

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

% **Date of decision: 1st July, 2014.**

+ **CS(OS) 2190/2011 & IA.No.7476/2013 (of plaintiff to lead additional evidence)**

SATISH KUMAR CHOJAR Plaintiff
Through: Mr. Prabhjit Jauhar, Ms. Anupama
Kaul and Mr. Jeevan Sharma, Adv.

Versus

SUBHASHNI CHOPRA & ORS. Defendants
Through: Mr. G.D. Chopra, Adv. for D-1 & 3.
Mr. Manuj Aggarwal, Adv. for D-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit, for partition of property bearing No.29/19, East Patel Nagar, New Delhi ('suit property'), and for permanent and mandatory injunctions with respect to the property, pleading:-

I) that late Sh. Shanti Sarup Chojar (father of the plaintiff and the three defendants) was granted leasehold rights in the suit property vide registered perpetual lease deed dated 23.01.1981 executed in his favour by the President of India through the Land & Development Office;

II) that late Sh. Shanti Sarup Chojar executed a registered Will dated 18.11.1991 recording that the plaintiff had been financially

helpful to him during his lifetime and bequeathing 55% share in the suit property to the plaintiff and 5%, 20% and 20% to defendants No.1,2 &3 respectively;

III) that it was also envisaged under the Will that the wife of Sh. Shanti Sarup Chojar (Smt. Sushila Chojar) would be entitled to possession of the suit property and to realise rent therefrom during her lifetime and upon her demise, the property would devolve upon the legal heirs as per the ratio provided in the Will aforesaid;

IV) that Sh. Shanti Sarup Chojar expired on 18.11.1998 leaving behind his wife, the plaintiff (son), and the defendants (daughters) as his only natural heirs; the wife of Sh. Shanti Sarup Chojar also expired on 30.01.2007;

V) that the plaintiff is in possession of the ground floor of the suit property whereas the defendant No.3 is in occupation of the first and second floors; the defendants No.1&2 reside in their respective matrimonial homes;

VI) that though the plaintiff is also in occupation of a room on the second floor of the suit property but the entry thereto has been

blocked by defendant No.3 by putting a lock on the entrance of the second floor;

VII) that a meeting was arranged on 02.06.2011 between the plaintiff and the defendants where the plaintiff expressed the desire to partition the suit property as per the Will of Sh. Shanti Sarup Chojar but the said request was refused by the defendants No.1 to 3 who insisted that the property be divided between the four legal heirs in equal shares;

VIII) that the request of the plaintiff to get the suit property mutated in the ratio contained in the Will and thereafter have the same converted into freehold from leasehold was also turned down;

IX) that the plaintiff was thus constrained to get issued a legal notice dated 15.06.2011 calling upon the defendants to partition the suit property in the said ratio and the same was duly served on all the defendants; and,

X) that though the defendants No.1&3 refused to accept the notice but a reply dated 24.06.2011 was received from the defendant No.2 who in paragraph 3 thereof has accepted the fact that her late father Sh. Shanti Sarup Chojar had left behind a Will whereunder she was

entitled to 20% share in the suit property and that she has no objection to the said Will.

The plaintiff has accordingly prayed for a decree, of partition of the suit property, declaring the shares of the plaintiff and the defendants therein as per the Will aforesaid, of permanent injunction restraining the defendants from creating third party rights in the suit property and of mandatory injunction directing the defendants to join in applying for mutation of the property as per the shares under the Will aforesaid and to thereafter in applying for getting the leasehold rights in the suit property converted into freehold.

2. The defendants No.1&3 have contested the suit, by disputing the existence of any Will and further claiming an oral family settlement between the heirs of Sh. Shanti Sarup Chojar in December 1998, pleading:-

(a) that under the aforesaid family settlement, the parties had affirmed that Sh. Shanti Sarup Chojar had died intestate and the suit property was partitioned by metes and bounds by the mother of the parties and the plaintiff was allotted the ground floor, defendant No.3 was provided the first floor and the defendant No.1 was given the second floor, with the common areas to be used by all the parties; the

defendant No.2 who was very well placed, was given roof rights over the second floor;

(b) that the parties since then, have been in possession of their respective portions for more than 12 years and the family settlement has thus been fully acted upon;

(c) that the plaintiff has suppressed the material fact that Sh. Shanti Sarup Chojar, upon realizing that the document got registered by the plaintiff at the office of the Sub Registrar was a Will, had in the presence of the plaintiff, torn and destroyed the same; this was declared so by the father in the presence of the defendants and the plaintiff even had agreed that he would not claim any share under the Will;

