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

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Date of Decision: 15.01.2016

+ CS(OS) 1430/2012

RAGHU NATH SAHAI ANAND Plaintiff

Through Mr.Rajiv K. Garg and Mr.Sanjay
Gupta, Advocates

Versus

PUSHPA DEVI & ORS. Defendants

Through Ms. Anupama Sharma, Mr.Vishnu
Sharma and Naman Nayak,
Advocates for D-1 to 8 & 13.

+ CS(OS) 1969/2003

RAGHU NATH SAHAI ANAND Plaintiff

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Versus

PUSHPA DEVI & ORS. Defendants

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**CORAM:
HON'BLE MR. JUSTICE JAYANT NATH**

JAYANT NATH, J.

1. At the outset, I may deal with a preliminary point. After arguments were heard and judgment was reserved in this matter, on 24.11.2015 a Notification was issued in exercise of powers under section 4 of the Delhi High Court (Amendment) Act, 2015. Under this Notification, all suits which are valued at less than Rs.1 crore, except those cases in which final judgments have been reserved, are to be transferred to the jurisdictional subordinate courts. There is no dispute that the present Suits have been valued at less than Rs.1 crore. What would be the effect of the Notification i.e. would the matters have to be transferred to the subordinate courts or a judgment can be pronounced? The answer would lie in the meaning of the phrase “final judgment has been reserved”.

2. The matter was listed in Court to enable the parties to make their submissions. On this several adjournments were sought by the parties. Finally on 8.1.2016, learned counsel for the plaintiff and the contesting defendants stated that the Notification would not effect this case as “final judgment” has been reserved before the Notification. Subsequently, defendants No.1 to 8 and 13 filed an application claiming that the counsel was under a different impression and the statement was wrongly recorded. This court on 14.01.2016 took the said submissions of the counsel for defendant nos. 1 to 8 and 13 on record.

3. The issue would be as to what can be termed as final judgment. Reference may be had to the judgment of *Shah Babulal Khimji vs. Jayaben D.Kania and another*, AIR 1981 SC 1786. The Supreme Court while determining as to what would comprise a judgment as stated in the

Letters Patent Appeal also dealt with the issue of final judgment and held as follows:-

“113.(1) A Final Judgment-a judgment which decides all the questions or issues in controversy so far as the Trial Judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the Trial Judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench. (2) A preliminary judgment-This kind of a judgment may take two forms-(a) where the Trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the Trial Judge would be a judgment finally deciding the cause so far as the Trial Judge is concerned and therefore appealable to the larger Bench.....”

4. Hence, wherever the suit is dismissed or decreed in part or in full, such an order would be a final judgment. Here in the present case, there are two suits. The two suits were consolidated. CS(OS)1430/2012 was filed before the Civil Judge but vide order dated 30.04.2007 was directed to be heard alongwith CS(OS) 1969/2003. The evidence was to be read in common.

5. As far as CS(OS) NO.1430/2012 is concerned, a judgment would finally dispose of the suit in terms of the aforesaid judgment of the Supreme Court in *Shah Babulal Khimji vs. Jayaben D.Kania and another (supra)*.

6. As far as Suit No.1969/2003 is concerned, on the basis of arguments either the suit would be dismissed or the Court would in case the contention of the plaintiff were to be accepted pass a preliminary decree.

7. Would an order passing a preliminary decree be a “final judgment”? Reference may be had to the judgment of the Supreme Court in the case of *Venkata Reddi & Ors. v. Pothi Reddi*, AIR 1963 SC 992 (MANU/SC/0024/1962), wherein the Supreme Court held as follows:

“7. It is not clear from the judgment what the contingencies referred to by the High Court are in which a preliminary decree can be modified or amended unless what the learned Judges meant was modified or amended in appeal or in review or in revision or in exceptional circumstances by resorting to the powers conferred by Sections 151 and 152 of the Code of Civil Procedure. If that is what the High Court meant then every decree passed by a Court including decrees passed in cases which do not contemplate making of a preliminary decree are liable to be modified and amended. Therefore, if the reason given by the High Court is accepted it would mean that no finality attaches to decree at all. That is not the law. A decision is said to be final when so far as the Court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees - a preliminary

decree and a final decree - the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to s. 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree.”

