

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

Date of decision: 25th October, 2013.

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RFA 765/2006

SURENDER RODE

..... Appellant

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr.
Galib Kabir & Mr. Anurag Jain,
Adv.

Versus

MADAN MOHAN RODE & ORS.

..... Respondents

Through: Mr. Mukul Talwar & Mr. S.
Mohapatra, Adv. for R-1&2.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree dated 15th November, 2006 of the Court of the Addl. District Judge, Karkardooma Courts, Delhi of dismissal of Suit No.63/06/98 filed by the appellant. The said suit was filed by the appellant/plaintiff against his two brothers and two sisters, (i) for partition of property No.21-B, Bara Bazar Marg, Rajinder Nagar, New Delhi and the remaining estate left behind by the mother of the parties Smt. Devki Devi Rode including cash, bank deposits, shares, debentures, vikas patras gold and silver ornaments etc., claiming 1/5th share therein; (ii) for rendition of accounts of the estate left behind by the mother Smt. Devki Devi Rode and/or father Shri Labh Chand Rode; and, (iii) for permanent injunction restraining the respondents/defendants from dealing with the said estate or from disrupting or disturbing in any manner the essential supply of water

and electricity to the portion of property No.21-B, Bara Bazar Marg, Rajinder Nagar, New Delhi in his possession, pleading:-

- (a). that Shri Labh Chand Rode father of the parties had acquired leasehold rights in property No.21-B, Bara Bazar Marg, Rajinder Nagar, New Delhi for the benefit and use of his entire family and had constructed a 2 ½ storeyed building thereon where he along with his wife Smt. Devki Devi Rode and the parties to the suit were residing;
- (b). that Shri Labh Chand Rode died intestate on 16th February, 1983 leaving the appellant/plaintiff and the respondents/defendants no.1&2 as his sons, the respondents/defendants no.3&4 as his daughters and Smt. Devki Devi Rode as his widow and all of them acquired 1/6th share each in the Rajinder Nagar property;
- (c). that the mother Smt. Devki Devi Rode also died intestate on 3rd May, 1998 leaving the parties to the suit as her only heirs and upon her demise the share of each of the five parties to the suit in the Rajinder Nagar property became 1/5th ;
- (d). that the appellant/plaintiff on 9th July, 1998 called upon the respondent/defendant no.1 to partition the property but was shown a Release Deed dated 1st October, 1981 executed by the appellant/plaintiff and execution whereof the appellant/plaintiff did not remember;

- (e). that it appeared that the love and affection of the appellant/plaintiff for the father Shri Labh Chand Rode and his brothers respondents/defendants no.1&2 had been misused for having the said Release Deed executed and it was also possible that signed blank papers given by the appellant/plaintiff for use for other purposes had been misused for preparing the same;
- (f). that the Release Deed was bad in law and illegal and not binding on the appellant/plaintiff and no amount of Rs.1 lac stated to have been paid thereunder to the appellant/plaintiff had in fact been paid;
- (g). in the alternative it was pleaded that the right of the appellant/plaintiff as an heir of his father could not have been transferred by the said Release Deed and therefore the said Release Deed dated 1st October, 1981 i.e. of a date prior to the demise of the father could not take away the rights of the appellant/plaintiff as an heir, to the said Rajinder Nagar property; and,
- (h). that the appellant/plaintiff had also learnt that the parents had left a lot of moveable properties in the form of cash, bank deposit, shares, stocks, vikas patras, ornaments and which had also not been disclosed by the respondents/defendants no.1&2 to the appellant/plaintiff.

2. The respondents/defendants no.1&2 filed a written statement contesting the suit on the grounds:-

- (i). that the wife of the appellant/plaintiff Smt. Sangeeta Rode who had instituted the suit and signed and verified the plaint was not entitled to do so;
- (ii). denying that the father Shri Labh Chand Rode had died intestate; it was pleaded that he had left a registered Will dated 28th June, 1973 whereunder the property at Rajinder Nagar was bequeathed to the respondents/defendants no.1&2 and the mother Smt. Devki Devi Rode with Smt. Devki Devi Rode having only a life interest therein and after her demise her share in the property also devolving on the respondents/defendants no.1&2;
- (iii). that the appellant/plaintiff Shri Surinder Mohan Rode had been living separately from the parents for long and was expressly disinherited in the said Will;
- (iv). that the mother Smt. Devki Devi Rode also executed her own Will which however did not relate to or deal with the Rajinder Nagar property;
- (v). denying that the appellant/plaintiff was in possession of any part of the Rajinder Nagar property and pleading that the entire property was in possession of the respondents/defendants no.1&2 only;
- (vi). that the appellant plaintiff had broken away from the family in the year 1973 but was temporarily permitted by the father to stay in a two room flat on the first floor of the Rajinder Nagar