(d) that the plaintiff has been residing in Dehradun since the last three years and it is the plaintiff who has put a lock on the room of the second floor to harass the defendants;

(e) that the Sh. Shanti Sarup Chojar has also left various bank deposits/movable property etc. which under the family settlement were directed by the mother of the parties to be kept deposited for a

period of fourteen years and the plaintiff is thus liable to disclose and render accounts thereof;

(f) that the defendants No.1&3 have never been served with any legal notice and that the defendant No.2 has colluded with the plaintiff to wrongfully admit the untenable claim of the plaintiff;

(g) that the plea of the plaintiff of being in occupation of a room on the second floor is false since the entire second floor is in possession of defendant No.1, though for the purpose of convenience she has been mostly living in her matrimonial house.

3. The defendant No.2 has also filed a written statement and has though not disputed the Will but claimed that she cannot be compelled to apply for mutation or get the property converted into freehold; it is pleaded that the suit property being leasehold, cannot be partitioned since the same would be in conflict with the Government Policy and the terms and conditions of the lease deed.

4. The plaintiff has filed a replication to the written statements of defendants No.1&3 denying any family settlement or knowledge on any movable properties. He has denied possession of defendant No.1 of the

second floor and stated that he was not even in Delhi when the Will was registered and was working in Mumbai at that time. The plaintiff has also filed a replication to the written statement of defendant No.2 but nothing new has been stated therein.

5. Vide *ex-parte* ad-interim order dated 09.09.2011, while issuing summons of the suit, the parties were directed to maintain status quo with respect to title and possession of the suit property. Vide subsequent order dated 13.04.2012, the said interim order was made absolute and the following issues were framed in the suit:

- 1) *Whether the plaintiff is entitled to 55% share in the suit property in terms of the registered Will dated 18.11.1991 executed by his late father Shri Shanti Sarup Chojar? OPP*
- 2) *Whether the suit property bearing number 29/19, East Patel Nagar, New Delhi is liable to be partitioned by metes and bounds in accordance with the Will executed by the father of the parties? OPP*
- 3) *Whether there is any family settlement deed between the parties executed during the lifetime of the mother of the parties? OPD 1 &3*
- 4) *Whether the Will dated 18.11.1991 has been executed by late Shri Shanti Sarup Chojar in sound disposing mind? OPP*
- 5) *Relief.*

Evidence was recorded before the Local Commissioner and the counsels of the parties were heard and judgment reserved. The plaintiff thereafter filed application being I.A. No.7476/2013 for leading additional

evidence. The plaintiff, vide the said application seeks to correct his error of not confronting Advocate M.N. Sharma (PW2) with the certified copy of the registered Will during his examination in chief on 05.09.2012. The defendants No.1&3 have contested the said application by filing a reply thereto stating that no application lies after the hearing has been concluded and the judgment in the matter reserved; they have also pointed out that it is not open to the plaintiff to fill up the lacunas in his evidence after the same were highlighted during the final arguments. The counsels were heard on the said application also and the order thereon also reserved with the clarification that if the application is dismissed, the judgment in the suit would be pronounced along with the order on the application.

6. The plaintiff, in his evidence filed affidavits by way of examination in chief of himself (PW1) and Advocate M.N. Sharma (PW2) who is claimed to have drafted the Will as well as attested the same. The same were tendered in evidence. Mr. Hemant Bhatia, Record Keeper, Office, Sub Registrar, Kashmiri Gate (PW3) was also summoned with relevant records for production of the registered Will. The defendants No.1&3 tendered in evidence affidavits by way of examination in chief of defendant No.3 (DW1) and Ms. Rashmi Batra (DW2) – a family friend of the defendants’

family and alleged to be a witness to the family settlement. All the witnesses were duly cross examined by the opposing counsels. The defendant No.2 neither led any evidence nor cross-examined the witnesses, neither of the plaintiff nor of defendants No.1&3.

7. The controversy for adjudication in the suit centres around the existence of the Will of the father and the effect if any of the family settlement, again if any, on the said Will.