8. Hence, an order passing a preliminary decree would amount to a “final judgment” within the meaning of the phrase as used in Notification dated 24.11.2015 issued in exercise of powers under Section 4 of the Delhi High Court (Amendment) Act, 2015.

9. I may also note that the matter was heard on several dates before judgment was reserved. It will cause grave injustice to the plaintiff and would be a waste of precious judicial time in case the matter is transferred and has to be reheard by the concerned subordinate court.

10. Accordingly, I shall now deal with the two suits.

11. I will first deal with CS(OS) 1969/2003 where parties have led their evidence. The suit is filed by the plaintiff seeking a decree of declaration in favour of the plaintiff and against the defendant declaring that the plaintiff is owner of 4/5th undivided share of the building 5207,

Basant Road, Pahar Ganj, New Delhi. A preliminary decree for partition is also sought for partition of 4/5th undivided share in favour of the plaintiff and 1/5th undivided share in favour of defendants No.1 to 8 with subsequent directions.

12. As per the plaint the property in question is built over 262 sq.yards. It was purchased by late Shri Kundan Lal from Shri Sewak Manik Raj through a registered sale deed dated 5.8.1959. The plaintiff states that he was inducted as a tenant in a portion of the suit property by the previous owner Shri Sewak Manik Raj in 1948. After Shri Kundan Lal bought the property, the plaintiff became a tenant under Shri Kundan Lal and started paying rent to the said Shri Kundan Lal. Apart from the plaintiff it is urged that there are four other occupants of various portions of the suit property, namely, Smt.Laxmi Devi, a legal heir of Shri Jagdish Lal a tenant, Shri Tilak Raj Manchanda, Mrs.Raj Mehta, daughter in-law of Shri Badri Nath who was the tenant and Shri Prem Nath Bhandari s/o Shri Shankar Lal Bhandari was the tenant.

13. Subsequently, it is urged, the plaintiff and late Shri Kundan Lal entered into an Agreement to Sell the suit property for an agreed consideration of Rs.1 lakh. Earnest money of Rs.10,000/- was paid by the plaintiff. It is urged that before the transaction could be completed, Shri Kundan Lal died on 20.4.1983. Subsequently, Smt. Longshree, wife of Late Shri Kundan Lal died on 26.11.1985. It is stated that both Shri Kundan Lal and Smt.Longshree died intestate.

14. Shri Kundan Lal and Smt.Longshree left behind several children. Defendants No.1 to 8 are the legal heirs of the late son of Shri Kundan Lal and Smt. Longshree, namely, late Shri Gaya Prashad. Defendants

No.9 to 12 are the married daughters of Shri Kundan Lal and Smt.Longshree. The deceased couple had another son Shri Hari Shankar, who was given in adoption to the brother of Shri Kundan Lal, namely, Ram Charan Dass. Hence, Shri Hari Shanker ceased to be a part of the family. He has not been impleaded as a party to the suit. Hence, it is urged that defendants No.1 to 8, being LR's of late Shri Gaya Prasad and defendants No.9 to 12 respectively each inherited 1/5th undivided share of the suit property.

15. Thereafter, it is stated that the plaintiff approached the legal heirs of late Shri Kundan Lal to complete the transaction pursuant to the Agreement to Sell entered into between the plaintiff and late Shri Kundan Lal. Defendants No.9 to 12 respectively agreed. Defendants No.10 and 11 respectively executed registered sale deeds dated 15.11.1990 for respective consideration of Rs.20,000/- in favour of the plaintiff. Defendant No.9 did the needful on 29.04.1994 for the same consideration. Similarly, defendant No.12 executed a registered sale deed dated 4.4.1995 for a consideration of Rs.20,000/-. It is urged that based on these sale deeds, the plaintiff became co-owner of the suit property to the extent of 4/5th undivided share leaving remaining 1/5th undivided share jointly to the share of defendants No.1 to 8.

16. It is further stated in the Plaint that sometimes in December 1996 the plaintiff was shocked to learn that defendant No.1 in collusion with a local property dealer, namely, defendant No.13 executed a sale deed on 30.01.1992 in favour of the said defendant No.13 claiming herself to be the absolute owner of the suit property on the basis of an alleged Will dated 04.02.1983 stated to have been executed by Shri Kundan Lal.