property; thereafter on 30th September, 1981 the appellant/plaintiff vacated the said first floor portion also and of his own sweet will and accord and in a sound disposing state of mind decided to have separate and independent residence elsewhere and completely severed his connection with the family and had validly executed the registered Release Deed;

- (vii). that the Release Deed was in fact in view of an amicable settlement whereunder the appellant/plaintiff was paid Rs.1 lac by means of a Demand Draft;
- (viii). denying that the Release Deed was a result of misuse by the father of any trust reposed by the appellant/plaintiff in him;
- (ix). that the movable properties left behind by the father Shri Labh Chand Rode were distributed as per his will and Succession Certificate in respect of various shares and securities was also obtained from the Court; and,
- (x). denying that the appellant/plaintiff had any share in the mother's properties also.

3. The respondents/defendants no.3&4 filed a separate written statement denying that the father Shri Labh Chand Rode had died intestate and further denying that the appellant/plaintiff was in possession of any part of the Rajinder Nagar property and denying that the appellant/plaintiff had any share in the Rajinder Nagar property.

4. The appellant/plaintiff filed a replication to the written statement of the respondent/defendants no.1&2 but need is not felt to advert thereto.

5. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 27th October, 2004:-

- “1. Whether the plaintiff’s wife through whom the present suit has been filed was authorized to sign, verify and institute the present suit? OPP*
- 2. Whether plaintiff’s father Late Sh. Labh Chand Rode had died intestate? OPP*
- 3. Whether Late Sh. Labh Chand Rode, father of the parties had left a registered will dated 28.6.1973 as alleged in para 4 of the written statement? OPD*
- 4. Whether the plaintiff is entitled to any share in the suit property and if so, what share? OPP*
- 5. Whether the plaintiff is entitled to a decree for rendition of accounts against the defendants as prayed for in prayer (ii) of the plaint? OPP*
- 6. Whether the suit property is liable to be partitioned by metes and bounds in order to separate the share of the plaintiff from the shares of other defendants? OPP*
- 7. Relief.”*

6. The learned Addl. District Judge, vide judgment dated 15th November, 2006, dismissed the suit, finding/observing/holding:-

- A. that the appellant/plaintiff had executed a Power of Attorney empowering his wife to institute the suit and sign and verify the plaint and thus issue No.1 was decided in favour of the appellant/plaintiff;
- B. that the wife of the appellant/plaintiff appearing as a witness also instead of the appellant/plaintiff, admitted receipt of Rs.1 lac mentioned in the registered Release Deed dated 1st October, 1981;

- C. that the wife of the appellant/plaintiff appearing as a witness had also admitted that the appellant/plaintiff had not been residing in the Rajinder Nagar property since 1st October, 1981;
- D. that the valid execution of the registered Will dated 28th June, 1973 of Shri Labh Chand Rode had been proved; accordingly issues no.2&3 were decided against the appellant/plaintiff and in favour of the respondents/defendants no.1&2;
- E. that the wife of the appellant/plaintiff appearing as a witness had admitted that the appellant/plaintiff had executed Release Deed undertaking that he will not make any claim or right whatsoever in the property of Shri Labh Chand Rode and had received a sum of Rs.1 lac in lieu thereof and had been unable to explain as to for what other consideration the said sum of Rs.1 lac was received;
- F. that the Release Deed was like a family settlement; and,
- G. that since the appellant/plaintiff had already relinquished his right by executing the Release Deed, the appellant/plaintiff was not entitled to any share in the property of Shri Labh Chand Rode.

