

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on : January 30, 2012
Judgment Pronounced on: February 10, 2012

+ RFA(OS) No.28/2005

SUDERSHAN LAL MAINI Appellant
Through: Mr.Hari, Advocate and
Mr.Sanjeev Tyagi, Advocate.

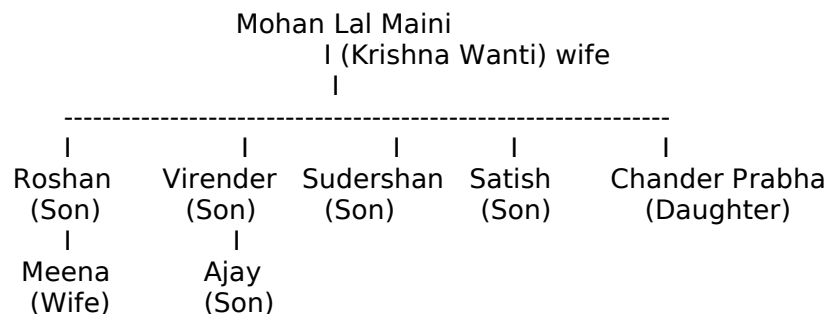
versus

VIRENDER KUMAR MAINI & ORS. Respondents
Through: Mr.R.L.Kohli, Advocate for R-1.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. The dispute in the present appeal is between the family members/legal heirs of Late Sh.Mohan Lal Maini.
2. The genealogy tree of family of Late Sh. Mohan Lal Maini is as under:-



3. In the year 1997 the appellant filed a suit against the respondents for partition of three properties bearing Municipal Nos.B-13/A, A-2 and A-4, Kalkaji, New Delhi (hereinafter referred to as the 'suit properties').

4. The appellant was the plaintiff and the respondents Nos.1, 2 and 3 were defendants Nos.1, 2 and 3 respectively in the suit. We shall be referring to the parties by their nomenclature in the suit.

5. It was pleaded in the plaint that Late Sh.Mohan Lal Maini who was the owner of the suit properties and he died intestate on 25.06.1972, leaving behind his wife Krishna Wanti, 4 sons named, Sudershan Lal Maini (plaintiff), Roshan Lal Maini, Satish K.Maini and Virender Kumar Maini (defendant No.1) and a daughter Chander Prabha (defendant No.2) as his legal heirs. Thus, his aforesaid legal heirs became entitled to 1/6th share each in the suit properties as per the provisions of Section 8 of the Hindu Succession Act, 1956. On 18.07.1972 the children of Late Mohan Lal Maini executed a relinquishment deed relinquishing their respective 1/6th share in the suit properties in favour of their mother Krishna Wanti (hereinafter referred to as the 'deceased') who became the exclusive owner of the suit properties. Roshan Lal Maini died intestate on 20.04.1979 leaving behind his wife Meena Maini (defendant No.3) as his sole legal heir. The deceased died intestate on 19.01.1993 leaving behind 3 sons i.e. the plaintiff, the defendant No.1 and Satish K. Maini as also Meena Maini, the wife of her predeceased son Roshan Lal Maini and a daughter Chander Prabha (defendant No.2) as her legal heirs. Thereafter, Satish K. Maini expired on 25.02.1993 leaving behind no Class-I heir and in this manner the plaintiff claimed 1/4th share in the suit properties.

6. Whereas defendants No.2 and 3 chose not to contest and hence did not cause appearance to be made after they

were served with summons in the suit and were hence proceeded ex-parte.

7. The defence taken by defendant No.1 was that the deceased had executed a Will (Ex.DY) dated 02.12.1992 where-under she had bequeathed the property bearing Municipal Nos.A-2 and A-4, Kalkaji, New Delhi in favour of the plaintiff and the rest had been bequeathed to him and his son.