17. It is stressed and urged that the defendant No.1 to 8 and 13 have acted fraudulently and in connivance. It is submitted that defendants No.1 to 8 are not in possession of any portion of the suit property. Further in 1996 two tenants vacated a portion occupied by them of the suit property and handed over physical possession to the plaintiff. Hence, the present suit has been filed.

18. Defendants No.9 to 12 have filed their written statements confirming that they have voluntarily executed sale deeds of their 1/5th share in the suit property in favour of the plaintiff. They have supported the case of the plaintiff that the Will propounded by defendant No.1 of late Shri Kundan Lal is a forged Will.

19. Defendants No.1 and 3 have also filed written statement (termed as a written submission). It has been urged in the written statement that late Shri Kundan Lal had two sons. One of the sons, namely, Shri Hari Shankar was given in adoption to Shri Ram Charan Dass and was duly settled in this manner. The other son, namely, Shri Gaya Prasad Gupta died on 3.9.1977 before the death of Shri Kundan Lal leaving behind two minor sons and five minor daughters who are impleaded as defendants No.2 to 8. It is urged that the seven minor children were brought up by late Shri Kundan Lal and defendant No.1 the widow of late Shri Gaya Prasad Gupta. It is urged that Shri Kundan Lal was worried about the future of his grandchildren and also about his widowed daughter in-law/defendant No.1. It was in these circumstances that Shri Kundan Lal executed a Will in favour of defendant No.1 on 4.2.1983. It is further urged that defendant No.1 executed the sale deed dated 30.01.1992 of the property in favour of defendant No.13 due to financial constraints. The

proceeds from the sale were utilised for the marriage of her daughters. The property was mutated in favour of defendant No.13 in the Municipal Records on 16.07.1992. The other averments made in the plaint have also been denied.

20. Issues were framed on 23.02.2006 and partly modified vide order dated 18.05.2006. They read as follows:-

- “1. Whether the suit is liable to be stay under Section 10 of the Code of Civil Procedure in view of the prior institution and pendency of the suit no. 779/02 pending in the court of Civil Judge, Delhi.
2. Whether the plaintiff has paid sufficient court fee? If so, its effect?
3. Whether the suit is properly valued for the purpose of court fee and jurisdiction and proper court fee is paid thereon.
5. Whether the Will dated 4.2.1983 propounded by the defendant no. 1 is legal, valid and is the duly executed Will of late Shri Kundal Lal? If so, its effect?
6. Whether the plaintiff is entitled to seek partition in respect of the suit property relating to his 4/5th share?
- 7.Relief.”

21. Parties have led their evidence. The plaintiff has filed evidence by way of affidavits of PW-1 Shri Hari Shankar Gupta and himself as PW-2. In his evidence by way of affidavit PW-2 has exhibited various documents i.e. sale deed dated 05.08.1959 between Late Kundan Lal and Shri Sewak Ram Manak Raj as Ex. PW2/3; rent receipts issued by Kundan Lal to tenants are Ex. PW2/2 and PW2/3; sale deeds executed in favour of plaintiff by the daughters of late Sh. Kundan Lal are exhibited as Ex.PW2/4 to PW2/7; mutation carried out in his name in the MCD record as Ex.PW2/8; House tax paid by PW2 exhibited as Ex.PW2/9 to

PW2/15 and lease deed executed between late Sh. Kundan Lal Gupta and Smt. Vidya Devi is exhibited as Ex. PW2/19 (Ex.P-13/D9-12). In addition, he has also led the evidence of Shri Satya Pal, Record Attendant of Delhi Archive as PW-3 and of SI Raman Kumar, Police Station Pahar Galj, New Delhi as PW-4. The defendants have filed the evidence by way of affidavit of DW-1, namely, Shiv Kumar Tyagi/ defendant No.13. In his evidence by way of affidavit he has exhibited some documents, namely, sale deed between himself and defendant No. 1/Smt.Pushpa Devi dated 30.01.1992 as Ex.DW2/1; mutation of the suit property has also been carried out in his name in the MCD record vide letter dated 16.7.1992 exhibited as DW1/3; certified order dated 5.2.1998 as DW1/4. Evidence by way of affidavit of Smt.Pushpa Devi/DW-2 and Mr.Vijay Kumar Gupta as DW-3, one of the attesting witnesses to the alleged Will of late Shri Kundan Lal dated 4.2.1983 have also been filed. The contesting defendants have admitted only one document which is exhibited as Ex. P-9/D1-D13. Documents of the plaintiff have been admitted by defendants No.9 to 12 which are exhibited as Ex.P1/D9-12 to P8/D9-12, P10/D9-12 to P13/D9-12