7. This appeal was admitted for hearing and vide *ex parte ad interim* order dated 8th December, 2006 *status quo* with respect to the suit property directed to be maintained. Arguments were heard on the appeal on 23rd July, 2009, 6th August, 2009, 12th August, 2009 and judgment reserved on 29th January, 2010. Arguments were again addressed on 5th August, 2010 and

30th September, 2010 and vide consent order dated 24th November, 2010, power of remand under Order 41 Rule 25 CPC was exercised observing:-

- (a). that though the suit was for partition of the estate of both, father Shri Labh Chand Rode and mother Smt. Devki Devi Rode, but the Trial Court had confined the entire trial in respect of the appellant/plaintiff's claim in respect of the estate of father only;
- (b). that the Trial Court had not framed any issue with respect to the appellant/plaintiff's claim in the estate of the mother, with the result that the appellant/plaintiff's claim in the mother's estate had remained untouched; and,
- (c). no evidence had been adduced with respect to the plea of the respondents/defendants of the Will of the mother.

and the following additional issues were framed:-

- "A. Whether the plaintiff is entitled to any relief in respect of the estate of his mother late Smt. Devki Devi? OPP*
- B. Whether late Smt. Devki Devi left a Will dated 21st September, 1994. If so, to what effect? OPD*
- C. If issues no.1 and 2 are decided in favour of the plaintiff then in respect of which of the properties of his mother he is entitled to claim partition and rendition of accounts? OPP"*

and the matter remanded back to the Trial Court for returning findings on the issues after giving opportunity to the parties to adduce additional evidence.

8. On remand, the wife of the appellant/plaintiff examined herself only with respect to the additional issues framed; the respondent/defendant no.1 besides himself examined one Ms. Ashwati Michael.

9. The learned Addl. District Judge vide judgment dated 30th May, 2011 has returned the following findings on the additional issues framed:-

- (i). that as per the law laid down in *Clarence Pais Vs. Union of India* AIR 2001 SC 1151, *M/s Behari Lal Ram Charan Vs. Karam Chand Sahni* AIR 1968 Punjab 108 and *Vinod Prabha Bhanot Vs. Savitri D Chopra* 175 (2010) DLT 218, it was not necessary to obtain probate of a Will in Delhi;
- (ii). that the Will of the mother could have been proved only by examination of at least one of the attesting witnesses and the identification of the signatures of the mother on the alleged Will by the respondent/defendant no.1 was not enough to prove the Will;
- (iii). that of the two attesting witnesses, one namely Shri M.K. Michael was proved to have died and his daughter Ms. Ashwati Michael though had identified her father's signatures as an attesting witness on the Will, but not of testator;
- (iv). that though it was the deposition of the respondent/defendant no.1 that the other attesting witness was not available at the address given and was not traceable but from a mere statement no such inference of the other attesting witness being not traceable could be drawn;

- (v). that the respondents/defendants no.1&2 had failed to bring on record any cogent evidence to prove that Smt. Devki Devi Rode was of sound mind and physical condition; as she was about 82-83 years of age and was admittedly suffering from cancer disease it was incumbent on the respondents/defendants to prove that despite such fatal decease she was possessing sound, mental and physical condition; thus the execution of the Will was shrouded by suspicious circumstances;
- (vi). that from the registration of the Will of the mother Smt. Devki Devi Rode the presumption of valid execution could not be drawn;
- (vii). accordingly the Will dated 21st September, 1994 of Smt. Devki Devi Rode was held to have been not proved;
- (viii). that the respondent/defendant no.1 had deposed that the mother Smt. Devki Devi Rode did not leave any other movable or immovable property except one account in the UCO bank, passbook whereof had been proved;
- (ix). that it was incumbent upon the appellant/plaintiff to prove that the mother Smt. Devki Devi Rode owned some estate but the appellant/plaintiff's wife had not only not proved so but in her cross examination deposed that she did not know whether Smt. Devki Devi Rode was holding any estate or not; accordingly the appellant/plaintiff had not proved that Smt. Devki Devi Rode had any estate in her name; and,

- (x). that since the share bequeathed by the father Shri Labh Chand Rode to Smt. Devki Devi Rode in the Rajinder Nagar property was a life time interest only, the appellant/plaintiff as a heir of Smt. Devki Devi Rode did not inherit any share in the Rajinder Nagar property out of the mother's share also.

and accordingly, directed rendition of accounts only of the money in the account of the mother Smt. Devki Devi Rode with UCO Bank.

10. The respondents/defendants no.1&2, after the receipt of findings aforesaid in this Court, have filed objections thereto. No objections have been filed by the appellant/plaintiff.

