

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

+ **RFA No.783 /2003**

% **30th January, 2012**

SHRI GANESHI LAL Appellant
Through: Mr. B.D. Batra, Advocate.

versus

SHRI ANANT RAM & ANR. Respondents
Through: Mr. T.C. Sharma, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 2.8.2003. By the impugned judgment, the suit of the appellant/plaintiff for partition and permanent injunction was dismissed.

2. The facts of the case are that the appellant/plaintiff filed the subject suit for partition of the property bearing No.C-376, Dakshin Puri on the ground that being the son and legal heir of Sh. Khachera who owned the property, he is a co-owner of the property. The appellant/plaintiff relied upon a Will dated 22.2.1989 which was said to have been executed

in his favour by the father- Sh. Khachera. The respondent No.1/defendant No.1 contested the suit by filing the written statement and by stating that the father during his lifetime had given another property bearing No.K-571, Dakshin Puri to the appellant/plaintiff and therefore had executed his Will dated 9.3.1989 bequeathing the suit property to the defendants (defendant No.2 being the other son of Sh. Khachera).

3. After completion of pleadings, the trial Court framed the following issues:-

“1. Whether the suit has been properly valued for the purpose of court fees? OPP

2. Whether father of parties executed WILL in favour of defendant No.1? OPD-1.

3. Whether the plaintiff is entitled for the relief claimed? OPP

4. Relief.”

4. The main issue was issue No.2 and in this regard the trial Court has arrived at a finding that the appellant/plaintiff failed to prove the Will, Ex.PW1/A (Will dated 22.2.1989) inasmuch as no attesting witness was examined. I may note that as per Section 68 of the Evidence Act, 1872 where a document is required by law to be attested, it shall not be used as evidence unless at least one attesting witness has been called for the purpose of exhibiting and proving of the document. The Will has to be

attested by two attesting witnesses and therefore being a document which requires to be attested by law, it was incumbent upon the appellant/plaintiff to prove the Will dated 22.2.1989 through the attesting witnesses. No reasons have been given by the appellant/plaintiff for not summoning the witnesses to the alleged Will dated 22.2.1989 which has been marked as Ex.PW1/A. The trial Court therefore rightly arrived at a finding discarding the Will Ex.PW1/A relied upon by the appellant/plaintiff. The trial Court also held the Will, Ex.DW2/P-1 being the Will dated 9.3.1989 of Sh. Khachera as proved inasmuch as the said Will was proved by the attesting witnesses including Sh. Gopi Ram/DW2 who is the maternal uncle and equally close to both the parties. In fact, the trial Court has also noted inconsistencies in the stand of the appellant/plaintiff to hold that the appellant/plaintiff lacks credibility. The following are the findings given by the trial Court with respect to issue No.2 and with which I agree:-

“ISSUE NO.2: Onus to prove this issue was on defendant no.1. According to defendant no.1 in written statement, their father left Will dated 09.03.1989. Plaintiff has also taken plea in plaint in para 9 that his father left Will dated 22.02.1989. In this issue, it will be discussed if father of parties executed Will in favour of plaintiff dated 22.02.1989 or he executed Will in favour of defendant dated 09.03.1989, though no separate issue has been framed on the point if Sh. Khachera, father of parties executed Will in favour of plaintiff. Accordingly to plaintiff, in plaint as well as in affidavit, Will Ex.PW1/A was executed in respect of suit property C/376. Their appears thumb impression of deceased father of parties. According to this document, Ex.PW1/A, the suit

property was to be divided amongst parties. Plaintiff examined himself as PW1 and has stated regarding Ex.PW1/A. Defendant no.1 examined himself as DW1 and has taken the plea that EXPW1/A is forged document and was not executed by their father. Interestingly, plaintiff did not examine any of the attesting witnesses to prove EXPW1/A though it was signed by three witnesses. The plaintiff has to prove that the Will was executed in the presence of at least two witnesses. I am of the opinion that in the absence of proper proof, EXPW1/A cannot be considered in favour of plaintiff and EXPW1/A has to be kept out of consideration. Now, it is to be considered if Will EXDW2/P-1 was executed by father of parties or not. This Will is dated 02.03.1989 and it was executed in the presence of Sh. Balbir Singh, Sh. Gopi Ram, Sh. Chhida Ram and Sh. Kamal Singh. Defendant examined Sh. Gopi Ram as DW2. According to this witness, Sh. Khachera Singh, father of the parties called them and told them that he wanted to give suit property to Sh. Anant Ram and Sh. Tej Singh. According to this witness, he alongwith Sh. Khachera Singh and other witnesses went to Patiala House Court and got this Will executed. According to this witness, it was signed by Sh. Khachera Singh as well as by other witnesses. In cross examination of this witness, several questions were put to testify the statement of DW2 on the point of execution of Will, in favour of defendant no.1 and 2. There is nothing in cross examination of DW2 to create doubt in the version given by him on oath. The witness appears to be illiterate person as is clear from his signature. DW2 could not tell the date of calling of this witness along with others to deceased a house. This is not so material. In cross examination, DW2 has named persons who accompanied him to the house of Sh. Khachera Ram. According to this witness, it was compromise. However, from the perusal of this document EXDW2/P-1, has also been mentioned by DW3 Sh. Balbir Singh as EXDW2/1. As the attesting witnesses are illiterate person, it is immaterial if they have mentioned the document in favour of defendant no.1 and 2 as compromise. If one goes through this document, the intention of Sh. Khachera Singh was to give legal right over suit property in favour of defendants. It is also clearly mentioned EXDW2/P-1 that plaintiff will have no legal right over the suit property. It is also mentioned in this Will in favour of defendants that the Will has been executed to avoid further litigation between parties. EXDW2/P-1 has also been

