

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

Date of decision: 1st April, 2014.

+ **CS(OS) 1412/2007, I.As. No.8817/2007 (u/O 39 R-1&2 CPC), 6357/2010 (u/O 22 R-4 CPC), 6358/2010 (for condonation of 350 days delay), 14452/2012 (of D-1&2 u/O 7 R-11 CPC) & 8414/2013 (u/O 22 R-4 CPC)**

ARJUN SOM DUTT & ANR **Plaintiffs**
Through: Ms. Payal Juneja, Advocate.

Versus

MADHVI BERY & ORS **Defendants**
Through: Ms. Sagari Dhanda, Adv. for D-1&2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The two plaintiffs have filed this suit, (i) for declaration of the purported Codicil dated 7th April, 2006 executed by Ms. Kunti Verman as invalid *ab initio*, illegal and null and void; (ii) for partition of the movable and immovable assets of the said Ms. Kunti Verman including property No.2A, Friends Colony (West), New Delhi; and, (iii) for ancillary reliefs of injunction and rendition of accounts, pleading:

(a) that Ms. Kunti Verman aforesaid was the sister of the paternal grandmother Ms. Parmeshwari Som Dutt of the two plaintiffs;

(b) that Ms. Kunti Verman made a Will dated 1st August, 1994 whereunder she bequeathed her property No.2A, Friends Colony

(West), New Delhi jointly and equally to her two sisters Ms. Umi Khanna and defendant No.1 Mrs. Madhvi Bery;

(c) that the paternal grandmother of the plaintiffs Ms. Parmeshwari Som Dutt was also one of the beneficiaries of the aforementioned Will dated 1st August, 1994 of Ms. Kunti Verman;

(d) that Ms. Parmeshwari Som Dutt, the paternal grandmother of the two plaintiffs died on 29th September, 2005 leaving *inter alia* the plaintiffs as her legal heirs.

(e) that Ms. Umi Khanna aforesaid also died on 1st March, 2006 and since she was unmarried and had no issue, the share in the property aforesaid bequeathed by Ms. Kunti Verman under her Will aforesaid to Ms. Umi Khanna, devolved upon the brothers and sisters of Ms. Umi Khanna and their legal heirs including the plaintiffs;

(f) that Ms. Kunti Verman died on 31st May, 2006;

(g) that after the death of Ms. Kunti Verman, the defendant No.1 has taken possession of the property aforesaid setting up the Codicil dated 7th April, 2006 aforesaid of Ms. Kunti Verman whereunder the entire property has been bequeathed to the defendant No.1;

(h) that the defendant No.1 has fabricated the Codicil aforesaid and

if at all the thumb impression thereon is of Ms. Kunti Verman, the same has been obtained through undue influence, fraud and coercion;

(i) that the Codicil dated 7th April, 2006 was purportedly executed barely 53 days before the demise of Ms. Kunti Verman and Ms. Kunti Verman was seriously ill at that time and not in a position to dispose of her property;

(j) that the Codicil aforesaid is not executed in accordance with law;

(k) that the plaintiffs are entitled to their lawful share in the assets of Ms. Kunti Verman including those bequeathed by Ms. Kunti Verman to Ms. Umi Khanna under the Will dated 1st August, 1994.

2. Summons of the suit and notice of the application for interim relief were issued though no interim relief granted to the plaintiffs.

3. Only the defendants No.1&2 (defendant No.2 is the husband of the defendant No.1) have filed their written statement and to which a replication has been filed by the plaintiffs.

4. Else, the suit has been languishing for the last nearly seven years for service of the other defendants (i.e. the other brothers/sisters of Ms. Kunti Verman and their legal heirs) and for service of the legal heirs of the

defendants No.3 & 6 who are stated to have died during the pendency of the suit.

5. It is *inter alia* the plea of the defendants No.1&2 in their written statement that the plaintiffs have no cause of action for the reliefs of challenging the Codicil dated 7th April, 2006 of Ms. Kunti Verman and/or for claiming partition of the property No.2A, Friends Colony (West), New Delhi which admittedly belonged to Ms. Kunti Verman, because, (I) Ms. Parmeshwari Som Dutt, grandmother of the plaintiffs through whom the plaintiffs claim, herself had no right to or share in the said property; (II) even if the Codicil is declared null and void, even then the plaintiffs do not get any right or share in the property.

