

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

+ **RSA No.100/2014**

% **15th April, 2014**

SH. NARESH KUMAR CHOPRA Appellant
Through: Mr. Vinay Gupta, Advocate.

Versus

SMT. SUNITA KHANNA AND ANR. Respondents
Through:

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.6430/2014 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

+ RSA No.100/2014

2. This Second Appeal under Section 100 of Code of Civil Procedure, 1908 (CPC) is filed against the concurrent judgments of the courts below; of the trial court dated 14.3.2011 and the first appellate court dated 3.2.2014; by which the appellant's/plaintiff's suit for declaration and cancellation has been dismissed. Appellant/plaintiff in the suit prayed for

declaration as illegal and void and cancellation of the documents executed
RSA 100/2014 *Page 1 of 16*

by the mother of the parties Smt. Kaushalya Devi dated 10.12.2004 of the suit property bearing No.E-70 (first floor), Jhilmil Colony, Delhi-110095 on a plot of 45 sq mtrs. By the said documents dated 10.12.2004, the mother Smt.Kaushalya Devi had transferred rights in the suit property in favour of the defendant no.1/respondent no.1/daughter (sister of the appellant/plaintiff).

3. The facts of the case are that admittedly the documents by which the suit property was purchased were in the name of the mother Smt. Kaushalya Devi. The suit property was a plot when the same was purchased by the mother and thereafter construction on the same was raised. During her lifetime, Smt. Kaushalya Devi had executed documents being the registered general power of attorney, registered Will, special power of attorney, agreement to sell, receipt, possession letter etc all dated 10.12.2004 by which the rights in the suit property were transferred to the defendant no.1/respondent no.1. The case of the appellant/plaintiff is that the said documentation is void not only because consideration did not flow under the same because inadequate consideration flowed under the same, but also because the documentation was got executed by the defendant no.1/respondent no.1 by exercising undue influence on her parents i.e the mother Smt. Kaushalya Devi and the father Sh. Baldev Raj Chopra. One

another reason for seeking declaration with regard to invalidity of the documents is also that possession under the same was not delivered.

4. On behalf of the respondent no.1/defendant no.1, it was stated that the appellant/son had strained relations with his parents and in fact the father Sh. Baldev Raj Chopra on 20.10.1991 by means of public notice in the newspaper Veer Arjun had severed all ties with the appellant/plaintiff. Due to the behavior of the appellant/plaintiff the parents had also filed a complaint against him in the local police station in the year 1991. The respondent no.1/defendant no.1 pleaded validity of the documentation dated 10.12.2004 besides also stating that the father Sh. Baldev Raj Chopra had borrowed moneys of Rs.4 lacs from the defendant no.1/respondent no.1 and from which amount the suit property was constructed and which loan was not repaid. It was therefore pleaded by the respondent no.1/defendant no.1 that there was sufficient reason for existence and execution of the documentation dated 10.12.2004 by the mother Smt. Kaushalya Devi in favour of the respondent no.1/defendant no.1. The documentation dated 10.12.2004 executed by the mother Smt. Kaushalya Devi in favour of the defendant no.1/respondent no.1 are as under:-

- “i) Registered General Power of Attorney dated 10.12.2004 (Ex.DW1/A)
- ii) Agreement to Sell dated 10.12.2004 (Ex.DW1/B)

- iii) Registered Will dated 10.12.2004 (Ex.DW1/C)
- iv) Receipt dated 10.12.2004 (Ex.DW1/D)
- v) Possession letter dated 10.12.2004 (Ex.DW1/E)
- vi) Affidavit dated 10.12.2004 (Ex.DW1/F)
- vii) Special Power of Attorney dated 10.12.2004 (Ex.DW1/G)
- viii) Undertaking dated 10.12.2004 (Ex.DW1/H)
- ix) Indemnity bond dated 10.12.2004 (Ex.DW1/I)”

As already stated above, out of the above documents, the general power of attorney and Will, which are Ex.DW1/A and Ex.DW1/C respectively, were registered with sub-Registrar.