8. As far as the existence of the Will is concerned, not only the defendant No.2, but even the defendants No.1&3 have expressly admitted the same. The defendants No.1&3 in this regard, in para 3 of the preliminary submissions of their written statement have pleaded:

“3. That the plaintiff has also suppressed the material facts that his father in his presence had told that the plaintiff had taken him to the office of the Sub Registrar and got registered a document. When the father of the plaintiff came to know that the document purported to be was a Will he torn out and destroyed the same. This was declared by the father of the parties in the presence of the defendants. The plaintiff had agreed in the presence of his father that he would not claim any will and for this reason after the death of his father, the legal heirs have arrived at a mutual oral family settlement.”

and in para 1 of the preliminary submissions have pleaded as under:

“....The plaintiff has suppressed the material facts that after the death of late Shri Shanti Swaroop Chojar on 18.11.1998, there had taken place a family settlement at the instance of Smt. Sushila Chojar. In the said family settlement, it was affirmed by all the parties that Shri Shanti Swaroop Chojar had died intestate.”

The aforesaid, in my opinion, amounts to unequivocal admission by the defendants No.1&3 also of not only the valid execution and registration of the Will by the father but also of knowledge of the father of the contents of the Will, even if, of after the execution and registration of the Will. I am further of the view that once the defendants No.1&3 have so admitted the knowledge of the father of the contents of the Will and have pleaded that the father destroyed the Will because he did not intend to bequeath the property as per the said Will, if the defendants No.1&3 fail in proving that the father so destroyed the Will, not only are they bound by admission of execution and registration of the Will but are also to be deemed to have admitted that the said Will is as per the want of the father. The father, even if at the time of execution did not have knowledge of contents of the document executed and registered by him, if not proved to have destroyed the Will, has to be deemed to have approved of the contents. It matters not, whether the knowledge of the contents was of the time of execution or of after

execution. Thus, the enquiry under Issues No.1, 2 & 4 which pertain to the Will, has to be of proof of destruction of the Will.

9. If the defendants No.1&3 fail to prove destruction of the Will but prove the family settlement, pleaded as under in paras 4-5, 6 and 10 of parawise reply in the written statement:

“4-5.As already stated after the death of father of the plaintiff, there had taken place a mutual settlement and it was specifically agreed that the property would devolve by inheritance in accordance with law. It may be mentioned that the defendant No.3 has been in possession of the first floor as owner ever-since family settlement. Similarly the defendant No.1 had been in possession of the second floor as owner. It is again specifically denied that there was any registered will and / or rights were to devolve on the parties by virtue of the alleged will. It had always been accepted by all the parties that there was settlement during the life time of the mother as mentioned above, and no will was left by the father of the parties. It is therefore, absolutely wrong that the plaintiff wanted share as per the alleged will. It may again be mentioned that since no will was left by the father of the parties, the bank deposits were never apportioned as per the alleged will but had been kept to be divided later on so that movable property / money is not dwindled.

6.The plaintiff admits that he is in possession of the ground floor. His possession of the ground floor is only in terms of the family settlement as mentioned above.

10.However, after the death of the father, there had been family settlement as mentioned above and it is most unfortunate that after enjoying possession of the ground floor, for more than 12 years, exclusively the plaintiff has filed this suit malafide with a view to sell the whole house and go away with

cash. He is living in Dehradun. In view of the facts stated in this written statement, there is no question of again partitioning the property by metes and bounds.....The property already stands partitioned by virtue of the oral family settlement which had been acted upon. Otherwise, the answering defendant would have also claimed possession of the ground floor also. But the defendant have always honoured the family settlement.”,

then the question for adjudication would be, the effect if any of such Family Settlement on the Will and which would be decided under Issue No.3. Though, no specific issue has been framed on the plea of defendant No.2, of the property being impartible, but that aspect will also be considered under Issue No.3.

10. I accordingly proceeded to adjudicate the issues.

Issues No. 1, 2 & 4

11. As aforesaid, all the defendants have expressly admitted the execution and registration of the Will of the father on which the claim of the plaintiff for a 55% instead of 25% share in the property which he would have as per law of succession applicable in the absence of a Will, is pegged. However, it is the case of the defendants No.1&3 that it was the plaintiff who had taken the father to the office of the Sub Registrar and got a document registered but when the father came to know that the document got

registered from him was a Will, he tore and destroyed the same. It is thus for the defendants No.1&3 to prove that the plaintiff took the father to the office of the Sub Registrar and got registered a document which the father executed without knowing that it was his Will, and that the father upon coming to know of the same, tore and destroyed the same. Though Issue No.4 also addresses the aspect of the father being in a sound disposing mind at the time of execution thereof but no such defence is found in the written statement of the defendants No.1&3 and such issue appears to have been framed in a routine manner. Rather, it is the case of the defendants No.1&3 that the father, though not aware at the time of execution and registration of the contents of the document got executed and registered, subsequently became aware of the same and being not in agreement therewith, tore and destroyed the Will. The father could not have tore and destroyed the Will without being in a sound disposing mind.