8. In the replication filed, the plaintiff pleaded that Will Ex.DY dated 02.12.1992 was not executed by the deceased out of her own free will and accord. He pleaded that there was a reference in the said Will to an earlier Will dated 22.10.1992 and thus urged there was something more than what meets the eye qua the Will dated 02.12.1992. He pleaded that the deceased was not enjoying good health and was not in a state of sound disposing mind on the date of the execution of the will Ex.DY as she was suffering from the cancer of ovaries. That taking advantage of the ill-health of the deceased the defendant No.1 Virender Kumar Maini misled the deceased to believe that the earlier will Ex.DX is not valid and got executed the will Ex.DY, under which he and his son Ajay Saini were the major beneficiaries. In essence, it was alleged by the plaintiff that Will Ex.DY is a contrived document.

9. It be highlighted that the Will dated 22.10.1992 to which a reference has been made in the Will dated 02.12.1992 was not produced by either party when issues were settled or even thereafter when admission/denial was effected. As would be noted herein after, the Will exhibited as Ex.DX was produced by Chander Prabha when she appeared as a

witness. Thus, it is apparent that no issue was settled with respect to the Will dated 22.10.1992.

10. On the basis of pleadings of the parties, following issues were settled by the learned Single Judge:-

“(i) Whether the suit has not been properly valued for the purposes of court fee and jurisdiction and court fee has not been paid? If so to what effect?

(ii) Whether the suit is bad for non-joinder and mis-joinder of parties?

(iii) Whether the plaintiff and defendants are joint owners of the suit properties as alleged?

(iv) Whether Smt.Krishnawanti executed her last Will dated 2.12.1992, if so its effect?

(v) Whether the plaintiff is entitled to decree for partition of suit properties? If so, what are their respective shares of the parties?

(vi) Relief.”

11. Plaintiff examined himself as his witness and stated that his mother never executed the Will dated 02.12.1992 and during cross-examination was confronted with the Will Ex.DX dated 22.10.1992 and he stated that the signatures thereon were probably those of his mother. The Will was brought in Court by Chander Prabha.

12. To prove the Will dated 02.12.1992 defendant No.1 produced Mahender Kumar Wadhwa, the alleged attesting witness to the Will as DW-2 after examining himself as DW-1 and thereafter he examined Chander Prabha as DW-3.

13. In his testimony the defendant No.1 reiterated the case set up by him in his written statement. He deposed that the deceased was in a state of sound disposing mind till about 6 days before her death. That the will Ex.DX dated 22.10.1992

contains the signatures of the deceased. That his sister Chander Prabha informed him about the existence of the will Ex.DY dated 02.12.1992 on the date when kriya ceremony of the deceased was held. He proved the discharge summary Ex.D1/3 of the deceased issued by G.B. Pant Hospital, which records that the deceased was admitted to the hospital on 28.10.1992 and discharged the next day i.e. 29.10.1992 and that she was suffering from malignant cancer of the ovaries.

14. It would be relevant to note the following portion of the cross-examination of the defendant No.1:-

“....In October, November, December, 1992, there was no episode in the family by which I could say that my mother became upset with my sister. Mostly three persons used to come to meet my mother in her last dates – one was Mr. and Mrs. Kapoor, one lady nurse and one other lady. I do not know why my mother had written in the second will “I am advised.....”. Possibly she might have consulted someone but she did not consult me. According to me the first will dated 22.10.1992 is also legal.

Q. Can you explain what might have transpired that your mother from giving the share in the property to her daughter and a relatively larger share to the plaintiff, suddenly decided to exclude her daughter and reduce the share of the plaintiff?

Ans. It is for the person who execute the will to decide what he writes in the will and to whom she gives.

.....It is correct to suggest that in the second will me and my son had got a little better share than what was given to us in the first will. My son Ajay is doing service. In 1992 Ajay had started his business. His business was normal. The business was that of printing and repair of computers.....”.