11. The appellant/plaintiff has filed application being CM No.6463/2012 under Order 41 Rule 27 of the CPC pleading, to have since learnt (i) that Shri Labh Chand Rode was also the owner of property no.516-P in Sector-14, Gurgaon; (ii) that the respondents/defendants no.1&2 together with Smt. Devki Devi Rode had sold the said property on 6th April, 1983, and wanting to lead additional evidence with respect thereto. No reply has been filed by the contesting respondents/defendants no.1&2 to the said application. The same was ordered to be heard along with the appeal.

12. The appeal was on 17th January, 2013 dismissed in default of appearance of the appellant/plaintiff. Upon application for restoration being filed, the same was vide order dated 20th March, 2013 restored to its original position.

13. The senior counsel for the appellant/plaintiff and the counsel for the respondents/defendants no.1&2 have been heard.

14. The senior counsel for the appellant/plaintiff has very fairly stated that he is confining the challenge to the following only:-

- (a). attention has been invited to the copy of the Will dated 21st September, 1994 set-up by the contesting respondents/defendants no.1&2 of the mother Smt. Devki Devi Rode particularly to the paragraph thereof bequeathing all her “stocks, shares and jewelry existing or that may be acquired in future” belonging to her at the time of her death except movable assets otherwise disposed of and it is contended that the learned Addl. District Judge in the findings returned on 30th May, 2011 though has held the said Will to have been not proved by the contesting respondents/defendants no.1&2 and as consequence of which the appellant/plaintiff and the respondents/defendants no.1 to 4 each will have a 1/5th share in the estate of the mother, has erroneously held that the appellant/plaintiff has not proved any estate left by the mother Smt. Devki Devi Rode and has erroneously not decreed the suit of the appellant/plaintiff for the relief of rendition of accounts of the “stocks, shares and jewellery” referred to in the Will set up by the respondents/defendants no.1&2 of the mother;
- (b). attention is invited to the plaint in which the appellant/plaintiff had expressly sought relief of rendition of accounts of the estate left by the mother as well as father; and,

- (c). that the contesting respondents/defendants no.1&2 have not preferred any appeal against the findings returned on 30th May, 2011 and are thus bound thereby.

15. Per contra, the counsel for the contesting respondents/defendants no.1&2 has argued:-

- (i). that no appeal was required to be filed by the respondents/defendants no.1&2 after the receipt of findings dated 30th May, 2011 on the additional issues framed by this Court while remanding the matter and has drawn attention to Order 41 Rule 26 of the CPC which envisages only filing of a memorandum of objections to any finding; it is argued that such objections have been filed;
- (ii). attention is invited to the Will dated 21st September, 1994 of the mother Smt. Devki Devi Rode, which is a registered document;
- (iii). attention is next invited to the deposition post remand of the respondent/defendant no.1 to the effect that the mother Smt. Devki Devi Rode did not tell him about the execution and registration of the Will and to the deposition post remand of the daughter of one of the attesting witnesses to the said Will of the mother;
- (iv). relying on Section 69 of the Indian Evidence Act, 1872 it is contended that if no attesting witness is to be found, the document can be proved by proving the signatures of one of the attesting witnesses and the signatures of the executants and it is

contended that the Will of the mother thus stands validly proved;

- (v). that the appellant/plaintiff post remand has not led any evidence of the mother Smt. Devki Devi Rode being not in a sound state of mind and the learned Addl. District Judge has wrongly presumed so; on enquiry from the counsel whether any such evidence was led at the pre-remand stage, attention is invited to the affidavit by way of examination-in-chief then of the respondent/defendant no.1;
- (vi). that the Release Deed executed by the appellant/plaintiff was pursuant to a family settlement and as per which also the appellant/plaintiff is not entitled to any share;
- (vii). that the appellant/plaintiff never appeared as a witness to refute the said Release Deed as he alone could have;
- (viii). on enquiry whether the wife of the appellant/plaintiff in her evidence has deposed anything about the testamentary capacity of the mother the reply given is in the negative;
- (ix). on further enquiry whether there is any pleading of the appellant/plaintiff regarding the mother having no testamentary capacity, the reply again is in the negative;
- (x). attention is invited to the deposition post remand of the wife of the appellant/plaintiff to the effect that she did not know whether the mother Smt. Devki Devi Rode was holding any estate or not; and,

(xi). that there is no plea of the appellant/plaintiff that the mother Smt. Devki Devi Rode was under the influence of the contesting respondents/defendants no.1&2.

