

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

% *Date of Judgment: 10.03.2011*

+ **RSA No. 92/2009 & CM Nos. 10095/2009 & 10096/2009**

SH. RAJESH**Appellant**
Through: Mr. Gurbhansh Singh, Advocate.

Versus

SMT. MUNNI DEVI**Respondent.**
Through: None.

CORAM:
HON'BLE MS. JUSTICE INDERMEET 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 has impugned the judgment and decree dated 30.03.2009 which has endorsed the finding of the trial judge dated 25.08.2005 whereby the suit filed by the plaintiff, Smt. Munni Devi, seeking declaration and permanent/mandatory injunction claiming her share in the will dated 19.06.1990 of her deceased father-in-law had been decreed in her favour. A decree of declaration had been passed declaring that the portion/share of the suit property as per the will dated 19.06.1990 was owned by the plaintiff; defendant was restrained from dispossessing the plaintiff from her share in the suit property and interfering in her peaceful possession in the suit property.

2. The case of the plaintiff was that her father-in-law had expired on 21.06.1990; he had left behind a will dated 19.06.1990.

As per the said will, the suit property owned by her deceased father-in-law was to be shared amongst the legal representatives. The husband of the plaintiff had also expired on 01.05.2000. The defendant, who was her brother-in-law, had forcibly dispossessed the plaintiff from the suit property. He was further threatening her. The present suit was accordingly filed.

3. In the written statement, it was stated that the deceased Gainda Ram was the absolute owner of the property i.e. property bearing no. 79/A-10, Gali no. 3, Gurunanak Pura, Delhi-92. It was his self acquired property. He died leaving behind two sons and two daughters. An earlier suit had been filed by the husband of the plaintiff during his lifetime; that suit had been compromised on 04.09.2001 and the suit had been permitted to be withdrawn on an application under Order 23 Rule 1 of the Code of Civil Procedure (hereinafter referred to as 'Code'). The present suit has been filed belatedly after 10 years.

4. On the pleadings of the parties, following six issues were framed:-

- "1. Whether suit of the plaintiff is without bearing cause of action? OPD*
- 2. Whether plaintiff has not come with clean hands and conceal the material facts? OPD*
- 3. Whether father-in-law of the plaintiff as well as defendant executed a WILL dated 19.06.1990 in favour of Shri. Jai Prakash, Shri. Rajesh and Smt. Ram Pyari? OPP*
- 4. Whether plaintiff is entitled for decree of declaration? OPP*
- 5. Whether plaintiff is entitled for decree of permanent injunction? OPP*
- 6. Relief."*

5. Issue nos. 3, 4 and 5 are relevant for this controversy. They were all decided in favour of plaintiff and against the defendant. It was held that the father-in-law of the plaintiff had, in fact, executed a will dated 19.06.1990 in favour of three persons namely Sh. Jai

Prakash (deceased husband of plaintiff), Sh. Rajesh and Smt. Ram Pyari (deceased mother-in-law of plaintiff); suit property was to be divided amongst them; will had been proved as Ex. PW 1 / 2; site plans depicting the share of the beneficiaries had been proved as Ex. PW 1 / 2 and PW 1/ 2A. The attesting witness to the will had come into the witness box as PW-2. Court had returned a finding that in the Union Territory of Delhi, probate of a will is not required. Will had been duly proved. Suit of the plaintiff was decreed.

6. The impugned judgment had endorsed this finding. The finding returned is as follows:-

"5. By way of grounds of appeal, it is alleged that Ld. Trial Court has not considered the actual facts and evidence on record. The alleged will is forged. Even, otherwise suit could not decreed on the basis of will without obtaining a probate of will. The impugned judgment and decree have been passed mechanically, without application of judicial mind.

6. In view of the grounds of appeal only question which emerges for consideration is whether will is genuine. If yes, whether it could be made basis for passing impugned judgment and decree. If this point is decided it shall dispose of this appeal.

7. I have gone through the entire trial court record including impugned judgment carefully and heard Ld. Counsels for parties with patience at length and considered the written submissions filed by appellant.