15. Mahinder Kumar Wadhwa DW-2, deposed that he was an attesting witness to the Wills Ex.DX and Ex.DY respectively, executed by the deceased. That he was the neighbour of the deceased and had known her for about 6-7 years prior to her death. The deceased was on visiting terms with him. The deceased was in a state of sound disposing mind during her lifetime. In October, 1992 the deceased called him to her residence. When he reached there, he met one Dr.Panwar and Chander Prabha, the daughter of the deceased. Dr.Panwar read over and explained the contents of the will Ex.DX to the deceased in his presence. Thereafter the deceased appended her signatures on the will Ex.DX in his presence as also in the presence of Dr.Panwar. Thereafter he and Dr.Panwar appended their signatures on the will Ex.DX as attesting witnesses in the presence of each other as also in the presence of the deceased. After about a month from the execution of the will Ex.DX the deceased came to his residence and informed him that she wants to cancel the will Ex.DX and execute another will and requested him to be an attesting witness to the said Will as well. On 02.12.1992 at about 4-5 P.M. he went to the residence of the deceased where the deceased was ready with the will Ex.DY. At that time, one Mr.Inder Raj Malhotra and Chander Prabha, the daughter of the deceased, were already present there. The will Ex.DY was read over and contents thereof were explained to the deceased in his presence. Thereafter the deceased appended her signatures on the will Ex.DY in his presence. Thereafter he and Inder Raj Malhotra appended their signatures on the Will Ex.DY as attesting witnesses. The deceased handed over the will Ex.DY to her daughter Chander Prabha and instructed her to disclose about the same to her

sons after her death. The deceased had executed the will Ex.DY out of her own free and accord. Chander Prabha disclosed the existence of the will Ex.DY dated 02.12.1992 to her brothers including the plaintiff on the date when kriya ceremony of the deceased was held.

16. The relevant portion of the cross-examination of Mahender Kumar Wadhwa, DW-2 reads as under:-

“The will Ex DY was executed on 2.12.92. Ex DY was already typed and written when I reached the house of Smt. Krishna Wanti on 2.12.92. I have no knowledge wherefrom it was got typed or who purchased the papers on which it was written....The will was read over and translated to Smt. Krishna Wanti in my presence by some gentleman or Smt. Chander Prabha and she admitted the same to be correct and then executed it, therefore, I say there was no pressure on her. I do not remember the name of the gentleman who was present there.”

Q. How have you identified the signatures of Shri Inder Raj Malhotra when you stated that you do not even remember the name of the person who was present?

Ans. I do not remember how many persons were present at the time Smt. Krishna Wanti executed her will.....”

17. Chander Prabha DW-3, the daughter of the deceased, deposed that on 22.10.1992 the deceased had executed the will Ex.DX in her presence. Dr.Panwar and Mahender Kumar Wadhwa had attested the will Ex.DX in her presence. The deceased was unhappy with the plaintiff as he did not take care of the family, due to which reason the deceased wanted to change the will Ex.DX. The deceased got prepared the will Ex.DY with the help of one J.C.Kapoor, a neighbour of the deceased. The deceased had executed the will Ex.DY in her

presence. Inder Raj Malhotra and Mahender Kumar Wadhwa had attested the will Ex.DY in her presence. After the execution of the will Ex.DY the deceased had handed over the same to her and instructed her to disclose about the same to her brothers after her death. The deceased was in a state of sound disposing mind till her demise on 19.01.1993. The deceased had executed the wills Ex.DX and DY out of her own free will and accord. She disclosed about the existence of the Wills Ex.DX and Ex.DY dated 22.10.1992 and 02.12.1992 respectively to her brothers including the plaintiff on the date when Kriya ceremony of the deceased was held.

18. The learned Single Judge has held that the Will Ex.DY dated 02.12.1992 is the last legal and valid testament executed by the deceased and has thus dismissed the suit. Discussing the suspicions raised qua the will and in particular that within less than two months of the execution of an earlier Will, the deceased had materially altered the bequest, in para 13 of the impugned decision, the learned Single Judge has reasoned as under:-

“13. Applying the above principles to the facts at hand, plaintiff's case is that he has been living separately in his own flat at Vasant Kunj, alongwith his family about 8 years prior to the death of his mother. He is employed as Professor in the Faculty of Law, Delhi University and his son is settled abroad; the first defendant is a retired person and his son is yet not settled. In these circumstances, it is not unnatural for the mother to give a larger share to the first defendant and his son. In terms of the Will, plaintiff has been given flat Nos.A-2 and A-4, Kalkaji. Defendant and his son have been given the house in which they had been living together. There is nothing inherently wrong, giving rise to any suspicion. The signatures on the Will are not in dispute. DW-2