12. The plaintiff appearing as PW-1, Sh. M.N. Sharma, Advocate appearing as PW-2 as also by the Record Keeper of the office of the Sub Registrar-I, Kashmiri Gate, Delhi appearing as PW-3 have purported to prove the Will. However, it may be highlighted that the original Will has not come before the Court. While the plaintiff purported to prove a certified

copy (obtained from the office of the Sub Registrar Kashmiri Gate) of the Will as PW-1/3, the witness from the office of the Sub Registrar deposed on the basis of the copy of the Will in the record brought by him. It is the case of the defendants No.1&3 that the original has not been produced because it is destroyed.

13. As far as the plea of the defendants No.1&3, of the plaintiff having got executed and registered the document from the father without the father knowing the nature and contents of the document, the same is without any particulars and vague. As aforesaid, it is not the case of the defendants No.1&3 that the father, at the time of execution and registration of the document owing to illness or any other reason, was not in his senses. In the ordinary course of human conduct and behaviour and otherwise, a person is presumed to know the consequences of his actions. It was thus for the defendants No.1&3 to plead and prove, as to exercising what undue influence and / or by making what mis-representations, the plaintiff managed to get the document executed and registered from the father without the father knowing the nature and contents of the document. No such particulars have been taken. The plea thus to the said effect is bald.

14. Though the plaintiff in his replication to the written statement of the defendants No.1&3 pleaded that he was working in Mumbai and was not in Delhi when the Will was registered but did not depose so in his examination-in-chief. However, in response to the cross-examination by the counsel for the defendants No.1&3, he deposed:

- (i) that the Will was not executed in his presence;
- (ii) that he came to know of the Will subsequently when he came from Bombay and when the father told him of the execution of the Will;
- (iii) that he had never seen the original Will;
- (iv) that he told the defendants of the Will immediately after the demise of the father and all the defendants admitted the same;
- (v) that he was living on the ground floor along with the parents since October, 1995 and first and second floors of the property were lying vacant from 1998 to 2004, though under his supervision and the defendant No.3 came in occupation of the first floor in March/April, 2004 for a temporary period, as her husband was sick;

(vi) that he had not informed of the Will, neither to the MCD nor to the L&DO nor to any other department;

(vii) that he was in service and was posted outside Delhi from 1965 till his resignation in 1995;

(viii) that he could not produce any documentary proof of having rendered financial assistance to his father;

(ix) that his wife had started working in 1983 in Dehradun and so remained working till her retirement in the year 2005.

15. A perusal of the cross-examination also shows that the defendants No.1&3, even in the cross-examination of the plaintiff, did not put to the plaintiff any circumstance or representation, taking advantage of / by making of which the plaintiff got the document which subsequently transpired to be a Will executed and registered from the father. In fact, the plaintiff was not even controverted qua his statement that he was not present in Delhi at the time of execution and registration of the document. The only suggestion given was that after the father had come to know that the plaintiff has procured a document as a Will, the father destroyed the same and which was denied by the plaintiff.

16. PW-2 Sh. M.N. Sharma, Advocate in his affidavit by way of examination-in-chief deposed that he had drafted the Will as per the instructions of Sh. Shanti Sarup Chojar; that Sh. Shanti Sarup Chojar was in sound and disposing mind and physically fit and had himself read over the contents of the document and had signed the same in his presence and in the presence of another witness Sh. Ravinder Kumar Rampal. In his cross-examination by the counsel for the defendants No.1&3, he deposed:

- (a) that he did not personally know Sh. Shanti Sarup Chojar who had come to him as a client;
- (b) that he had earlier not done any legal work for Sh. Shanti Sarup Chojar but had seen his proof of identity;
- (c) that at the time of execution and registration, Sh. Shanti Sarup Chojar was accompanied by the other witness Sh. Ravinder Kumar Rampal and the Deed Writer; however, the Deed Writer left after introducing Sh. Shanti Sarup Chojar;
- (d) that he did not recognize the plaintiff and had seen him for the first time on the date of his deposition;

(e) that the Sub Registrar has seen the document of identification of Sh. Shanti Sarup Chojar.

17. It is significant that no suggestion even was given by the counsel for the defendants No.1&3 in the cross-examination of PW-2 that the plaintiff had accompanied Sh. Shanti Sarup Chojar at the time of execution and registration of the Will.

