

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

+ **RFA No.465/2010**

% **28th February, 2012**

GULAB CHAUDHARY Appellant
Through: Ms. Deepika, Adv.

versus

GOVINDER SINGH DAHIYA & ANR. Respondents
Through: Mr. Ajay Dahiya, Adv. for R-1.

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 (RFA) filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the Trial Court dated 15.1.2010 dismissing the suit filed by the appellant/plaintiff/sister for declaration, possession and injunction with respect to the property of the father, late Sh. Bhagwan Singh.

2. The appellant/plaintiff in the plaint pleaded that she was the daughter of late Sh. Bhagwan Singh and was entitled to one-fourth share in the suit property bearing no. 6301/1A(2), Kamla Nagar, Delhi. The

appellant/plaintiff/sister also prayed for possession of the suit property to the extent of her one-fourth share. Direction was also sought against the defendant no.2/respondent no.2/Municipal Corporation of Delhi to mutate one-fourth share of the property in the name of the appellant/plaintiff, and injunction was prayed for restraining the respondent no.1/defendant no.1 from transferring etc the suit property. The appellant/plaintiff claimed that the father-Bhagwan Singh died on 25.11.1987 leaving behind, besides the appellant/plaintiff-the daughter and the defendant no.1-son, two other daughters namely, Smt. Daya and Smt. Kamla. It was pleaded in the plaint that in 1987, in around the time of death of her father the respondent no.1/defendant no.1 told her of a Will executed in his name by the father. It is pleaded that till 2006, i.e. for 19 years, the appellant/plaintiff took no action because she only came to know in May, 2006 that the Will was a manipulation done by the defendant no.1/respondent no.1. The appellant/plaintiff claimed to have sent the legal notice dated 3.5.2006 and thereafter in the absence of response filed the subject suit.

3. The respondent no.1/defendant no.1 contested the suit on two basic grounds. The first was that the suit was barred by limitation and the second was that the respondent no.1/defendant no.1 became the owner of the suit property by virtue of a registered Will dated 20.9.1986 executed by

the father, and which was registered with the sub-Registrar at Sonapat, Haryana on 29.9.1986.

4. After completion of pleadings, the Trial Court framed the following issues:

- “1. Whether the suit has not been valued for the purpose of court fees and pecuniary jurisdiction? (OPD)
2. Whether the suit is barred by limitation? (OPD)
3. Whether the Will dated 29.9.1986 of late Sh. Bhagwan Dass is genuine as per the pleadings in the Written Statement? If yes, its effect upon the relief for declaration sought for by the plaintiff in the plaint? (OP Parties)
4. Whether the plaintiff is entitled to the relief of possession as asked for in the plaint? (OPP)
5. Whether the plaintiff is entitled to the relief of permanent and mandatory injunction as asked for in the plaint? (OPP)
6. Relief.”

5. The Trial Court held the suit to be within limitation, however, dismissed the suit by holding that the father-late Sh. Bhagwan Singh had executed a Will dated 29.9.1986, Ex.PW2/1, bequeathing the suit property in favour of the respondent no.1/defendant no1. The reasoning of the Trial Court to uphold the Will dated 29.9.1986 is on the basis of following observations:-

“I have given my careful consideration to the aspects raised before me. **Firstly** the Will in dispute dated 29.9.1986 which is **Ex.PW2/1** is a registered document and proved by PW2 is admissible in evidence. **Secondly** it is not disputed that late Sh. Bhagwan Singh who had executed the Will, was highly qualified having studied in

London and was a retired Class-I Gazetted Officer from the Indian Railway Services. **Thirdly** it has been duly proved by the defendant that both the attesting witnesses namely Mahender Singh S/o Late Sh. Swaroop Singh and Sh. Sukhbir Singh S/o Late Sh. Kali Ram have expired whose death certificate are **Ex.DW3/A & Ex.DW3/B** have been duly proved by the witness from the Sub Registrar Office (Death & Birth) Sonapat, Haryana. Both the said witnesses were from the same village as that of the testator, the witness Mahender Singh being the close relative of the deceased testator being the first cousin. **Fourthly** the plaintiff has not denied the signatures of her father on the Will rather she has admitted the same. The relevant portion of her cross-examination is as under:

“..... It is correct that in the written statement as well as in my previous affidavit/ evidence I have not denied the signatures of my father on the Will exhibit PW-2/1....”