16. The senior counsel for the appellant/plaintiff in rejoinder has argued:-

- (I). that the onus of the additional issue framed “whether late Smt. Devki Devi Rode left a Will dated 21st September, 1994” was on the respondents/defendants;
- (II). that the respondents/defendants in cross examination admitted that Smt. Devki Devi Rode was suffering from cancer;
- (III). that Ms. Ashwati Michael, daughter of one of the attesting witnesses of the Will dated 21st September, 1994 of the mother Smt. Devki Devi Rode has proved only the signatures of her father as an attesting witness and not the signatures of Smt. Devki Devi Rode;
- (IV). that the wife of the appellant/plaintiff as the daughter-in-law of Smt. Devki Devi Rode had knowledge of the facts and was a competent witness and it was not a case of the wife of the appellant/plaintiff not having any knowledge whatsoever; and,
- (V). that thus the finding dated 30th May, 2011 of the learned Addl. District Judge of the Will dated 21st September, 1994 of Smt. Devki Devi Rode being surrounded by suspicious circumstances is correct.

17. Before dealing with the arguments raised, it is deemed appropriate to record that I had during the hearing enquired from the senior counsel for the appellant/plaintiff whether the appellant/plaintiff was challenging the other findings in the impugned judgment dated 15th November, 2006 or in the order dated 30th May, 2011 of the learned Addl. District Judge. The senior counsel for the appellant/plaintiff has very fairly stated that the challenge was confined to the arguments raised. Thus need is not felt to go into the other findings of the learned Addl. District Judge, though may have been challenged in the memorandum of appeal, as, as of today there is no challenge thereto.

18. The only contention of the appellant/plaintiff now is that in view of the learned Addl. District Judge having held the Will dated 21st September, 1994 of the mother Smt. Devki Devi Rode to have been not proved, notwithstanding the appellant/plaintiff having not furnished any details of the assets with respect to which rendition of accounts was sought, in view of Smt. Devki Devi Rode in her Will set-up by the contesting respondents/defendants having referred to stocks, shares, jewellery etc., a direction for rendition of accounts with respect thereto ought to have been given. However before the said argument is considered, it has to be adjudicated whether there is any challenge by the contesting respondents/defendants no.1&2 to the finding dated 30th May, 2011 of the learned Addl. District Judge of the proof of the Will dated 21st September, 1994 of the mother Smt. Devki Devi Rode and if so, the merits of such challenge have to be adjudicated.

19. The contesting respondents/defendants no.1&2 have in the objections filed by them pursuant to receipt of findings dated 30th May, 2011 in this Court, challenged the finding of the Will dated 21st September, 1994 of Smt. Devki Devi Rode having not been proved and the finding of the appellant/plaintiff being entitled to rendition of accounts in respect of the account of Smt. Devki Devi Rode with UCO Bank; it is contended that the said account was a family pension account which contained a sum of Rs.2,500/- only and to which none of the legal heirs had any right since the said amount had been deposited in her account by the Government after her death and the said amount was liable to be returned to the Government.

20. The contention of the senior counsel for the appellant/plaintiff is that filing of objections does not amount to a challenge to the findings returned and the contesting respondents/defendants were required to prefer an independent appeal.

21. I am unable to agree.

22. Not only is the language of Order 41 Rule 26 clear and the entire purposes of providing for filing of objections against the findings would disappear if an independent appeal were to be required to be filed to challenge the said findings but I also do not find the question to be *res integra*. This Court in ***Amarjit Kaur Vs. Kishan Chand*** 17 (1980) DLT 225 has held that no separate appeal lies against such findings on remand and the only remedy thereagainst is of preferring objections under Order 41 Rule 26. The position in law is that the findings received from the Trial Court are not final and binding on the Appellate Court merely because objections are not

filed and the Appellate Court is required to examine the findings on their merits and can take a different view.

23. The first question which is thus required to be answered is whether the finding dated 30th May, 2011 of the learned Addl. District Judge of the contesting respondents/defendants no.1&2 having not proved the Will dated 21st September, 1994 of the mother Smt. Devki Devi Rode is correct. The learned Addl. District Judge has given two reasons therefor; firstly that the Will had not been proved as required by law and secondly that the execution of the Will was surrounded by suspicious circumstances.

24. The learned Addl. District Judge has for the first of the aforesaid reasons referred only to Section 68 of the Evidence Act and has held that since none of the attesting witnesses had been examined, the Will had not been proved. No reference was made to Section 69 of the Evidence Act to which the counsel for the respondents/defendants no.1&2 has adverted to and which permits proof, where none of the attesting witnesses can be found, by proving the attestation by one of the witnesses and by proving the signatures of the executant of the document.