18. The defendant No.3 Smt. Suraksha Madan appearing as DW-1 in her affidavit by way of examination-in-chief reiterated that the father, upon coming to know that the document got executed and registered from him was a Will, tore and destroyed the same and that is why the plaintiff had not filed the original Will before the Court. She in her evidence also did not disclose as to in what circumstances and my making what representation, the plaintiff could make the father sign and execute the document without the father knowing the nature and contents of the document.

19. In her cross-examination, she deposed:

(I) that in the year 1991 i.e. the year of registration of the Will, the plaintiff was doing service in Mumbai;

(II) that she was not sure, whether on 18.11.1991 i.e. the date of execution and registration of the Will, the plaintiff was in Delhi or Mumbai;

(III) that “may be” Sh. Ravinder Kumar Rampal being the other attesting witness to the Will, was living in the adjoining property at that time;

(IV) that she could not tell “the exact period when the Will was torn” by the father’ the father; had told her of having torn the Will in the year 1996-1997;

(V) that she was not aware about the Will and came to know of the same only when the father so informed her;

(VI) that her father was called an Electrical Engineer and was doing business;

(VII) denied the suggestion that the father had never torn the Will and in fact she had misplaced the Will;

(VIII) that the talk in which “the plaintiff agreed in front of the father that he will not claim anything under the Will” never happened.

20. The only other witness examined by the defendants did not depose about the Will or its destruction but in her cross-examination stated that the mother of the parties had told her about the Will and the same having been torn.

21. As would be apparent from the above, the defendants have failed to prove; either that the plaintiff had got executed and registered the document titled as and purporting to be the Will from the father without the father knowing the nature and contents thereof, or, of the father having torn the Will.

22. The fact however remains that the original Will has not come before the Court.

23. The plaintiff has also not led any evidence of the whereabouts of the original Will except for the suggestion in the cross-examination of the defendant No.3 appearing as DW-1 that the defendant No.3 had misplaced the original Will.

24. The question which arises is whether from the mere non-availability of the original Will, the revocation by destruction thereof has to be presumed.

25. Section 70 of the Indian Succession Act, 1925 provides that no Will shall be revoked otherwise than (i) by marriage; (ii) or by another Will; (iii) or by some writing declaring an intention to revoke the same and executed in the same manner as a Will; or (iv) by burning or tearing or otherwise destroying the same by the testator with the intention of revoking the same. Therefrom it follows that from a mere non-availability of the original Will, the presumption of revocation by destruction thereof, is not to be drawn. It has to be proved by the person who pleads such revocation by destruction that the Will was destroyed with the intention of revoking the same. To that effect, as aforesaid, no evidence has been led by the defendants No.1&3.

26. The Supreme Court in ***Durga Prashad Vs. Debi Charan*** (1979) 1 SCC 61 held that where a Will has been properly executed and registered by the testator and not found at the time of death, the question whether the presumption that the testator had revoked the Will can be drawn or not will depend on the facts and circumstances of each case. It was further held that in our country, most of the people are not highly educated and do not in every case take the care of depositing the Will in the bank or with the Solicitors and as a result of which the possibility of the Will being stolen, lost or surreptitiously removed by interested persons cannot be excluded. It

was yet further held that when there is no obvious reason or clear motive for the testator to revoke the Will and yet the Will is not found on the death of the testator, it may well be that the Will was misplaced or lost or was stolen by the interested persons. An interesting discussion in this respect is also to be found in the judgment of the Division Bench of the High Court of Orissa in ***Brundaban Chandra Vs. Ananta Narayan Singh Deo*** AIR 1956 Orissa 151 and in ***Salem Town Bazaar Street, Kannika Vs T.K. Sadasivam Chettiar*** MANU/TN/0322/1980.

27. In the light of the said legal position, the judgment of the Division Bench of this Court in ***Pt. Devi Charan Vs. Durga Pershad*** AIR 1967 Delhi 128 relied on by the counsel for the defendants no.1 and 3 and in which case, in the facts and circumstances thereof, a presumption of destruction from non availability of the original was drawn, is of no avail.

28. Else, a Will like any other document may be proved either by primary evidence i.e. by producing and proving the original or by secondary evidence, within the meaning of Sections 62 & 63 of the Indian Evidence Act, 1872.