This being so, the signatures of the testator have been duly admitted by both the parties. **Fifthly** it has been pleaded by the plaintiff in the plaint that at the time of execution of the Will her father was not in a proper state of mind and could not distinguish between right and wrong and it is probable that the defendant no.1 took the signatures of Bhagwan Singh with malafide intention. She has not produced any evidence on record to substantiate the aforesaid allegations rather in her cross-examination she has deposed that she had never stated/ pleaded that her father was not in sound mental health at the time of execution of the Will. The relevant portion of his cross-examination is as under:

“..... I have not stated/ pleaded that my father was not in sound mental health at the time of the execution of the Will.....”

This being so the probability of the defendant no. 1 having induced his father seems remote. **Sixthly** it is alleged by the plaintiff that her father was highly educated having studied in London and could not have written the Will in Hindi and that too without mentioning the details of the various properties. In this regard, it is an admitted case that the testator was a Class-I, Gazetted Officer and was working in Indian Railways. The plaintiff has admitted that her mother had studied till class 5th and his father used to normally

converse in Hindi to her. She has also deposed that her father knew both Hindi and English as well. The relevant portion of his cross-examination is reproduced as under:

“..... My mother had studied till fifth standard. My father used to normally converse in Hindi. My father knew Hindi language. He knew both Hindi and English languages well.....”

This being so, the apprehension of the plaintiff that her father would not have written the Will in Hindi and the Will could not have been written by some other person, does not hold any merit, more so the plaintiff has failed to lead any evidence in this regard. **Seventhly** it had also been stated that the signatures of the attesting witnesses had not been proved. As observed herein above the factum of death of both the attesting witness has been duly proved. Both the attesting witnesses belong to the same village and Mahender Singh was a close relative to the testator being his cousin and his signatures have been duly identified by DW1. However, in so far as DW2 is concerned she has identified the signatures of Mahender Singh only on the basis of what has been written on the Will whereas she has never seen him writing and signing. Therefore, her testimony in so far as the identification of Mahender Singh cannot be taken as authentic in view of the fact that there is no dispute in so far as the signatures of the testator are concerned. The apprehensions of the plaintiff that the Will might be bearing the signatures and thumb impression of some other person, or that some other person might have been presented before the Sub Registrar before, is unfounded since the only evidence on record is the oral testimony of PW1 which does not find any corroboration or support from any other independent/circumstantial evidence. **Eighthly** it is also alleged by the plaintiff that the property in question has been purchased from the common funds of his father and his three brothers and he did not have right to execute the said Will. The same also does not seem to be very convincing since she has not examined any of the brothers of late Sh. Bhagwan Singh to prove and substantiate the aforesaid allegations nor any other close relative has been examined. **Lastly** it is argued that the Will in question has not been got probated by the defendant no.1 and therefore, no mutation could have been effected. The legal position in this regard is very clear. The

provisions of **Section 213** of the **Indian Succession Act** requiring probate do not apply to the Wills made outside Bengal and the local limits of the ordinary jurisdiction of the High Courts of Madras and Bombay except where such Wills relate to property situated in the territories of Bengal or within the aforesaid local limits. This view has also been reiterated in the case of **Murlidhar Dua & Ors. Vs. Shashi Mohan** reported in **68 (1997) DLT 284** and **Santosh Kakkar vs. Ram Prasad & Ors.** reported in **71 (1998) DLT 147**. The Will in the present case dated 29.9.1986 was executed at Sonapat Haryana and therefore, the defendant no.1 does not require any probate in respect of the same.

.....

Therefore, in view of my aforesaid discussion, I hereby hold that the Will of late Sh. Bhagwan Singh dated 29.9.1986 is a genuine document and the plaintiff who is the daughter of the testator would not be entitled to any share in property bearing no. 6301/1A at Kamla Nagar as shown in the red colour in the site plan. Issue is decided against the plaintiff and in favour of the defendant no.1.”