5. Both the courts below have held that there is no substance in the case as set up by the appellant/plaintiff with regard to alleged inadequacy of consideration because the plot was earlier purchased by Smt. Kaushalya Devi for Rs.1.75 lacs but the consideration as mentioned in the subject documents is only a sum of Rs.1.50 lacs. The courts below have also held that the appellant/plaintiff failed to prove lack of soundness of mind of the mother for establishing the invalidity of the documentation dated 10.12.2004. The courts below have also disregarded the document dated 25.3.2005, Ex.PW2/6, which was relied upon by the appellant/plaintiff to contend that by virtue of this document, and which is pleaded to be a family settlement, appellant/plaintiff would be 1/4th owner of the suit property. It may be noted that whereas the trial court gave the reason that the document

the suit property and therefore his executing this document cannot in any manner confer on the four children of the parties equal shares, the first appellate court has however taken a different line of reasoning by observing that since the condition of repayment of loan contained in the document Ex.PW2/6 was not fulfilled by the appellant/plaintiff, consequently the appellant/plaintiff could not claim any rights under the document Ex.PW2/6 dated 25.3.2005.

6(i) I completely agree with the conclusions given in the concurrent judgments of the courts below except the conclusion of the first appellate court that the document Ex.PW2/6 cannot be relied upon by the appellant/plaintiff because the appellant/plaintiff failed to discharge his liability under the document Ex.PW2/6 of payment of his share of loan of Rs.1 lakh. In this regard, the correct reasoning is given by the trial court and to which I am also hereafter giving additional reasoning of my own.

(ii) Firstly, it may be noted that the documents in question contain two registered documents i.e the general power of attorney and the Will. The father of the parties Sh. Baldev Raj Chopra was a witness to these documents and he appeared in the witness box and deposed in favour of the respondent no.1/defendant no.1 as DW-2. The father-DW2 denied the case

of the appellant/plaintiff that no consideration had passed for execution of

the documents dated 10.12.2004 in favour of his wife Smt. Kaushalya Devi (mother of the parties) from the daughter/defendant no.1/respondent no.1. The father as DW-2 has also denied that his wife Smt. Kaushalya Devi was suffering from unsoundness of mind.

(iii) The deposition of the father Sh. Baldev Raj Chopra is in my opinion a crucial deposition in favour of the respondent no.1/defendant no.1. This deposition of the father clearly proves not only passing of the consideration (leaving apart some contradiction of the entire amount being in cash or partly in cash and partly in cheque) but also the soundness of mind of Smt. Kaushalya Devi at the time of execution of the subject documents. It is extremely relevant to note that the document relied upon by the appellant/plaintiff Ex.PW2/6 dated 25.3.2005 goes against the plaintiff for various reasons and one important reason is that this document Ex.PW2/6 shows that the defendant no.1/respondent no.1 had given a loan of Rs.4 lacs to the father and from which the construction was made on the suit property, and admittedly this loan was not repaid back by the father to the respondent no.1/defendant no.1 till the time of execution of the subject documentation. Therefore, there was a valid and sufficient ground for execution of the said documents dated 10.12.2004 in favour of the defendant no.1/respondent no.1 and to whom loan was owed by the father of the parties and from which loan

RSA 100/2014 *Page 6 of 16*

construction was raised on the plot. There would be thus nothing unusual for the mother in such circumstances to have transferred rights in the suit property to the daughter/defendant no.1/respondent no.1 by the said documentation. In fact, this aspect will also take care of the argument urged on behalf of the appellant/plaintiff of lack of consideration or lack of adequacy of consideration, because, once the suit property was constructed upon from the funds of the respondent no.1/defendant no.1, and which funds in the form of loan was given to the father Sh. Baldev Raj Chopra was not repaid, the mother-Smt. Kaushalya Devi had sufficient reasons to transfer the rights in the suit property in favour of the defendant no.1 for an amount of Rs.1.5 lacs.