22. I will now deal with issues No.5 and 6 which reads as follows:-

“5. Whether the Will dated 4.2.1983 propounded by the defendant no.1 is legal, valid and is the duly executed Will of late Shri Kundan Lal? If so, its effect?

6. Whether the plaintiff is entitled to seek partition in respect of the suit property relating to his 4/5th share?”

23. Learned counsel for the parties have made extensive submissions in regard to these issues. Learned counsel for the plaintiff has made the following submissions to submit that the Will propounded by the

contesting defendants has no authenticity or validity:

i) It is pointed out that on 08.04.1991, two sons of defendant No.1, namely defendant No.2 and defendant No.3 jointly executed an affidavit that their father Sh. Gaya Prasad has died and was the owner of the said property. The affidavit also states that the deponents have no objection if the suit property is mutated in the name of their mother- defendant No.1. In this affidavit, there is no reference whatsoever to the alleged Will dated 04.02.1983 of Sh. Kundan Lal, which they are now propounding.

ii) It is further urged that the Testator was not in sound disposing mind and could not comprehend the contents of the alleged Will. He is said to have been unwell and suffering from T.B. on the date of alleged execution of the Will, i.e. on 04.02.1983. He was 90 years old and died within two and half months of the alleged execution of the Will, i.e. on 20.04.1983. It is further urged that Testator did not know English i.e. the language in which the Will has been drafted. Hence he could not have comprehended the contents. No evidence is led to show that any body explained the contents of the Will to the Executor before he allegedly executed the same. The alleged scribe of the Will is not stated nor any evidence led of the scribe of the Will.

iii) It is further stated that there is no attempt on the part of the contesting defendants to prove that the alleged signatures on the Will are that of Sh. Kundan Lal. No handwriting expert has been examined nor is the handwriting sought to be matched with his signatures on any admitted documents. Further, the alleged Will is signed by the Testator as “Kundan Lal” when in fact he used to sign as “Kundan Lal Gupta”. Reliance is placed on Rent Receipts Ex.P-2/D9-12, Ex.P-3/D9-12 and

lease deed dated 07.12.1973 (Ex.P-12/D9-12) to contend that these documents are executed by Sh.Kundan Lal and he has signed as “Kundan Lal Gupta”.

iv) It is further stated that the evidence of the attesting witnesses, namely, DW-3 cannot be believed. He was not known to late Sh. Kundan Lal. In fact he is a relative of defendant No.13 and is conniving in the whole scheme. The second witness to the Will was the grandson of the Testator who was an interested party as his mother inherits the entire suit property as per the Will. There is a third witness whose whereabouts or connection with late Sh. Kundan Lal is not known to anybody. It is urged that Testator of a Will would normally request a person well known to him to attest the execution of his Will. Any outsider and unknown persons would not normally be requested to witness the Will of a Testator. It is stated that clearly the testimony of DW-3 cannot be believed.

v) It is further urged that Sh. Kundal Lal died on 20.04.1983. Defendant No.1 the beneficiary of the alleged Will took no steps whatsoever to claim her rights in the suit property based on the alleged Will. No attempt was made to mutate the property in her name. No attempt was made to demand rent from the tenants who are in physical possession of the suit property. No notice of eviction was issued against the said tenants. This state of affairs continued for 9 years after the death of Sh. Kundan Lal when suddenly a Sale Deed is alleged to have been made on 30.01.1992 of the suit property in favour of defendant No.13. It is urged that the conduct of defendant No.1 clearly shows that there was no Will executed by Sh. Kundan Lal and it has been manufactured only

for the purpose of affecting the sale of the property to defendant No.13.