25. No challenge is made by the appellant/plaintiff to the proof of the signatures of one of the attesting witnesses, by examining his daughter. I have examined the testimony of Ms. Aswati Michael who has deposed that the attesting witness Mr. M.K. Michael was her father; that he died on 25th January, 2011; his death certificate was proved as Ex.DW3/1 and she identified the signatures of her father on the Will dated 21st September, 1994 of Smt. Devki Devi Rode. In cross examination, she deposed that her father

was an Advocate; her testimony to the extent of the demise of her father and the attestation of the Will by her father could not be shaken; on asking, she offered her passport to prove her parentage as well as the identity card of her father as well as the cheque book of her father containing cancelled cheque, bearing signatures identical to that bearing on the Will.

26. The respondent/defendant no.1 in his own evidence has identified the signatures of the mother Smt. Devki Devi Rode on the said Will. I do not find any bar to the signatures of the executant of a Will being proved by the propounder of the Will. A Division Bench of this Court recently in *Subhash Nayyar Vs. Registrar, University of Delhi* MANU/DE/0246/2013 concurred with the decision of the Madras High Court in *Jambunatha Iyer Vs. Sankari Ammal* MANU/TN/0735/1993 laying down that though Section 69 requires fulfillment of two conditions but the emphasis therein is on fulfillment only of the condition of proof of attestation by one of the attesting witnesses and which when proved is evidence of everything upon the face of the instrument since it is to be presumed that the witness would not have subscribed his name in attestation of that which did not take place. It was further held that Section 69 nowhere prescribes that both requirements have to be fulfilled by the same witnesses and the propounder of the Will can identify the signatures of the executant.

27. As far as the aspect of proof of neither of the attesting witnesses being found is concerned, the contesting respondent/defendant no.1 has deposed having personally visited the address of the other attesting witnesses mentioned under his signatures on the Will and the said attesting witness being not found thereon and new address not being available with any of the

neighbours also. Not a single question was put to him in cross examination on the said aspect. The inference in law from non-cross examination of a witness on a particular aspect of his deposition is well settled i.e. that the cross examining party is deemed to have accepted the said part of the deposition. Reference in this regard can be made to ***Laxmibai (Dead) Through LR's Vs. Bhagwant Buva (Dead) Through LR's*** (2013) 4 SCC 97, ***Rajinder Pershad (Dead) by LR's Vs. Darshana Devi*** (2001) 7 SCC 69 and judgment dated 19th September, 2013 in RFA No.411/2000 titled ***Chanchal Dhingra Vs. Raj Gopal Mehra***. The learned Addl. District Judge is thus clearly in error in holding the contesting respondents/defendants no.1&2 to have not proved that no attesting witness to the Will was to be found.

28. As far as the testamentary capacity of the mother Smt. Devki Devi Rode is concerned, merely from the factum of old age and her suffering from cancer it cannot be presumed that she lacked testamentary capacity; the Will was executed in 1994 but she fell ill with cancer only in 1996. It is for a person challenging a Will to not only plead but prove that the testator/testatrix lacked testamentary capacity but also to give specific reasons therefor. Admittedly there are no pleadings of the lack of testamentary capacity of Smt. Devki Devi Rode. The wife of the appellant/plaintiff appearing as a sole witness on his behalf in her affidavit by way of examination-in-chief did not even utter a word of Smt. Devki Devi Rode not having testamentary capacity. In her cross examination she admitted the photograph on the registered Will to be of Smt. Devki Devi

Rode. In her cross examination also, nothing came out challenging the testamentary capacity.

29. I am of the view that in the absence of any challenge to the testamentary capacity, the Will cannot be disbelieved on that ground. Rather in the cross examination of the contesting respondent/defendant no.1 it has come to light that Smt. Devki Devi Rode at the time of execution of the Will was able to walk and she used to read newspapers. No further cross examination was done on the said aspect. To hold that a Will can be disbelieved on the ground of lack of testamentary capacity without even the person propounding the Will being put to notice of such challenge, would be contrary to the basic principles of natural justice. The Supreme Court in ***Niranjan Umesh Chandra Joshi Vs. Mrudula Jyoti Rao*** (2006) 13 SCC 433 has held that there exists a distinction where the suspicions are well founded and cases where there are only suspicions and that existence of suspicious circumstances alone may not be sufficient and the Court may not start with a suspicion and a resolute and impenetrable incredulity is not demanded from the Judge even if there exist circumstances of grave suspicion.