(iv) Also, evidence has been led on behalf of the respondent no.1/defendant no.1, including of the father, of the strained relations between the appellant/plaintiff/son with the parents.

(v) Further, in my opinion, the appellant/plaintiff has no locus standi to question the existence of consideration or adequacy of consideration because this is really an issue which could have only been an issue between the parties to the documents i.e the mother Smt. Kaushalya Devi and the daughter/defendant no.1/respondent no.1. Never any dispute was raised at any point of time by the mother to challenge the documentation

in the defendant no.1's favour on the ground that consideration had not passed or inadequate consideration had passed. In fact, as already stated above, the father Sh. Baldev Raj Chopra deposed in favour of the respondent no.1/defendant no.1, and disputed the aspect of non-passing of the consideration or alleged inadequacy of consideration. Therefore, in addition to the reasoning given by the courts below, I am of the opinion that the appellant/plaintiff really has no locus to challenge execution of the documents, except of course on the ground of soundness of mind and on which aspect the appellant/plaintiff has miserably failed because no medical evidence whatsoever was led of the mother Smt. Kaushalya Devi suffering from unsoundness of mind at the time of execution of the documents dated 10.12.2004.

7. Learned counsel for the appellant argued before this Court the following aspects:-

(i) Consideration did not flow to the mother Smt. Kaushalya Devi from the defendant no.1/respondent no.1 under the documentation dated 10.12.2004, and if consideration did flow the same was inadequate, thus showing undue influence upon the parents by the defendant no.1/respondent no.1 in having got the subject documentation dated 10.12.2004 executed.

(ii) The Will in question Ex.DW1/C cannot be said to have been proved because no attesting witness was called.

(iii) The mother was suffering from unsoundness of mind and hence the documentation dated 10.12.2004 are void and of no effect.

(iv) The admitted document being the settlement dated 25.3.2005, Ex.PW2/6 is sufficient for decreeing the suit and holding that the appellant/plaintiff is 1/4th owner of the suit property.

(v) Lastly, it was urged that since there is contradiction with regard to handing over of possession under the subject documentation in the testimonies of the defendant no.1/respondent no.1 and the father Sh. Baldev Raj Chopra, such contradiction belied the case of the respondent no.1/defendant no.1.

8. So far as the aspect of adequacy of consideration or passing of consideration is concerned, I have already dealt with this aspect above and that part of discussion is not repeated herein to avoid prolixity but the same is adopted for rejecting the first argument urged on behalf of the appellant/plaintiff.

9. So far as the aspect that the Will dated 10.12.2004, Ex.DW1/C cannot be relied upon by the defendant no.1/respondent no.1 is concerned, I may note that on a specific query being put to the counsel for the
RSA 100/2014

appellant/plaintiff, it had to be conceded that before beginning of the cross-examination of the witness, no objection was raised to the exhibit marking of the Will. Therefore, once there is no objection at the relevant time, subsequently no objection can be taken with regard to exhibition of the documents in view of the ratio of the judgment of the Supreme Court in the case of ***R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple and Anr. AIR 2003 SC 4548.*** Not only that, I would like to add that this is not a typical Indian Succession Act case i.e it is not a case of probate or letters of administration case based upon a Will. Really in the facts of this case the Will in question is one of the documents in the set of documents by which rights were transferred in the suit property. I have had an occasion to examine this aspect as to whether a Will which is part of the documentation for transfer of rights in the suit property has to be proved in a classical manner as in a probate petition or it is sufficiently proved like any other document in any other case, in the case reported as ***Sh. Ramesh Chand Vs. Suresh Chand and Anr. 188 (2012) DLT 538.*** The relevant para of this judgment is para 8 and the same reads as under:-

“8. Great stress was laid on behalf of the appellant to the fact that the respondent No.1/plaintiff had failed to prove the Will, Ex.PW1/5 in accordance with law inasmuch as no attesting witnesses were examined. Reliance is placed on behalf of the appellant on the judgment of the Supreme Court in the case of

Kashibai & Anr. Vs. Parwatibai & Ors. 1995 IV AD S.C. (C) 41 to argue that the Will has to be proved in terms of the provisions of Indian Succession Act, 1925 and Section 68 of the Evidence Act, 1872 by calling of the attesting witnesses and if the same is not done merely because there is an exhibit mark given to the Will, the same cannot be said to be proved.