6. The plaintiffs in their replication, in response to the aforesaid defence in the written statement, have pleaded that since the Will dated 1st August, 1994 of half share in property No.2A, Friends Colony (West), New Delhi in favour of Ms. Umi Khanna did not provide for to whom, what was bequeathed to Ms. Umi Khanna was to belong in the event of her death, therefore what was bequeathed to her i.e. Ms. Umi Khanna has to be divided between all the legal heirs of the deceased.

7. The defendants No.1&2 have also filed I.A. No.14452/2012 under

Order VII Rule 11 of the Civil Procedure Code (CPC), 1908 for rejection of the plaint on the same grounds as noted in para 5 above and to which application a reply has been filed by the plaintiffs.

8. The application of the defendants No.1&2 under Order VII Rule 11 of the CPC is for consideration today. The counsel for the plaintiffs has chosen not to appear and has sent a proxy counsel who, except for seeking adjournment has no knowledge of the case. Upon reason for the absence of the counsel for the plaintiffs being asked, no reason also is forthcoming except for stating that the counsel has desired that a date be given.

9. Suits cannot be allowed to be kept pending in this manner, specially when there is no reason for non-appearance of the counsel for the plaintiffs and when the application is posted today for hearing and has already remained pending for a considerable length of time.

10. I have heard the counsel for the defendants No.1&2 on the application under Order VII Rule 11 CPC and have perused the pleadings and the documents.

11. Ms. Kunti Verman, in her Will dated 1st August, 1994, which is accepted by the plaintiffs as well as by the defendants No.1&2, has stated:

(i) that she possessed of the following properties:

- (A) Property No.2A, Friends Colony (West), New Delhi;
 - (B) Monies in her bank accounts;
 - (C) Investments with National Thermal Power Corporation;
 - (D) Investments with Unit Trust of India and Industrial Development Bank;
 - (E) Jewellery lying in her Safe Deposit Locker;
 - (F) Household and personal effects.
- (ii) that she was the sole owner of all the aforesaid assets;
 - (iii) that her husband had pre-deceased her on 21st October, 1979;
 - (iv) that she had no offspring of her own;
 - (v) that her husband had two daughters from a previous marriage but the said daughters had no claim over any of her aforesaid properties.
12. Ms. Kunti Verman vide her Will dated 1st August, 1994, bequeathed:
- (a) her property No.2A, Friends Colony (West), New Delhi to her two sisters Ms. Umi Khanna and defendant No.1;
 - (b) a sum of Rs.1 lakh to the Institution of Electronics and Telecommunication Engineers for establishing a memorial in the name of her deceased husband;

- (c) a sum of Rs.1 lakh to her husband's Trust managed by the Standards Engineers Society;
- (d) Rs.25,000/- each to the six children of the daughters of her husband from an earlier marriage;
- (e) Rs.20,000/- to her domestic help;
- (f) certain household goods to the daughters of her husband from an earlier marriage;
- (g) "the balance of her remaining assets, such as cash, securities, investments, fixed deposits, jewellery, silverware, motor car, household goods, furniture etc. that remained after the distribution of the bequests listed in the Will, to her other five brothers and sisters including to Ms. Parmeshwari Som Dutt, paternal grandmother of the plaintiffs, equally".

13. Ms. Kunti Verman vide her registered Codicil dated 7th April, 2006 which is challenged in this suit, taking note of the demise of Ms. Umi Khanna (to whom half share in property No.2A, Friends Colony (West), New Delhi had been bequeathed) and of Ms. Parmeshwari Som Dutt and another brother Major Avinash Chander Khanna (to both of whom certain bequests had been made under the Will),

(I) bequeathed property No.2A, Friends Colony (West), New Delhi exclusively to the defendant No.1 and in the event of the defendant No.1 also pre-deceasing Ms. Kunti Verman to defendant no.1's heirs in equal share;

(II) bequeathed the residuary share which was to fall on Ms. Parmeshwari Som Dutt to Mr. Arun Som Dutt (defendant No.6) son of Ms. Parmeshwari Som Dutt;

(III) bequeathed the bequest which under the Will dated 1st August, 1994 was made in favour of Major Avinash Chander Khanna, in favour of Mr. Ashok Khanna (defendant No.8) son of Major Avinash Chander Khanna;

(IV) nominated the defendant No.2 as the executor of her Will.

