 is therefore redundant. The only question which arises for decision is as to whether the Will of the deceased Ram Diti could have been relied upon to decree the suit in favour of her legal representative. This

Will is dated 20.05.1986. It is a registered document. It had been proved as Ex. PW-2/1. It was proved through the testimony of Smt. Swaraj Kumari Dutta, the daughter of the deceased. The summoned record from the office of the Sub-Registrar had also been proved to certify that this document is registered with the said office. It is not in dispute that the plaintiff had died during the proceedings in the trial Court on 21.12.1987. The order dated 20.07.2001 was passed on an application preferred by the legal representative of the deceased whereby her application was allowed and she had been brought on record as the legal representative of her deceased mother. This was pursuant to the will which Smt. Swaraj Kumari Dutta had relied upon. Matter was thereafter listed for framing of issues on 12.10.2001. If the defendant was aggrieved by this order dated 20.07.2001, he should have assailed it; the contention now raised that the said will was not a genuine document cannot be agitated. It was incumbent upon the defendant to have raised this objection on the application under Order 22 Rule 3 of the Code itself; issue could have been framed on the veracity of will at this stage itself. That apart even during the main contest in the suit proceedings, no such objection had been taken. Admittedly no appeal or revision had been preferred by the appellant against this order dated 20.07.2001. That order has now attained a finality. It cannot now be agitated after a lapse of more than decade.

10. It is true that a Will has to be proved in accordance with law and under Section 68 of the Evidence Act, one of the two attesting witness to the Will has to come into the witness box to prove the said document. However, this is only in those cases where the Will

is under challenge or is in dispute. In this case as is evident from the record after the death of Smt. Ram Diti, Smt. Swaraj Kumari Dutta her daughter had filed an application seeking impleadment on the basis of the said Will. This application had been allowed in the presence of counsel for the defendant. No objection was raised. This order was never challenged in any subsequent proceedings. This order now having attained a finality, it does not lie in the mouth of the defendant to say that the Will is not a genuine document.

11. Even otherwise the present suit was simplicitor a suit seeking prayer of mandatory injunction against defendant to hand back the original sale deed dated 08.9.1965 to the plaintiff and by way of permanent injunction he was restrained from transferring/alienating/disposing of the suit property. This suit had not decided the question of the title of the legal representative in the suit property.

12. The judgment relief upon by learned counsel for the appellant reported in 1992 RLR (NSC) 45 Smt. A.N. Kapur Vs. Pushpa Talwar does not come to his aid. Section 105 of the Code does not entitle the appellant to raise this issue on the order dated 20.07.2001 i.e. after more than a decade.

13. No substantial question of law has arisen. Appeal as also pending applications are dismissed in limine.

INDERMEET KAUR, J.

MARCH 11, 2011

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