vi) Learned counsel has relied on the following judgments:-

- 1. *Sudarshan Lal Maini vs. Virender Kumar Maini*, 187 (2012) DLT 414 (DB);**
- 2. *Kavita Kanwar vs. State*, 214(2011) DLT 448;**
- 3. *Bharpur Singh & Ors. vs. Shamsher Singh*, 2009(3) SCC 687;**
- 4. *Lalita Ben Jayantilal Popat vs. Pragna Ben Jamnadass*, 2008 (15) SCC 365;**
- 5. *Smt.Guro vs. Atama Singh*, 1992(2) SCC 507;**
- 6. *Shri Narain Singh vs. State*, 211(2014) DLT 632;**

24. Learned counsel appearing for defendants No. 1 to 8 and 13 has reiterated that DW-3 the witness to the Will has in his evidence proved the signatures of Kundan Lal on the Will. There is no reason or occasion to disbelieve his testimony. It is urged that Shri Kundan Lal was in good health and in sound disposing mind. Merely because he suffered from TB/Bronchitis would not mean that he was not of sound disposing mind. It is stressed that he was concerned about the minor children of his pre-deceased son late Shri Gaya Prasad and it was in those circumstances that he executed a Will in favour of defendant No.1. He wanted to settle the said children. It is further pointed out that the second attesting witness Shri Arun Kumar Gupta had passed away on 6.11.2010. Reliance is also placed on the Deed of Adoption dated 30.08.1961 to point out that this deed is also executed by late Shri Kundan Lal where he has signed as “Kundan Lal”. This document it is urged is in English. Kundan Lal used to sign documents in English. Reliance is placed on the following judgments:-

- (i) *H.Venkatachala Iyengar vs. B.N.Thimmajamma & Ors.*, AIR 1959 SC 443.**

(ii) Anita Khosla vs. State & Ors., 173 (2010) DLT 290.

(iii) Peshori Lal vs. State of Delhi & Ors., 96 (2002) DLT 491.

25. I may first look at the evidence of DW-3 Shri Vijay Kumar Gupta, the crucial witness to the Will. Shri Vijay Kumar Gupta in his evidence by way of affidavit has said that he was called by Late Shri Kundan Lal on 4.2.1983, he was having family terms and living near the vicinity of Sh. Kundan Lal at Ladoo Ghati, Pahar Ganj, New Delhi. Late Shri Kundan Lal signed the Will in the presence of other witnesses, namely, Shri Arun Kant and one more witness whose name he states that he does not remember. He identifies the signatures of Kundan Lal on the Will which is exhibited as Ex.DW-3/1. In his cross-examination on 18.03.2009 he states that Shri Kundan Lal called him from his house by sending someone. He met defendant No.1 Smt.Pushpa Devi on the same day as she offered him tea on the asking of her father-in-law. He denies that he is related to Smt.Pushpa Devi. He states that he had met Shri Kundan Lal before as Shri Kundan Lal was having a restaurant in Connaught Place by the name of 'Gupta Restaurant'. He admits that Shri Shiv Kumar Tyagi/defendant No.13 had told him about the pendency of the case and that he had also brought him to the Court. He also states that he knows Shri Shiv Kumar Tyagi and his elder brother since childhood. In his further cross-examination on 19.3.2009 he admits that he did not attend any marriage or function in the family of Shri Kundan Lal.

26. Reference may also be had to the evidence of DW-2 Smt.Pushpa Devi defendant No.1. She has reiterated the fact about being the absolute owner of the suit property. She states that after the death of her father-in-

law the tenants were not giving her any rent. In her cross-examination on 27.11.2008 she admits that the suit property is under tenancy of tenants and that she has never lived there. She states that the tenants have not paid her rent after the death of her father in-law though she demanded the same orally from them. She admits that no notice/suit or Eviction Petition was filed against the tenants. She also states in her cross-examination on 11.12.2008 that it was her eldest son Arun Kant who told her about the Will executed by her father in-law. She admits that on the date the Will was executed her mother in-law was admitted in Lady Hardinge Hospital. She admits that she did not tell about the Will to any of her relatives and kept it as a secret. She also did not tell anybody about the sale. Upon her further cross-examination on 12.12.2008, she admits that she did not get the property mutated in her name. She states that all the matters were being looked after by her elder son.