14. The question which arises for consideration is, whether in the factual situation aforesaid, the plaintiffs, who are the son and daughter respectively of another son of Ms. Parmeshwari Som Dutt, have any locus to challenge the Codicil dated 7th April, 2006 aforesaid of Ms. Kunti Verman or are entitled to a share in the estate left by Ms. Kunti Verman so as to be entitled to claim partition thereof.

15. This Court, in ***O.N. Sharma Vs. Raj Kishore Gupta*** 187 (2012) DLT

130 and in order dated 23rd July, 2012 in Test. Cas. No.41/1995 titled **Prof. B.R. Grover Vs. The State**, has held that objections to a Will (as also to a Codicil) can be filed either by legal heirs or others who inherit the property of the deceased under the applicable law of succession or under a different Will and that a person who is not entitled to the estate of the deceased has no *locus standi* to file such objections. I have in order dated 31st May, 2013 in CS(OS) No.1166/2013 titled **Vinod Kumar Vs. Virender Kumar** also discussed the law on this aspect and held that a challenge to a Will/Codicil can be made only by a person having caveatable interest i.e. a right to succession in the event of intestacy and a person who has no caveatable interest is not entitled to challenge the Will/Codicil. In view thereof, need is not felt to discuss the said aspect in detail. Though the question, in **Jagjit Singh Vs. Pamela Manmohan Singh** (2010) 5 SCC 157 has been referred to a larger bench, but on a different aspect.

16. Thus, only if it is found that the plaintiffs have a chance of inheritance to the estate of Ms. Kunti Verman, whether as her natural heirs under the law of succession applicable to her (in the event of the Codicil dated 7th April, 2006 being held to be invalid) or under her Will dated 1st August, 1994, can it be said that the plaintiffs have a *locus standi* to

challenge the Codicil dated 7th April, 2006. Else, the challenge by the plaintiffs to the said Codicil and on which the other reliefs claimed in the suit are predicated, has to be summarily dismissed.

17. Under the Will dated 1st August, 1994, what was bequeathed by Ms. Kunti Verman to Ms. Parmeshwari Som Dutt, paternal grandmother of the plaintiffs, was only a 1/5th share in the cash, securities, investments, fixed deposits, jewellery, silverware, motor car, household goods, furniture etc. which remained after the distribution of the specified bequests under the said Will. However, Ms. Parmeshwari Som Dutt, paternal grandmother of the plaintiffs pre-deceased Ms. Kunti Verman. Section 105 of the Indian Succession Act, 1925 provides that if the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the Will that the testator intended that it should go to some other person. The Will dated 1st August, 1994 did not provide as to whom the share in the balance cash, securities, investments etc. which was bequeathed by Ms. Kunti Verman to Ms. Parmeshwari Som Dutt was to go in the event of Ms. Parmeshwari Som Dutt pre-deceasing Ms. Kunti Verman. Thus, the same, as per Section 105 of the Indian Succession Act was to form part of the residue of the testator's

property. The Will dated 1st August, 1994 also did not provide as to what was to happen to the residue of the estate. In the absence of any such provision in the Will, Ms. Kunti Verman is to be deemed to have died intestate with respect to the said residue and which intestate estate is to devolve as per the law of succession applicable to her.

18. Before proceeding to consider, whether the plaintiffs can, under the law of succession applicable to Ms. Kunti Verman, be said to be legal heirs of Ms. Kunti Verman qua estate qua which she died intestate, it is also deemed appropriate to consider the position of the half share in property No.2A, Friends Colony (West), New Delhi which was bequeathed by Ms. Kunti Verman under her Will dated 1st August, 1994 to Ms. Umi Khanna, who also pre-deceased Ms. Kunti Verman.