6. Learned counsel for the appellant/plaintiff argued the same aspects which were also argued before and dealt with by the Trial Court. It is argued that the father was an educated person who had studied in London, and had worked at a senior position in the Railways, and therefore, the Will which is prepared in Hindi is an unnatural document and hence a fabricated document. It is also argued that the Will is a fabrication because it does not contain names of the daughters of the deceased. It is also argued that the Will wrongly refers to the defendant no.1/respondent no.1 as an Advocate. It is argued that the Will therefore propounded by the defendant no.1/respondent no.1, Ex.PW2/1, is not a genuine document and

the impugned judgment be set aside.

7. In my opinion, the arguments urged on behalf of the appellant/plaintiff have no merits and the appeal therefore is bound to fail. Before I advert to the aspect of validity of the Will, let me turn to the issue of limitation, inasmuch as, I am of the opinion that the Trial Court has fallen into a grave and clear error in holding the suit to be within limitation. I agree with the arguments urged on behalf of the respondent no.1/defendant no.1 that the suit was time-barred and this argument can be raised as per Order 41 Rule 22 CPC without filing any necessary objections/appeal.

8. In my opinion, the suit which was filed on 2.11.2006 seeking rights in the suit property for declaration and injunction was clearly barred by time inasmuch as form of the suit cannot conceal the real nature of the suit, and which was really a suit for partition and possession of the property which belonged to the father. A suit for possession of an immovable property is covered by Article 65 of the Limitation Act, 1963 and as per which, the suit for recovery of an immovable property has to be filed within 12 years of the date the possession of the property becomes adverse to that of the appellant/plaintiff. In the present case, the suit was ex facie barred by limitation, and in fact need not even have gone for trial inasmuch

as the appellant/plaintiff in the plaint itself admits that the respondent no.1/defendant no.1 immediately after the death of the father, Sh. Bhagwan Singh in the year 1987 proclaimed himself to be the owner of the suit property on the basis of a Will. This admission is made by the appellant/plaintiff in para 4 of the plaint which reads as under:-

“4. That after the death of the father of the plaintiff, the plaintiff was told by the defendant no.1 that their late father had made a ‘WILL’ of the above said properties in the name of the defendant no.1. The plaintiff believing the words of the defendant no.1 did not ask for the “WILL” left behind or any share in the properties of their late father, assuming that the defendant no.1 will take probate or letter of administration regarding the properties and then the plaintiff will file her objections.”

9. The aforesaid para 4 of the plaint shows that in and around the year 1987 itself the appellant/plaintiff was put to notice of the ownership of the defendant no.1/respondent no.1. The fact that ownership was claimed on the basis of the Will, is the reason for claiming the ownership, however, the claim of ownership, i.e. a claim adverse to the appellant/plaintiff was thus known to the appellant/plaintiff in the year 1987 itself. A suit for an immovable property thus ought to have been filed within 12 years of 1987 i.e. at the very maximum by the year 1999, however, the subject suit admittedly was filed only on 2.11.2006, i.e. after 19 years. No doubt remains of the appellant/plaintiff being aware of the claim of ownership of the suit property inasmuch as there are depositions in the affidavits by way

of evidence filed on behalf of the defendant no.1/respondent no.1 as DW1 and sister of the parties, Smt. Kamla Chaudhary as DW2 which state that all the legal heirs of late Sh. Bhagwan Singh, including the appellant/plaintiff were made aware of the execution of the registered Will of the father. The relevant depositions which have been made in this regard are in para 4 of the affidavit by way of evidence filed by the defendant no.1/respondent no.1 and para 4 of the affidavit by way of evidence of Smt. Kamla Chaudhary. Para 4 of the deposition of Smt. Kamla Chaudhary reads as under:

“4. That all the legal heirs (including the plaintiff) were aware of the execution of the registered will of my father due to which we all three sisters never claimed any share in the properties after the death of my father. After the death of my father, my brother (defendant no.1) is in continuous, peaceful and exclusive possession of the suit property. The will in question is the genuine will of my father.”