In my opinion, the judgment of the Supreme Court in the case of ***Kashibai & Anr. (supra)***, and various other judgments which deal with the issue of requirement of a Will having to be proved by summoning of an attesting witness, are judgments given in those cases where there are inter se disputes between the legal heirs of a deceased testator and the validity of the Will is questioned in those circumstances. Observations in the said judgments cannot have application to the facts of those cases where the disputes with regard to Will are not classical disputes between the legal heirs of the deceased testator and the Will is an instrument which really furthered an intent to transfer the rights in an immovable property by the testator to the beneficiary. I may note that in the present case, there is absolutely no cross examination at all on behalf of the appellant when the registered Will was proved and exhibited in the statement of the respondent No.1/plaintiff as PW-1. Once there is no cross-examination, in the cases such as the present, which are different than the classical disputes inter se the legal heirs of a deceased testator, I would feel that the Will should be held to be a proved document inasmuch as the object of the Will in cases such as the present was really to transfer rights in an immovable property after the death of the testator. Further, I may note that the observations with respect to Will having to be very strictly proved by calling the attesting witness are in probate cases where the judgment is a judgment in rem whereas in the present case the judgment on the basis of ownership rights devolving upon the respondent No.1/plaintiff under a Will will not be a judgment in rem but only a judgment inter se the parties. Also another aspect to be borne in mind is that besides the two sons of the deceased Sh. Kundan Lal, who were the plaintiff and defendant No.1 in the suit, the other legal heirs of the deceased Sh. Kundan Lal were very much in knowledge of the present litigation but they never chose to add themselves as parties. Whereas the other son i.e. the

brother of the parties to the present suit, Sh. Ram Swaroop deposed in favour of respondent No.1/plaintiff as PW-2, the only daughter of the deceased Sh. Kundan Lal namely Smt. Krishna deposed in favour of the appellant/defendant No.1 as DW-2. Therefore, all the interested parties, who would claim any benefit in the suit property, were aware of the subject litigation.”

I therefore reject the second argument urged on behalf of the appellant/plaintiff and hold that the Will of the mother Smt. Kaushalya Devi stands otherwise proved and since the mother Smt. Kaushalya Devi is no longer alive this is another reason for holding that the respondent no.1/defendant no.1/ has ownership rights in the suit property.

10. So far as the aspect of soundness of mind is concerned, learned counsel for the appellant drew the attention of this Court to certain admissions made by the father-Sh. Baldev Raj Chopra/DW-2 where it is stated that Smt. Kaushalya Devi was more than 50 years of age and was suffering from respiratory ailments as also that she remained ill for 15 to 20 years, however, in my opinion, these aspects only show illness and not lack of soundness of mind. As already stated hereinabove, lack of soundness of mind has to be proved to the satisfaction of the Court by clear cut medical evidence otherwise it would not amount to declaring a person lacking in soundness of mind merely on the oral deposition and self-serving statement of a party. This I cannot do, and so has also not rightly been done by the

courts below. This argument therefore urged on behalf of the appellant/plaintiff is rejected.