Dr.Wadhawan has stated that the Will was executed by the testatrix after the same was read over and explained to her in the presence of the witnesses. The most vital evidence to support the Will comes from DW-3, sister of the plaintiff. She is an M.A. B.Ed., employed as a teacher living separately in a nearby house. She has not been given any share in the property under the Will. She has stated that her mother had executed the Will, Ex. DY, of her own free will. There is no reason to disbelieve a person who does not get any share of the property under the Will. The earlier Will has also been produced by her. She has stated at the time of kriya ceremony of her mother, existence of the Will was disclosed. Defendants 1 & 3 have stated that Smt.Krishnawanti was mobile when she had executed the Will. Plaintiff has not been able to produce any evidence to the contrary, merely because a person is suffering from cancer of ovaries, would not *ipso facto* show that she was in sound disposing state of health. The first defendant has himself produced the discharge slip of the LNJP hospital, Ex.D-3. There is nothing in the certificate to indicate that testatrix was not in a sound state of mind at the time of the execution of the Will.

14. In view of the above, it is held that defendant has been able to prove that Smt.Krishnawanti executed her last Will on 2.12.1992 of her own free will, while she was in sound state of mind, in respect of the suit properties.....”

(Emphasis Supplied)

19. Before proceeding with our discussion, we note the contents of the Will dated 02.12.1992, Ex.DY. It reads as under:-

“WILL

I, Krishna Wanti, wife of Late Shri Mohan Lal Maini aged about 75 years, resident of B-13/A, Kalkaji, New Delhi – 110019, do hereby make this as my last Will and Testament to operate after my death. I made one Will on 22.10.92 earlier which I

am advised is not a valid Will, I, therefore, hereby
revoke that Will and declare as my last Will.

I am in normal health and sound disposing mind and I am making this Will entirely on my own volition to safeguard the interest of my family as well as to avoid any ambiguities or disputes after my demise.

I am living with my son Shri Virender Kumar Maini and his family and Shri Satish Kumar Maini my youngest unmarried son.

I am the mother of four sons namely Late Shri Roshan Lal Maini, Shri Virender Kumar Maini, Shri Sudarshan Lal Maini, Shri Satish Kumar Maini and one daughter Smt. Chander Prabha married to Shri Surinder Pal Choddha who after the death of my husband Shri Mohan Lal Maini made me owner of properties left by my late husband through a Deed registered with Sub-Registrar, Asaf Ali Road, Delhi.

I am owner of immovable Property Bearing No.B-13/A, Kalkaji, New Delhi – 110019, where I am living at present, and A-2 and A-4, Kalkaji, New Delhi – 110019 which are given on rent to Shri Yash Pal Suri, and Shri Daljit Singh respectively.

I hereby devise that the properties owned by me and mentioned above shall be distributed amongst my lineal descendants. I do not want to give any share out of my properties to the widow of my deceased son Shri Roshan Lal Maini as she deserted my deceased son immediately after his marriage.

I am not giving any share in my Properties to my daughter Shrimati Chander Prabha wife of Shri Surinder Pal Choddha as I spent substantial amount on her marriage and she is happily married and happily living with her family.

I hereby leave, give and devise to my sons Shri Virender Kumar Maini and Shri Satish Kumar Maini House No.B-13/A, Kalkaji, New Delhi-110019, in which they are residing in equal shares. As my son Satish Kumar Maini is unmarried, and mentally

sick and unemployed and Shri Ajay Maini S/o Shri Virender Kumar Maini has promised to keep him maintained till he is alive, his share on his death shall go to Shri Ajay Maini my Grandson who also looked after me in my Old Age. If Shri Satish Kumar Maini marries in his life his Share in the Property, shall be inherited by his wife and children, if any and Shri Ajay Maini shall have no right, title or interest in the Property.

I, leave, give, devise and bequeath absolutely and for ever to my son, Shri Sudarshan Lal Maini Qr. No.A-2, and A-4, Kalkaji, New Delhi-110019.

I hereby appoint Shri Virender Kumar Maini to be sole executor of my this Will. He will collect rent of Property No.A-2, A-4, Kalkaji, New Delhi, till they are sold and spend the same on my son Shri Satish Kumar Maini.

In Witness, I Krishna Wanti, hereunto put my signatures this 2nd December, 1992."