10. There is not even a single question which is put in the cross-examinations of either DW1 or DW2 that the appellant/plaintiff was not aware of the claim of ownership of the defendant no.1/respondent no.1 immediately after death of the father. In fact, the sister-Smt. Kamla Chaudhary deposed that all the three sisters did not claim any share in the property after the death of the father inasmuch as all the sisters, including the appellant/plaintiff, were aware of the registered Will executed by the father. Not only the fact that the appellant/plaintiff was aware right from

the year 1987 of the claim of ownership of the defendant no.1/respondent no.1 on the basis of the Will, Ex.PW2/1, the defendant no.1/respondent no.1 had acted pursuant thereto and got the property mutated in the property tax records in his name. This mutation in the property tax records took place right in the year 1989 or so, and therefore there was proclamation to the world at large that the defendant no.1/respondent no.1 was claiming exclusive rights in the suit property. I also note that none of the other two sisters have supported the appellant/plaintiff. In my opinion, therefore the suit was clearly barred by limitation as it was filed more than 12 years after the claim of ownership was made by the respondent no.1/defendant no.1 of the suit property. After the expiry of the period of limitation, the respondent no.1/defendant no.1 became complete owner of the property by virtue of law of prescription contained in Section 27 of the Limitation Act, 1963. I therefore hold that the Trial Court was totally unjustified in holding the suit to be within limitation merely because the appellant/plaintiff claimed to have derived knowledge of fabrication of the Will in the year 2006. Obviously, this self-serving statement in the plaint of knowing of the fabrication of the Will in May, 2006 had no force because para 4 of the plaint itself talks of the appellant/plaintiff becoming aware of the Will soon after the death of the father. A mere self-serving

avermment of the appellant/plaintiff waiting for a probate to be filed, cannot arrest the period of limitation, inasmuch as, as per Section 9 of the Limitation Act, 1963 when once time has begun to run, no subsequent disability or inability in view of the suit stops him.

11. At this stage, I may also state that the suit was also barred because no declaration can be claimed when a person can ask for further and proper relief, but fails to do so. Though the appellant/plaintiff has pleaded causes of action of declaration and injunction, really, the suit is one for partition and possession of the disputed property. The appellant/plaintiff therefore could not file the suit for declaration and injunction, and which suit was barred by Section 34 of the Specific Relief Act, 1963 read with Section 41(e) thereof. Not only the further reliefs of partition and possession were to be claimed as per Section 34, but the alternative and efficacious remedy was of partition and possession, making the suit filed as not maintainable in view of Section 41(e) of the Specific Relief Act, 1963. Further, the appellant/plaintiff was out of possession and which is why the relief of possession has been asked for. Once ouster has been established, and which has clearly been established in the facts of the present case on account of the issue of limitation being decided against the appellant/plaintiff, the subject suit, without specifically paying Court fees

with respect to the share of the appellant/plaintiff, was also barred. Therefore, in addition to the suit being barred by limitation, the suit was also barred by virtue of the provisions of Sections 34 and 41(e) of the Specific Relief Act, 1963 and also on account of not being properly valued for the purposes of Court fees and jurisdiction and not paying Court fees on the relief of possession.

12. The next issue is as to whether the deceased Bhagwan Singh left behind the Will, Ex.PW2/1. I must, immediately at this stage itself, state that even assuming that there was no valid Will, Ex.PW2/1, even then the suit was bound to be dismissed as also the present appeal, inasmuch as, I have held that the suit was barred by limitation, i.e. even assuming there was proved that there was no valid Will, Ex.PW2/1, the suit for possession as filed by the appellant/plaintiff claiming her share in the suit property was bound to be dismissed.

13. In my opinion, there is nothing illegal or unnatural about the Will, Ex.PW2/1. The Trial Court has already noted that the appellant/plaintiff does not dispute that the signatures on the Will were of the father. The appellant/plaintiff also did not dispute that no pleadings were made with respect to the unsoundness of the mind of late Sh. Bhagwan Singh. The relevant admissions in this regard are contained in

following portion of the cross-examination of the appellant/plaintiff:-

“It is correct that in the written statement as well as in my previous affidavit/evidence I have not denied the signatures of my father on the Will exhibit **PW-2/1**, I have also not stated/pleaded that my father was not in sound mental health at the time of the execution of the Will.”