29. The plaintiff in his evidence, as aforesaid, attempted to prove a certified copy of the Will obtained from the office of the Sub Registrar and

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to which objection was taken by the counsel for the defendants No.1&3 and which objection is also to be dealt with now. The plaintiff examined one of the attesting witnesses of the Will Sh. M.N. Sharma, Advocate. He, in his affidavit by way of examination-in-chief though generally referred to the Will but not with respect to any particular document, not even with reference to the certified copy of the Will placed by the plaintiff on record. No such reference was got made from him even when he tendered the said affidavit into evidence. It was in this context, enquired from the counsel for the plaintiff during the hearing, as to how it could be known, as to with respect to what document the witness was deposing and how the attesting witness could be said to have identified the signatures of the testator or of the other witnesses or his own signatures on any document/Will. In fact, it was unnerved by the said enquiry, that the counsel for the plaintiff has subsequently moved an application for additional evidence. Reliance was however placed on ***Mahesh Kumar Vs. Vinod Kumar*** (2012) 4 SCC 387 and on ***Hameed Vs. Kanhaiya*** 2004 Allahabad Law Journal 3654 to contend that even a certified copy of the Will could be proved and on ***Ram Lal Vs. Hari Krishan*** AIR 1988 Delhi 73 and ***Sita Ram Vs. R.D. Gupta*** AIR 1981 Punjab & Haryana 83 to contend that the Will has been proved.

30. Though the copy of the Will in the office of the Sub Registrar was requisitioned and produced by PW-3 but on a different date from the one when the PW-2 was examined. PW-3 was producing the same of course was not privy to execution and registration and could not have proved the Will.

31. As far as the proof by the plaintiff of the Will is concerned, the plaintiff not being an attesting witness thereto, could not have proved the same. A Will, being a document required by Section 63 of the Succession Act to be attested, under Section 68 of the Evidence Act cannot be used as evidence until one attesting witness at least has been called for proving its execution. The plaintiff has thus led the evidence mechanically and without regard to law and which lacunas/errors, the counsel for the plaintiff now seeks to make up, upon being made wiser during the hearing.

32. However, notwithstanding such neglect on the part of the plaintiff in proving his case, I am inclined to hold the Will to have been validly proved for the following reasons and owing where to do not feel the need to consider the application of the plaintiff for additional evidence, moved out of fright rather than by addressing the reasons herein below mentioned:

(A) The defendants No.1&3 who really are the contesting defendants qua the Will having in their pleadings admitted as aforesaid the valid execution of the Will;

(B) The counsel for the defendants No.1&3 also, notwithstanding the counsel for the plaintiff having not referred to any document sought to be proved as Will, while examining the attesting witness thereto, having proceeded to cross-examine him on the premise that the witness has deposed about the document on record; a perusal of the entire cross-examination shows that the counsel for the defendants No.1&3 proceeded on the premise that the document deposed by the said witness was the certified copy of the Will on record;

(C) PW-3 from the office of the Sub Registrar who had brought file from the office of the Sub Registrar containing a copy of the Will registered in that office having deposed that the same contained “the original signatures of the testator Sh. Shanti Sarup Chojar on both the pages along with the signatures of the witnesses” and he having not been controverted on the said aspect, though he stated that he could not identify the signatures; I am in this regard reminded of what the lawyers of a bygone era, steeped in trial and which art is now dying,

used to say, that a Will mostly not proved in the classic sense by the Advocate for the propounder thereof but is nevertheless proved by unnecessary and excessive cross-examination by the Advocate for the party challenging the Will;

(D) It has been held in ***Prithi Chand Vs. State of Himachal Pradesh*** (1989) 1 SCC 432, ***Kewal Krishan Mayor Vs. Kailash Chand Mayor*** 95 (2002) DLT 115, ***Continental Telepower Industries Ltd. Vs. UOI*** MANU/DE/1691/2009 and ***Narender Nath Nanda Vs. The State*** MANU/DE/1626/2010 that a document containing carbon copy of the signatures is also primary evidence;

(E) It has been held in ***Y. Narsimha Rao Vs. Y. Venkata Lakshmi*** (1991) 3 SCC 451 that even a photocopy of the original is secondary evidence. The certified copy of the Will on record is a photocopy of the original;

(F) The mistakes in proof are of the Advocate of the plaintiff. It is the settled principle in law (see ***Rafiq Vs. Munshilal*** (1981) 2 SCC 788) that a litigant ought not to suffer for mistake of his Advocate. The mistake here is undoubtedly of counsel in proving the Will in the classic sense. Though in some subsequent decisions it has been held

that a litigant is bound by mistakes of his Advocate but the mistakes here are such, qua which the plaintiff could not have taken any remedial action.

I on appreciation of the pleadings, evidence and the documents on record, am satisfied of the existence and validity of the Will and hold that the Will dated 18.11.1991 of the predecessor in title qua the suit property stands proved.