8. The case of the appellant/defendant is that his father was absolute owner of self acquired property No. 79A-10, Gali No. 3, Gurunanakpura, Delhi-92 out of his own earnings. Then all the Class-1 legal heirs of his father after his death inherited this property in equal shares. Then how could his mother alone sell entire property to appellant/defendant, if so, what was the need of relinquishment deed etc. Where has share of appellant's elder brother gone? This goes to discard the documents of defendant DW 1/1 to DW 1/5. They are merely waste papers, of no value. Defendant has failed to produce the copy of compromise, order or statements in suit filed by Jai Parkash, his brother, against him. Thus, there is found, no force in the case of defendant. Even his own witness DW 2 Smt. Kanta his sister, has admitted signature on will, like her father.

Therefore, by way of pre-ponderance of evidence, will is proved. There is no requirement probate of will in Delhi. That too which it has been acted upon.

9. Accordingly, it is held that will is genuine and it could be made basis for impugned judgment and decree. The point for determination is accordingly answered in affirmative. There is no infirmity, illegality or perversity in the impugned judgment. No ground of appeal is made out to interfere with impugned judgment and decree.

10. In view of above position of facts and circumstances the impugned judgment and decree are upheld and the appeal is hereby dismissed with cost throughout. Decree sheet be drawn accordingly. Trial Court record be returned with copy of judgment immediately. File be consigned to record room."

7. This is a second appeal. It is yet at the stage of admission. On behalf of the appellant, it has been urged that the question about the genuineness of the will could only be decided by the probate court and civil court has no jurisdiction to go into the matter. Reliance has been placed upon 154 (2008) DLT 354 Priyanka Vivek Batra Vs. Neeru Malik and Ors. to support the submission that under Section 34 of the Specific Relief Act, declaration can be granted only of any legal character or right to any property. It is pointed out that in this case, the Bench of the Delhi High Court had held that no declaration can be made during the pendency of probate proceedings. Reliance upon this judgment is totally misplaced. Admittedly, in this case, there are no probate proceedings pending. It is also an admitted case that in Union Territory of Delhi, probate of a will is not mandatory. The judgment of 2002 VAD (Delhi) 733 Manmohan Singh Vs. Smt. Joginder Kaur & Ors. also does not help the case of the appellant. In this case, it had, in fact, been held that a suit for declaration is maintainable where either a party has been evicted from possession, secondly, a person must possess a letter of administration before filing the suit

and, thirdly, where there is a contention of the fact that proceedings shall take as nearly as may be a form of a regular suit. Condition no. 1 has been fulfilled; plaintiff has categorically averred that she had been evicted from her possession; suit was maintainable. Reliance upon the judgment of the Madras Bench reported in AIR 1992 Madras 136 Alagammai and Ors Vs. Rakkammal is also unwarranted. In this case, court has held that where a decision is rendered by an ordinary civil court and a decision is rendered by a probate court on question of truth, validity, genuineness and due execution of a will, the decision of the probate court is a judgment in rem, which will bind not only the parties before it, but the whole world. There is no dispute to this proposition. It is wholly inapplicable to the present case as admittedly there are no probate proceedings filed or pending.

8. The substantial questions of law have been embodied at page 1 of the body of appeal. They read as follows:-

- a) Whether when Specific law is provided to get the Will probated under the Succession Act, can the procedures of General law could be adopted to get the Will validated by filing the suit for Declaration?*
- b) Whether the probate is not essential if the Will is under cloud?*
- c) Whether on the basis on un-registered Will the suit of the respondent will be maintainable without obtaining probate?*
- d) Whether the Regular First Appeal can just be dismissed without deciding the issue on admissibility of Will?*
- e) Whether without impleading the legal heirs, the suit of declaration is maintainable filed on the basis of forged Will?*
- f) Whether the Suit for Declaration on the basis of Will is maintainable and not barred by limitation as the same was filed after a gap of more than 12 years?"*

9. No substantial question of law has arisen. Both the fact finding courts have delved into the evidence- both oral and documentary- to arrive at the finding that the will of the deceased

father-in-law was a valid and binding will. The plaintiff was rightly entitled to her share in the suit property pursuant to this document. No interference is called for in the impugned judgment as no substantial question of law has arisen. Appeal as also the pending applications are dismissed in limine.

INDERMEET KAUR, J.

MARCH 10, 2011
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