11(i). So far as the fourth argument that the settlement Ex.PW2/6 dated 25.3.2005 gives rights to the appellant/plaintiff as co-owner in the suit property is concerned, even this argument is misconceived and I would give the reasons hereinafter, however, at this stage, this document is reproduced as under:-

“I Baldev Raj Chopra son of Shri Gyan Chand Chopra, am resident of E-70, First Floor, back side Jhilmil Colony, Delhi. Till today i.e. 25.03.2005, I am under loan of Rs.4,00,000/- which I have to repay to my daughter Smt. Sunita Khanna. (This loan was taken for construction of the house). This loan is divided amongst all my four children by Rs.1,00,000 each. Leaving aside share of Rs.1,00,000/- of Smt. Sunita Khanna, the remaining loan amount of Rs.3,00,000/- will be paid by all the three brothers and sister (Naresh Kumar, Nand Kishore and Shobha) to their sister Sunita Khanna by raising money from Committees. Till such time, I Baldev Raj Chopra, am alive, I alone will have rights to the house and rent of the house will be received only by me. After me, this house will be divided into four portions by my four children.

Sd/-

Baldev Raj Chopra

Dated: 25.03.2005

1. Naresh Chopra-Sd/-
 2. Nand Kishore Chopra-Sd/-
 3. Shobha Chopra-Sd/-
 4. Sunita Khanna-Sd/-
- Exhibit PW-2/6
SCJ/Karkardooma
03.11.2008

Mark-K
SCJ/Karkardooma
03.11.2008”

(ii) Firstly, this document is not a family settlement as is sought to be urged on behalf of the appellant/plaintiff. For this document to be relied upon as a family settlement, it must be a document entered into as an agreement between the parties but this document is not a document entered into between the parties but it is a document which is executed only by the father Sh. Baldev Raj Chopra and to which the four children of Sh. Baldev Raj Chopra and Smt. Kaushalya Devi are only witnesses so to say. Witnesses to a document cannot be an executant of the document. In any case, even if this aspect is not considered admittedly the suit property stood in the name of mother Smt. Kaushalya Devi and therefore it is not understood as to how the father can call himself as an owner and execute the document Ex.PW2/6 dated 25.3.2005 taking himself to be the owner of the suit property. In fact, this stand that the father is the owner, would be barred by the provision of Section 4 of the ***Benami Transactions (Prohibition) Act, 1988***. Also the fact that the father took a loan of Rs.4 lacs to construct on the suit plot from the defendant no.1/respondent no.1, and from which amount the house was constructed, would at best make the amount received by the father for construction on the plot as a gift of moneys to the mother because admittedly the property remained in the name of mother-Smt. ***RSA 100/2014***

Kaushalya Devi during her entire lifetime. Therefore, looking at it in any manner, the document Ex.PW2/6 cannot confer ownership rights upon the appellant/plaintiff as a co-owner, though of course the reasoning given by the first appellate court is incorrect that since the appellant/plaintiff had not paid his share of the loan he cannot get ownership of the suit property however this reasoning is overlooked because there are sufficient reasons as stated in this judgment that the document Ex.PW2/6 cannot be a family settlement, much less so as to confer rights upon the father-Sh. Baldev Raj Chopra and for him to give co-ownership rights in the suit property to the appellant/plaintiff.

12. So far as the issue of contradictions with regard to handing over possession is concerned, in my opinion, certain contradictions are bound to exist in each and every case, however, a case is decided on the basis of conclusions to be derived at from the complete evidence led, and therefore some contradictions with regard to delivering of possession, in my opinion, cannot take away the substance of the case which is quite clearly in favour of the respondent no.1/defendant no.1.

13. I may again reiterate that the document Ex.PW2/6 will go against the appellant because it showed that the respondent no.1/defendant no.1 had paid the huge amount of Rs.4 lacs to the father and from which

amount the suit property was constructed and which amount admittedly was not repaid to the respondent no.1/defendant no.1 and hence there is a valid reason for the suit property for being transferred by the mother Smt. Kaushalya Devi to the defendant no.1.

14. In view of the above, no substantial question of law arises for this appeal to be entertained, and which is therefore dismissed, leaving the parties to bear their own costs.

APRIL 15, 2014
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VALMIKI J. MEHTA, J.