33. Though the plaintiff as aforesaid has failed to give any reason for non-production of the original Will but from a reading of the entirety of the evidence including the lengthy cross-examination by the counsel for the defendants No.1&3 of the plaintiff and of the replies given by the defendant No.3 in her cross-examination, it is abundantly proved that the defendant No.3 had much more access than the plaintiff to the parents. The possibility thus of the defendants No.1&3 being in possession of the original Will and having suppressed the same cannot be ruled out. The plaintiff had no reason to suppress the same. It is not the case of the defendants that the father had put an endorsement of “cancelled” on the original, for the plaintiff to be interested in suppressing the original. Rather, it is the plea of the defendants

No.1&3 that the original was torn and destroyed and which they have failed to prove.

34. It is not the case of any of the defendants that as per the said Will even if proved, the parties do not have the shares in the property as pleaded by the plaintiff.

35. I have nevertheless perused the Will which I have held to have been proved and find the same in paras 2 to 4 thereof to be providing as under:

“2. I Shanti Sarup Chojar (Testator) affirm and bequeath that after my death my wife Sushila Chojar (legatee) would be wholly and solely entitled to get possession of all my property both movable and immovable as mentioned in para one above of the testament. Besides my wife Sushila Chojar would have the liberty to realize rents and collect gains from all sources concerned, and utilize them according to her own wishes.

3. I Shanti Sarup Chojar (Testator) affirm and bequeath that after death of my wife Sushila Chojar (a) my son Satish Kumar Chojar who leaves one son and one daughter and being financially helpful to me through out my life would be entitled to fifty five percent share in my property both movable and immovable, (b) my daughter Savita Kapoor w/o Shri Santosh Kumar Kapoor, who bears three sons shall be entitled to twenty percent share in my property both movable and immovable, (c) my daughter Suraksha Madan wife of Shri Lalit Kumar Madan would be entitled to twenty percent share in my property both movable and immovable, (d) my daughter Subhashni Chopra wife of Shri Subhash Chander Chopra who does not bear any child, nor has adopted any child, would be entitled to five percent share in my property both movable and immovable.

4. I Shanti Sarup Chojan affirm and bequeath that if the death of my wife Sushila occurs before my death then after my death the disposal of my property both movable and immovable will be dealt with as mentioned above in para three of the (Will) Testament.”

36. I am of the view that under the aforesaid Will, the predecessor in title of the parties had bequeathed the property to his wife. Such bequeath to the wife cannot be said to be a limited one. The use by the testator of the words “wholly and solely” negate, the bequeath to the wife being of a life interest or life estate only. The words used in the Will “my wife Sushila Chojar, would have the liberty to realize rents and collect gains from all sources concerned and utilize them according to her own wishes” cannot be read as limiting the right of the wife only to collecting the rents and not having the power to sell the property. The bequeath to the son and daughters is only “after death of my wife Sushila Chojar”. It becomes further clear from Clause-4 that the bequeath to the son and daughters immediately on the demise of the testator was to be only in the event of the wife predeceasing the testator and not otherwise. Had the bequeath been intended to be to the son and daughters with the wife having only a life interest, Clause-4 would not have been inserted, as in that case the son and daughters would have a residuary interest in the property immediately on the demise of the testator.

37. The Supreme Court in *Mauleshwar Mani Vs. Jagdish Prasad* (2002) 2 SCC 468 on the basis of the words “Pane ki Musthak” and “Ba Akhtiar Intakal” used in a Will made in Hindi language held the bequeath to be of an unlimited and an absolute estate and not a limited one. The Division Bench of this Court in *Judge Pal Khera Vs. Chand Rani Khera* MANU/DE/1766/2012 also held the use of the words “absolutely” and “exclusively” in the Will to be indicative of bequeath of an absolute and unlimited estate and not a limited one.

38. The question which however arises is whether the predecessor in title of the parties having bequeathed the property wholly and solely to his wife could have provided for the manner in which the property was to be dealt with after the death of his wife. In my opinion, he could not have done so. A testator, once has bequeathed the property wholly and solely to his wife and the wife is alive on the date of the demise of the testator, the property becomes of the wife and any provision in the Will, of the manner in which the property is to be inherited after the demise of the wife, is of no avail. This is the reason that once the property has on the demise of the testator vested in the wife of the testator, the same in the absence of a Will of the wife of the testator, has to be dealt with in accordance with law of

succession application to such wife. Reliance if any required in this regard, can be placed on *Sadaram Suryanarayana Vs. Kalla Surya Kantham* (2010) 13 SCC 147.