(Emphasis Supplied)

20. We note the contents of the Will dated 22.10.1992, Ex.DX. It reads as under:-

"WILL

I, Krishna Wanti, wife of Late Shri Mohan Lal Maini aged about 75 years, resident of B-13/A, Kalkaji, New Delhi – 110019, do hereby make this as my last Will and Testament to operate after my death or even before it. I have not made any Will at any time in the past and in the event of any document in the nature of Will or a Testamentary disposition is found bearing a date earlier than the present Will the same shall be deemed to have been revoked and superseded and my this Will alone shall operate after my death or even before.

I am in normal health and sound disposing mind and I am making this Will entirely on my own volition to safeguard the interest of my family as well as to avoid any ambiguities or disputes after my demise.

I am living with my son Shri Virender Kumar Maini and his family and Shri Satish Kumar Maini

my youngest son and am head of family vide ration card No.4707, Registration No.507 Circle No.33, issued on 01-01-1988.

I am the mother of four sons namely Late Shri Roshan Lal Maini, Shri Virender Kumar Maini, Shri Sudarshan Lal Maini, Shri Satish Kumar Maini and one daughter Smt. Chander Prabha married to Shri Surinder Pal Choddha who after the death of my husband Shri Mohan Lal Maini made me owner of properties left by my late husband through a Deed registered with Sub-Registrar, Asaf Ali Road, Delhi.

I am owner of immovable Property Bearing No.B-13/A, Kalkaji, New Delhi – 110019, where I am living at present, and A-2 and A-4, Kalkaji, New Delhi – 110019 which are given on rent to Shri Yash Pal Suri, and Shri Daljit Singh respectively.

I hereby devise that the properties owned by me and mentioned above shall be distributed amongst my living children and myself as under. I do not want to give any share to Late Shri Roshan Lal Maini.

I hereby devise that my share out of the said property shall go to my grandson Shri Ajay Maini S/o Shri Virender Kumar Maini R/o B-13/A, Kalkaji, New Delhi – 110019 as he has promised to keep me till I am alive.

The share of my son Shri Satish Kumar Maini shall also go to my grandson Shri Ajay Maini S/o Shri Virender Kumar Maini because he is mentally sick and my grandson Ajay Maini has promised to keep him maintained him till he is alive, as he is unmarried.

I device to give equal shares to my two remaining sons Shri Virender Kumar and Shri Sudershan Lal Maini and my daughter Smt. Chander Prabha W/o Surinder Pal Choddha.

In nutshell I devise that 2/5th of the share of property shall go to Shri Ajay Maini S/o Shri Virender Kumar Maini, 1/5th share to Shri Virender Kumar Maini, both resident of B-13/A, Kalkaji, New

Delhi – 110019, 1/5th to Shri Sudarshan Lal Maini R/o Flat No 3055, Sector D, Pocket-3, Vasant Kunj, New Delhi and 1/5th to Smt. Chander Prabha W/o Shri Surinder Pal Choddha R/o H-16/2, Malviya Nagar, New Delhi – 1100017.

If at any stage it becomes necessary to sell any of the property I authorize my son Shri Virender Kumar Maini to sell the properties in order to fulfill my desire.

I hereby appoint Shri Virender Kumar Maini to be sole executor of my this Will. He will collect rent of Property No.A-2, A-4, Kalkaji, New Delhi, till they are sold and spend the same on my son Shri Satish Kumar Maini.

I Krishna Wanti, have on this 27/10/92 put my signature.”

21. With respect to the reasoning of the learned Single Judge in para 13 and 14 of the impugned decision, with regret we are constrained to note that the learned Single Judge has gullibly digested, after accepting, the arguments advanced with respect to the disproportionate bequest made by the deceased after altering a proportionate bequest made less than two months earlier. The learned Single Judge did not apply his mind to the fact that he was dealing with a Will statedly executed in December 1992 when neither was the plaintiff a professor, nor was his son settled abroad, nor was the first defendant a retired person. This was the status of the parties in the year 2005 when arguments were advanced and the learned Single Judge just about kept on accepting whatever was presented to him, ignoring that the deceased had allegedly executed the Will in December 1992 and what would she know then as to where would fate take her two sons to and where would fate take the plaintiff's son to. The circumstances present and existing when the Will was

statedly executed were relevant and not the circumstances when arguments were advanced. There is an apparent non application of mind.