27. The plaintiff himself as PW2 has filed his affidavit by way of evidence. He has reiterated that he was inducted as a tenant in a certain portion of the suit property in 1948. He has reiterated that he entered into an oral Agreement to Sell with Sh. Kundan Lal in 1975/76 and that he paid Rs.5200.00 by way of a cheque and balance of Rs.4800.00 in cash being a total of Rs.10,000.00 as part consideration. He has confirmed that he has got mutation also done in his favour after four sale Deeds in his favour vide letter dated 20.11.1995 (Ex. PW2/8) and that he has been paying house tax. He has confirmed that in 1996 he received part possession from two tenants. He received possession from Sh. Raj Kumar S/o Smt.Vidya Devi who was a tenant and Sh. Sardar Singh a tenant of the respective portion in their occupation in 1996. He further states that

after the death of Sh. Kundan Lal, defendant No.1 filed a suit for partition on 11.09.1987, the plaint being Ex. PW2/20 (Ex. P-11/D9-12). In the plaint she did not disclose any Will said to have been left behind by Sh. Kundan Lal.

28. Defendant No.13 Sh. Shiv Kumar Tyagi also filed his affidavit by way of evidence as DW1. He has proved the Sale Deed executed by defendant No.1 in his favour. He states that the Will of Sh. Kundan Lal was never challenged by any of the legal heirs of late Sh. Kundan Lal. In his cross-examination on 31.10.2009 he submits that it is within his knowledge that two tenants have vacated a portion of the suit property in 1996 and have handed over vacant possession to the plaintiff though he states that probably the plaintiff had paid money to them. He also admits that he did not take any steps or action against the said two tenants or the plaintiff in respect of that portion of the suit property. He also admits that he has till date not filed any suit seeking declaration of title of the suit property or challenging the Sale Deed executed in favour of the plaintiff by defendant Nos. 9 to 12.

29. Sh. Hari Shankar Gupta PW1, son of late Sh. Kundan Lal who was given in adoption has also supported the case of the plaintiff. He states in his affidavit by way of evidence that late Sh. Kundan Lal categorically told him that he has not executed any Will. He confirms the Agreement to Sell between late Sh. Kundan Lal and the plaintiff. He states that the Will propounded by defendant No.1 does not bear the signatures of Sh. Kundan Lal. In his cross-examination on 01.11.2007 he admits that there is one case pending between him and defendant No.1 regarding the property at Ladoo Ghati, Paharganj, New Delhi. He reiterates that Will

dated 04.02.1983 bears bogus signatures of late Sh. Kundan Lal. He admits that he has no rights in the suit property as he was given for adoption to Sh. Ram Charan Dass. The Will dated 04.02.1983 was specifically put to the witness and he was asked about the signatures of Sh. Kundan Lal at point 'A' and 'A1'. The witness has denied that the signatures are the signature of Sh. Kundan Lal. He states that Sh. Kundan Lal was illiterate and was only second class pass.

30. We may now see the legal position regarding proof of a Will.

31. Reference may be had to the judgment of the Supreme Court in the case of *H.Venkatachala Iyengar vs. B.N.Thimmajamma & Ors.*, AIR 1959 SC 443. The Supreme Court held as follows:

“18. What is the true legal position in the matter of proof of wills ? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, sections 59 and 63 of

the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will ? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents.

The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator

was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.”

32. Similarly, reference may be had to the judgment of the Supreme Court in the case of ***Bharpur Singh & Ors. vs. Shamsher Singh***, AIR 2009 SC 1766 (MANU/SC/8404/2008). In the said judgment the Supreme Court relied upon “***H.Venkatachala Iyengar vs. B.N.Thimmajamma & Ors.***, (*supra*) and reiterated the legal position regarding proof of a Will as follows:-

“12. This Court in *H. Venkatachala Iyengar v. B.N. Thimmajamma* MANU/SC/0115/1958 : AIR1959SC443 opined that the fact that the propounder took interest in execution of the Will is one of the factors which should be taken into consideration for determination of due execution of the Will. It was also held that one of the important features which distinguishes Will from other documents is that the Will speaks from the date of death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator.

It was also held that the propounder of will must prove:

- (i) that the Will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free will, and
- (ii) when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient

to prove the sound and disposing state of testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of propounder, and

(iii) If a Will is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion.

In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated therein.”