39. It is the admitted position that the mother of the parties died intestate. In accordance with the law of succession applicable to her, on her demise, the property would be inherited equally by her children i.e. by the plaintiff and the defendants No.1&3.

40. Thus, though I hold the plaintiff to have proved the Will and the defendants to have failed to prove the Will having been revoked by destruction but on an interpretation of the Will, I am unable to find the plaintiff entitled to 55% share in the property. Rather, the plaintiff and the three defendants are found to have an equal share in the property. The Issues No.1, 2 & 4 are decided accordingly.

Issue No.3

41. The plea of the defendants No.1&3 is that the plaintiff in the family settlement after the death of the father, not only admitted the father having died intestate but also to partition of the property, with the plaintiff getting the ground floor, defendant No.3 getting the first floor, defendant No.1

getting the second floor and the defendant No.2 having the roof right over the second floor. Though in view of my interpretation of the Will, the plea of the defendants No.1&3, of the plaintiff having in the said family settlement agreed to the father having died intestate becomes redundant but for the sake of completeness, the same is also adjudicated.

42. Though in my view, the share even if any of the parties in the ratio as pleaded by the plaintiff, could in a family settlement have been agreed to be 25% only but the fact remains that the defendants have utterly failed to prove any such family settlement. The defendant No.3 appearing as DW-1 in her cross-examination admitted that there is no Deed or document of family settlement and there is no other documentary proof thereof also. There is also nothing to show that the parties at any time acted in consonance with the said family settlement. The mere factum of the plaintiff being in possession of the ground floor and the defendant No.3 being in possession of first floor is not indicative thereof. It has been admitted by the defendant No.3 in evidence that the parents of the parties were living on the ground floor of the property and the upper floors were being rented. It has further been admitted by the defendant No.3 in evidence that the plaintiff from time to time used to reside with the parents

on the ground floor. The defendant No.3 has in cross-examination admitted to have come to occupy the first floor after she had left the official accommodation allotted to her husband at Pandara Road, New Delhi. The defendant No.3 in her cross-examination of the plaintiff and in her own cross-examination has replied that the house tax of the property remained one. Had the parties felt the need for any family settlement as is pleaded by the defendants No.1&3, the parties in the ordinary course of human behaviour, would have also pursuant thereto dealt with the property accordingly. It is not the case of the defendant No.3 that the property tax was shared floorwise. The defendant No.1 has not even appeared as a witness to prove the family settlement. The evidence of the DW-2 examined is hear say. I thus hold the defendants No.1&3 to have failed to prove the family settlement and decide Issue No.3 against the defendants No.1&3.

43. As far as the plea of the defendant No.2 of the property being impartible is concerned, the said question is no longer *res integra*. I have in ***Madan Lal Vs. Kuldeep Kumar*** MANU/DE/4039/2013, on a conspectus of case-law in this regard held that the terms of the perpetual lease of the land underneath the property prohibiting partition thereof, do not prevent the

superstructure from being partitioned. There is thus no merit in the said plea of the defendant No.2.

44. The plea of the defendant No.2 of the property being impartible and the plea of the defendants No.1&3 of the property having already been partitioned in family settlement having been negated, a decree for partition and for which relief the suit has been filed, has to follow. However, the plaintiff having failed in his plea of having inherited 55% share in the property under the Will of the father and the shares of the parties having been found to be equal, a preliminary decree for partition is passed declaring the plaintiff as well as the three defendants to be having 25% share each in the property.

45. The plaintiff is also found entitled to the relief of permanent injunction restraining the defendants from dealing with the property in which all the parties have a share from dealing therewith. Of course such injunction will be till the execution of the final decree for partition. Accordingly, the parties are restrained till the execution of the final decree for partition in this suit from alienating, encumbering or parting with possession of any share or portion of the property.

46. As far as the claim of the plaintiff for mandatory injunction is concerned, the same is found to be in interest of all the parties and in aid to the final decree for partition to follow in this suit. Accordingly, all the parties are directed to, within sixty days hereof, join in making an application for mutation of the leasehold rights in the land underneath the property from the name of Sh. Shanti Sarup Chojar to their own names and to thereafter also take steps for conversion of the leasehold rights in the said land into freehold. Needless to state that all the expenses therefor will be born equally by the parties and if any of the parties fail to contribute his/her share, the same shall be deducted with interest, out of his/her share in the property.

Decree Sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

JULY 01, 2014

aa/bs