22. 'Will' as defined under Section 2(h) of the Indian Succession Act means 'the legal declaration of the testator with respect to his property which he desires to be carried into effect after his death'. The essential characteristic of a will, as is well known, is that it is a mere declaration of an intention so long as the testator is alive, a declaration which may be revoked or varied by the testator during his lifetime; it is a disposition that requires the testator's death for its consummation and is but ambulatory or without fixed effect until the happening of this event. The document is a will if it contains specific words of bequest to come into effect after the death of the testator.

23. A will is a solemn document. By it, a dead man entrusts to the living to carry out his wishes and since it is impossible that he can be called either to admit or deny his signatures or to explain the circumstances in which it was executed, duty of care is cast on the shoulders of the court while considering a case of genuineness of the will.

24. The legal burden to prove due execution always lies upon the person propounding a will. The propounder must satisfy the judicial conscience of the court that the instrument so propounded is last will of a free and capable testator.

25. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by the law. The contestant opposing the will may bring material on record meeting such prima facie in which event the onus would shift back on the propounder to

satisfy the Court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. (See the decision of the Supreme Court in Madhukar D.Shende v. Tarabai Aba Shedge [2002] 1 SCR 132).

26. The nature of proof required to prove a will is not different from those required to prove other documents except the requirement of attestation prescribed under Section 63 of the Indian Succession Act. The proof is to be tested on the usual satisfaction of a prudent mind. What distinguishes a will from other document is that the testator would not be available to testify the same as his last will. This introduces an element of solemnity in the decision. Even then the Court has to proceed with the enquiry in the same manner as is done in respect of any other document. The propounder is called upon to show by satisfactory evidence that (1) the will was signed by the testator in the presence of two attesting witnesses; (2) at the relevant time he was in sound and disposing state of mind; (3) he understood the nature and effect i.e., the content of the disposition; (4) he put the signature to the document of his own free will. The onus of the propounder can be said to be discharged on proof of the above essential facts. No specific standard of proof can be enunciated which must be applicable to all the cases. Every case depends upon its circumstances. Apart from other proof, conduct of parties is very material and has considerable bearing on evidence as to the genuineness of will which is propounded. Courts have to be vigilant and zealous in examining evidence. Rules relating to proof of wills are not rules of laws but are rules of prudence.

27. However, in a case surrounded by suspicious circumstances the initial onus very heavy; and unless satisfactorily discharged, the Court would be reluctant to treat the document as the last will of the testator. Courts have to evaluate evidence pertaining to the circumstances under which the will was prepared. If a will is prepared and executed under circumstances which raise a well grounded suspicion that the executor did not express his mind under the will, probate would not be granted unless that suspicion is removed. Suspicious circumstances are a presumption to hold against the will. Greater is the suspicion more heavy would be the onus to be discharged by the propounder of the will.

28. Suspicious circumstances like the following may be found in the execution of a will: (i) the signature of the testator may be very shaky and doubtful or not appear to be his usual signature; (ii) the condition of the testator's mind may be very feeble and debilitated at the relevant time; (iii) the disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason; (iv) the dispositions may not appear to be the result of the testator's free will and mind; (v) the propounder takes a prominent part in the execution of the will; (vi) the testator was in the habit of signing blank papers; (vii) delay in propounding the will; and (viii) incorrect recitals in the will. The circumstances narrated hereinabove are not exhaustive.

29. The burden upon the propounder to show that the will in question is the last legal and valid testament of the testator is all the more heavy when the disposition

evidenced by the will runs counter to the disposition admitted to have been made by the testator by previous wills executed by him.

30. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even if there is no such plea but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court.