14. Therefore, the Trial Court was fully justified in holding that the deceased Bhagwan Singh was in sound state of mind and the disputed Will bore the signatures of late Bhagwan Singh. It is also relevant to note that there is no cross-examination by the appellant/plaintiff that the Will was not properly attested. The Will has been exhibited, and no objection was raised at the time of exhibition of the Will, possibly because the appellant/plaintiff had admitted the signatures of the father on the Will.

15. At the first blush, it appeared out of place as to why the father, who was highly educated and held a senior position in the Railways, would make a Will in Hindi. However, the answer is not far to seek. The deceased father-Bhagwan Singh, at the time when the Will was made, was living at Sonapat in Haryana along with the defendant no.1/respondent no.1. In Sonapat, Haryana the local language prevalent is Hindi. I must also take judicial notice of the fact that pleadings in Courts in Haryana are contained in Hindi language, and the usual language with respect to legal documents including Wills which are executed at Sonapat, Haryana is Hindi. The deceased therefore living at Sonapat would only have an

assistance of a deed writer who would have made the Will in Hindi and therefore, there is nothing strange that the Will was made in Hindi. After all, it is not the case of the appellant/plaintiff that the deceased father did not know Hindi. In fact the father used to converse with his wife (mother of parties) in Hindi as she was educated only upto Class IV. I therefore hold that there is nothing unnatural in the Will having been drafted in Hindi.

16. So far as the objection raised on behalf of the appellant/plaintiff that the Will does not contain the name of the daughters, all I can say is that obviously a Will is preferable when details are given, however, lack of the names of the daughters in the Will cannot, in any manner, whittle down the validity of the Will in the facts of the present case, where none of the other sisters have claimed any rights in the suit property and in fact, one of the sisters has deposed in support of the respondent no.1/defendant no.1. The fact that after the name of the respondent no.1/defendant no.1 in the Will, the word Advocate has been written, obviously, the same is a mistake by the typist or the draftsman of the Will, however too much emphasis cannot be laid on this minor typing mistake in the Will so as to invalidate the claim of the respondent no.1/defendant no.1 on the basis of this Will, Ex.PW2/1.

17. I may also note that the admitted fact, which has come on record, is that the deceased father, Sh. Bhagwan Singh at the time when the Will was executed, was living with the respondent no.1/defendant no.1 at Sonapat, Haryana. The Will also mentions the fact of the respondent no.1/defendant no.1/son taking care of all the needs of the father. The Will also notes that all the sisters have been married off and are settled in their homes. These facts in my opinion show that there is nothing unnatural about the Will, Ex.PW2/1 by which the suit property was bequeathed to the son/defendant no.1 who was living with and taking care of the father.

18. A civil case is decided on balance of probabilities. The balance of probabilities clearly show that the suit was ex facie barred by the limitation and the respondent no.1/defendant no.1 was the owner of the suit property by virtue of the provisions of Section 27 of the Limitation Act, 1963 read with Article 65 thereof. Even the Will relied upon was a validly executed Will and no challenge was laid to it for about 19 years after the death of the father. As already stated above, none of the other sisters have supported the appellant/plaintiff, and in fact one of the sisters, Smt. Kamla Chaudhary has deposed in favour of the respondent no1/defendant no.1. Obviously, the suit was nothing but an endeavour to harass and unsettle the defendant no.1/respondent no.1 after 19 years of the death of the father, and

during which period he had acted as an owner of the suit property.

19. The Supreme Court in the recent judgment in the case of *Ramrameshwari Devi and Others v. Nirmala Devi and Others (2011) 8 SCC 249*, has held that in certain dishonest litigations, actual costs must be imposed. The Supreme Court has held that unless actual costs are imposed a dishonest litigant will take unnecessary benefit of the false litigation. In this case, I take into account the state of mind of the respondent no.1/defendant no.1, who suddenly after 19 years of the death of the father, late Sh. Bhagwan Singh, and surely 19 years is a very long period of time, was faced with the suit claiming rights in the suit property. The respondent no.1/defendant no.1 has also incurred costs of litigation. Accordingly, I deem it fit that the appeal should be dismissed with costs of ₹25,000/-.

20. In view of the above, there is no merit in the appeal, and which is therefore dismissed with the aforesaid costs. Costs be paid within a period of 2 months from today. Trial Court record be sent back.

VALMIKI J. MEHTA, J

FEBRUARY 28, 2012
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