19. The Will dated 1st August, 1994 does not also make any provision qua the said half share in property No.2A, Friends Colony (West), New Delhi bequeathed to Ms. Umi Khanna, in the event of Ms. Umi Khanna pre-deceasing Ms. Kunti Verman. Section 105 supra of the Indian Succession Act would thus apply to the said half share also and the same also would become part of the residue estate of Ms. Kunti Verman which will be governed by the law of succession applicable to her. As aforesaid, there is

no residual bequest in the Will dated 1st August, 1994.

20. Section 15(1) of the Hindu Succession Act, 1956 (which appears to be applicable to Ms. Kunti Verman) provides the General Rules of succession in the case of female Hindus. The same provides that the property of a female Hindu dying intestate shall devolve firstly upon the sons and daughters (including the children of any predeceased son or daughter) and the husband; secondly upon the heirs of the husband; thirdly upon the mother and father; fourthly upon the heirs of the father and lastly upon the heirs of the mother.

21. Section 16 of the Hindu Succession Act lays down the order of succession and manner of distribution amongst the heirs of a female Hindu and provides that the heirs in one entry shall be preferred to those in any succeeding entry i.e. if the female leaves son/daughter/husband, the question of her estate being inherited by the heirs of her husband would not arise.

22. Clause (a) of Section 15(2) of the Hindu Succession Act provides that property inherited by female Hindu from her father or mother, in the absence of any son/daughter/ their heirs, shall devolve upon the heirs of the father; Clause (b) thereof provides that property inherited by female Hindu from her husband or father-in-law, in the absence of son/daughter/their

heirs, shall devolve upon the heirs of the husband.

23. There is no plea, neither in the plaint nor in the replication that any of the properties, movable or immovable, mentioned in the Will dated 1st August, 1994 were inherited by Ms. Kunti Verman from her father or mother. There is no such statement, neither in the recitals in the Will dated 1st August, 1994 nor in the recitals in the Codicil dated 7th August, 2006. In the absence of any pleadings to the said effect, Clause (a) of Section 15(2) of the Hindu Succession Act cannot be said to be applicable. Thus, the succession to the estate of Ms. Kunti Verman, in the event of her intestacy, is to be governed by Section 15(1) of the Hindu Succession Act and as per which provision, the estate is to devolve firstly upon the son and daughter including the children of any pre-deceased son or daughter and the husband. Ms. Kunti Verman admittedly did not have any son or daughter of her own and her husband had pre-deceased her. Thus, the heirs mentioned in the said entry are not applicable and we have to proceed to the second entry. The second entry is of the heirs of the husband of Ms. Kunti Verman. Such heirs are available in the form of the two daughters of the husband of Ms. Kunti Verman from an earlier marriage. Thus, it has but to be held that even if Ms. Kunti Verman were to be said to have died intestate qua the half

share in property No.2A, Friends Colony (West), New Delhi, which was bequeathed to Ms. Umi Khanna and qua the bequest to Ms. Parmeshwari Som Dutt, paternal grandmother of the plaintiffs, because of both Ms. Umi Khanna and Ms. Parmeshwari Som Dutt have pre-deceased Ms. Kunti Verman, the plaintiffs would not be heirs of Ms. Kunti Verman to be entitled to a share in the said estate qua which Ms. Kunti Verman died intestate.

24. Once it is so, it falls that the plaintiffs cannot have a *locus standi* to challenge the Codicil dated 7th April, 2006 because even if the Codicil is to be declared invalid, the plaintiffs would still not be heirs of Ms. Kunti Verman and not have any share in her estate or be entitled to claim partition thereof and the present suit is misconceived.

25. Before parting with the case, I may notice that the defendants No.1&2 have along with their application under Order VII Rule 11 CPC filed a copy of a registered Gift Deed dated 5th December, 1963, vide which the husband of the said Ms. Kunti Verman had gifted the plot of land underneath property No.2A, Friends Colony (West), New Delhi, which is the bone of contention in this suit, to his wife Ms. Kunti Verman. For this reason, though there are no pleadings, the possibility of Ms. Kunti Verman having

inherited the said property from her father or mother, does not exist.

26. The plaint on the averments contained therein thus does not disclose a cause of action. The suit is found to be misconceived and in ignorance of the position in law and is thus dismissed with costs of Rs.20,000/-.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

APRIL 01, 2014

Bs..