31. The golden rule in interpreting a will is to give effect to the testator's intention as ascertained from the language, which he has used. The overriding duty of a Court is to construe the language which the testator has in fact employed giving due weight to all the words and rejecting none to which a meaning can reasonably be assigned. The Court is entitled to put itself into the testator's arm chair to construe a will and to form an opinion apart from the decided cases and then, to see whether those decisions require any modification of that opinion and not to beckon by considering as to how far the will in question resemble other will upon which the decisions have been given. The proposition that the will has to be read as a whole cannot be disputed. Whether there is a will on the basis of the document, the probate Court certainly will not proceed to consider as to whether or not the disposition of the property was good or bad. The primary duty of the probate Court is to see first whether prima facie, the document constituted a will.

32. Keeping the afore-noted legal principles in mind, we proceed to determine whether the defendant No.1 has been able to establish that the will Ex.DY is the last legal and valid testament of the deceased.

33. The basic contours of the present case need to be noted. At the outset it strikes the reader that when within a gap of 40 days of the Will Ex.DX being executed, the Will Ex.DY has surfaced. What made the deceased change her mind is unknown. The so called flats bearing Municipal Nos.A-2 and A-4 Kalkaji are a one room tenement on the first floor having total carpet area of less than 600 sq.ft. and plot No.B-13/A Kalkaji ad-measures 200 sq.yd. i.e. 1800 sq.ft. on which, when the Will was executed a 2½ storeyed building could be constructed, and we are informed that then only a single floor was constructed. Under the Will Ex.DX the plaintiff has been given 1/5th share in all the properties and there are reasons as to why the deceased had given 1/5th share to her daughter, 2/5th share to her grandson Ajay Maini and 1/5th to her son Virender Maini. There is a natural surrounding in the Will. Why would the deceased change her Will and alter the bequest materially? No reasons have surfaced.

34. It is the case of the defendant No.1 that he was aware of the will Ex.DY soon after the death of the deceased. It is further his case that the relations between him and plaintiff became strained soon after the death of the deceased on account of the plaintiff demanding a partition of the suit properties. His not propounding the Will Ex.DY till the suit was filed assumes importance. Delay in propounding a Will is an important factor to be taken note of while deciding on a challenge to the Will in question.

35. That the deceased was aged and suffering from cancer of the ovaries is an admitted fact. The deceased died on 19.01.1993 i.e. within less than 2 months of 02.12.1992 is also of importance. We can safely presume

that due to her advancing age and extreme ill health, she was in no position to move around. The Will Ex.DY has been scribed on a stamp paper. Who purchased the stamp paper for the deceased? There is no answer. Who got the Will typed? There is no answer. Whereas Mahender Kumar Wadhwa DW-2 has stated that a gentleman whose name he does not recollect was present when the Will Ex.DY was executed, Chander Prabha categorically states that except for the two attesting witnesses and herself, nobody else was present.

36. There is a grave suspicion that after the deceased had executed the Will Ex.DX, somebody ill informed her that having executed a Will on a plain paper, she had executed a Will which was not acceptable to law and thus she should re-execute the Will on a stamp paper, and believing that what she was re-executing, was a verbatim copy of the original, the deceased did so. Otherwise, there is no explanation as to why the Will Ex.DY is scribed on an ordinary paper and the Will Ex.DX on a stamp paper.

37. We conclude by holding that there is a grave suspicion qua the Will Ex.DY, which suspicion has not been removed by the propounder of the Will, requiring it to be held that the Will Ex.DY dated 02.12.1992 is not the last legal and valid testamentary disposition by the deceased. Since nobody has propounded the Will dated 22.10.1992 and noting that before reserving for judgment we had asked the parties whether they are ready to accept the bequest as per the Will dated 22.10.1992, defendant No.1 categorically refused to do so, but the plaintiff was ready and willing to consider accepting the same as the bequest of his mother, but did not firm up his mind because defendant No.1

outrightly rejected the said proposal and thus it was useless for him to ponder over the same, we allow the appeal and set aside the impugned judgment and decree dated 31.05.2005 and pass a preliminary decree in CS(OS) No.1565/1997 declaring that the plaintiff has 1/4th share in the suit properties and the remaining 3/4th share is that of the three defendants i.e. each defendant also has 1/4th share in the three suit properties.

38. The suit stands restored for further steps to be taken by the learned Single Judge to proceed to partition the properties as required by law.

39. The appellant is held entitled to costs all throughout against defendant No.1.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

FEBRUARY 10, 2012
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