30. Even otherwise in the preponderance of probabilities I am inclined to believe the said Will. It cannot be lost sight of that there is now no challenge to the appellant/plaintiff having executed the registered Release Deed dated 1st October, 1981 in which he has categorically admitted having broken away from his father in the year 1973 and having decided to have a separate and independent abode or residence elsewhere and to completely sever his connections with the father and having received Rs.1 lac from the father in

consideration of disclaiming all claims in the properties of the father then or in future; that the appellant/plaintiff though challenged the said Release Deed but did not himself appear as a witness and the said challenge having failed; that the father in consonance with what is recorded in the aforesaid Release Deed having disinherited the appellant/plaintiff. The Will of the mother is but a corollary in the aforesaid scheme of family affairs and cannot be treated as unnatural. The Supreme Court in *Vidyadhar Vs. Manikrao* (1999) 3 SCC 573 has held that where a party does not appear in the witness box and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct.

31. I am therefore not inclined to agree with the finding of the learned Addl. District Judge of the Will dated 21st September, 1994 of mother Smt. Devki Devi Rode having not been proved. The said Will dated 21st September, 1994 of the mother Smt. Devki Devi Rode is accordingly held to have been proved.

32. Though in view of the aforesaid the contention of the senior counsel for the appellant/plaintiff need not to be dealt with but I may record that the claim for rendition of accounts cannot be based merely on the contents of the Will and without putting the same in cross examination to the respondent/defendant no.1 and which also has not been done. For the appellant/plaintiff to make a claim for rendition of accounts, even in the absence of proof of Will but on the basis of contents thereof, it was incumbent upon the appellant/plaintiff to in the cross examination of the contesting respondent/defendant no.1 enquire from him as to what were the stocks, shares and jewellery referred to in the said document and as to what

happened thereto. The Court cannot make a direction for rendition of accounts in vacuum. Even when the wife of the appellant/plaintiff in her cross examination was asked as to what was the estate of the mother Smt. Devki Devi Rode of which share was claimed, she merely stated that she was not aware whether the mother had left anything or not and did not draw attention to the said paragraphs of the Will. The direction for rendition of accounts has to be circumscribed by the assets of which the accounts are to be rendered and the period for which the accounts are to be rendered and cannot be open ended or a fishing and roving enquiry. In the absence of it having come on record as to what are the assets, no such direction could have been made. Even otherwise the language of the Will is not unambiguous; the same refers to the stocks, shares and jewellery owned then or which may be acquired in future. Draftsmen of such documents as Will, to make the same all pervasive are not unknown to use such language to cover all possible assets to be bequeathed thereunder and which may not even be owned by the testator/testatrix. Thus, merely on the basis of the said language, no such relief can be granted.

33. Interestingly, though it was the contention of the senior counsel for the appellant/plaintiff that the respondents/defendants no.1&2 having not filed appeal challenging the findings dated 30th May, 2011 are not entitled to do so, but the appellant/plaintiff also has neither filed any appeal nor objections under Order 41 Rule 26 against the finding qua which grievance is made.

34. No error is thus found in the impugned judgment and decree of dismissal of the suit for partition filed by the appellant/plaintiff. In view of

reversal of the finding dated 30th May, 2011 qua the Will dated 21st September, 1994 of the mother Smt. Devki Devi, the limited direction therein to the contesting respondents/defendants no.1&2 to render accounts with respect to the bank account is also set aside. Though the suit filed by the appellant/plaintiff is found to be false and frivolous and containing pleadings which the appellant/plaintiff himself was not willing to support and to have been pursued only by the wife of the appellant/plaintiff, perhaps for extraneous reasons, and the appellant/plaintiff is liable to pay exemplary costs to the respondents/defendants no.1&2 but I refrain from doing so in the sincere hope that good sense would at least now prevail on the wife of the appellant/plaintiff and she would not indulge in any further litigation for extraneous reasons.

35. The appeal is dismissed; the objections filed by respondents/defendants no.1&2 to the findings dated 30th May, 2011 returned by the learned Addl. District Judge are allowed, leaving the parties to bear their own costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

OCTOBER 25, 2013

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