proved by DW3 Sh. Balbir Singh. Sh. Balbir Singh has also
deposed in his affidavit that this document EXDW2/1 was executed
by Sh. Khachera Singh in their presence and they also signed it. In
cross examination of DW3, the witness has replied that they were
called by Sh. Khachera Singh to settle dispute of the property in
dispute. This witness has also stated in cross examination that
document was prepared at Patiala House Court. Same is statement
made by DW2, another attesting witness. This witness has further
stated in examination in chief that the document was signed by
deceased father of parties and other witnesses. Again, the witness
has stated that he does not remember the date of purchase of papers.
Being illiterate person, such like details are not expected from such
persons. It is apparent from the perusal of cross examination of
DW2 and DW3 that they have no motive to make false statement.
Suggestion was given to defendant no. 3 by plaintiff that he is
deposing being relative of defendant. DW3 has clearly stated in his
cross examination in the opening line of Sh. Khachera Singh was
not related to him and he was his cousin. That alone is not
sufficient to discard testimony of DW2. However, DW2 Sh. Gopi
Ram is material uncle of parties. It shows that he is equally close to
plaintiff and defendants. Statement made on oath by material uncle
regarding execution of document has to be believed and there is no
reason to discard his testimony without any reason. DW2 is
material uncle of plaintiff as well as of defendant and he is not
expected to tell lie on oath without any reason. Nothing has been
brought in the cross examination of DW2 that he has favoured
defendant no 1 and 2 on account of certain reason. In the absence
of such material on record, the statement made by this witness has
to be believed. In the light of Statement made by DW2 and DW3,
it has to be concluded that Sh. Khachera Ram executed document
i.e. Will in favour of defendants. It may be appropriate to mention
that question was also put in cross examination of DW2 that DW2
has signed EXDW2/P-1. It shows that it is also case of plaintiff
that EXDW2/P-1 / EXDW2/1 were signed by DW2 Sh. Gopi Ram.
The defendants have proved that this document was executed by
deceased Sh. Khachera Singh/Khachera Ram. It will also not be
out of context to discuss the plea taken, by plaintiff in respect of
suit property. In plaint, case of the plaintiff is that his father
purchased plot no. C-376 and entire money was given by plaintiff.
According to plaintiff, he build two rooms on the above plot on

ground floor and later on constructed one more room on first floor with his money. But, in his cross examination PW1 admitted that the property was purchased by his father and it has been constructed upto ground floor at the time of purchase. It shows that plea taken by plaintiff in para no. 6 of the plaint is not correct wherein he has pleaded that he raised construction on ground floor with his saying. Interestingly, plaintiff gave suggestion to DW1 to the effect that he spent money for construction of ground floor also. It shows that he has taken contradictory stand at the time of cross examination of DW1 and at the time of his cross examination. It has been admitted by plaintiff that he is not having any bank account. However, plaintiff has deposed that he was doing business. Certainly, plaintiff must have spent lot of money for raising construction over first and second floor. In the absence of any plausible evidence on record, it has to be inferred that property in dispute belonged to deceased father of which he executed Will in favour of defendants depriving plaintiff for any right over suit property. The plea of defendant is further strengthened by language of EXDW2/P-1. It is mentioned in this document that deceased father managed house for plaintiff in K-Block.” (emphasis added)

5. A civil case is decided on balance of probabilities. The onus of proof that the father Sh. Khachera left the Will dated 22.2.1989 as propounded by the appellant/plaintiff was on the appellant/plaintiff and which onus he failed to discharge. The respondents/defendants discharged their onus by proving the subsequent Will dated 9.3.1989 which was exhibited as Ex. DW2/P-1 through the attesting witnesses Sh. Gopi Ram and Shri Balbir Singh. The trial Court was therefore justified in coming at a finding for holding that the appellant/plaintiff had no share in the suit property on account of the Will, Ex.DW2/P-1 and that he was already

given ownership of a property in K-Block of the same colony. Merely because two views are possible this Court sitting in appeal will not interfere with the impugned judgment and decree of the trial Court unless the judgment is grossly perverse or is against law. I do not find the impugned judgment to be against the law or in any manner perverse.

6. In view of the aforesaid, there is no merit in the appeal which is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

VALMIKI J. MEHTA, J

JANUARY 30, 2012
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