33. Reference may also be had to the judgment of the Supreme Court in the case of *Sridevi and Ors. v. Jayaraja Shetty and Ors.*, AIR 2005 SC 780 (MANU/SC/0065/2005) wherein the Supreme Court held as follows:

“14. The propounder of the will has to show that the will was signed by the testator; that he was at the relevant time in sound disposing state of mind; that he understood the nature and effect of dispositions and had put his signatures to the testament of his own free will and that he had signed it in the presence of the two witnesses who attested in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged.

34. Now coming to the facts of this case, we may see as to whether defendant No.1, who has propounded the Will of late Sh.Kundan Lal dated 04.02.1983, has been able to prove the execution of the Will as stated in the above judgments.

35. I may first look as to whether defendant No.1 has been able to prove that Sh.Kundan Lal, the testator signed the Will in a sound

disposing state of mind understanding the nature and effect of disposition and he put his signatures on the document on his own free will. I may also see as to whether the evidence adduced in support of the Will is satisfactory and sufficient as required by law.

36. The only witness who has deposed about the execution of the Will in the present case is DW-3 Sh. Vijay Kumar Gupta. DW-2/defendant No.1 has also filed her evidence by way of affidavit. Though she is said to have been in the residence when the Will was executed by the testator, her evidence is completely silent on the circumstances or the events that took place on 04.02.1983.

37. I may first see whether the propounding defendants have proved the signatures of the Testator on the Will. According to the plaintiff, defendant Nos. 9 to 12, the daughters of Sh.Kundan Lal and Sh.Hari Shankar, DW-1 who is the real son of Sh.Kundan Lal and had been given away in adoption, the alleged Will dated 04.02.1983 does not bear the signatures of Sh.Kundan Lal. It has been further averred that the Will has been allegedly signed using the signatures 'Kundan Lal' whereas Sh.Kundan Lal used to always sign as 'Kundal Lal Gupta'. Reliance has been placed on two rent receipts i.e. Ex.PW-2/2 (Ex.P-2/D9-12) and Ex.PW2/3 (Ex.P-3/D9-12) which bear, it is urged, the original signatures of Sh.Kundan Lal where he has signed as 'Kundan Lal Gupta'. Reliance is also placed on the lease deed dated 07.12.1973 whereby it is urged that Sh.Kundal Lal had inducted a tenant, namely, Sh.Ram Bihari Lal Gupta on which document again Sh.Kundan Lal has signed as 'Kundan Lal Gupta' on the two pages (Ex.P-12/D9-12).

38. The contesting defendants have failed to produce any handwriting

expert or any document to prove that the signatures as affixed on the purported Will dated 04.02.1983 is that of Sh.Kundan Lal. The only submission made by the contesting defendants is that Sh.Kundan Lal has executed an adoption deed on 30.08.1961 (Ex.P10/D9-12) regarding the adoption of Sh. Hari Shankar where Sh.Kundan Lal has signed as a witness and has only signed as 'Kundan Lal'. Only the photocopy of this adoption deed is on record. This document has been admitted by the counsel for defendants No.9 to 12 but no attempt has been made to file a certified copy of the same. There is no attempt to summon the original adoption deed or to bring the testimony of a handwriting expert to prove that the handwriting on the alleged Will matches with the signatures of Sh.Kundan Lal on admitted documents.

39. That apart, I may also see whether the contesting defendants have been able to prove that the Testator understood the nature and effect of the disposition.

40. It has been admitted by DW-2 in her cross-examination on 04.02.2009 that Sh. Kundan Lal did not know English. Sh.Hari Shankar/PW-1 has stated that Sh.Kundan Lal was uneducated and had passed only second class. There is no evidence led by the contesting defendants to show that Sh. Kundan Lal before he executed the Will comprehended its contents. There is no evidence to show that the contents of the Will were explained to him by any person. The name of the scribe who drafted the Will is not known nor has the scribe been examined. This evidence was necessary as one of the sons of defendant No.1 i.e. Arun Kant Gupta was a witness to the Will. Defendant No.1 was also informed about the Will by her son.

41. In the light of the evidence led by the contesting defendants, in my opinion they have failed to prove that signatures on the Will dated 04.02.1983 are that of Sh. Kundan Lal or that he comprehended the contents of the Will before allegedly executing the same.

42. I may further note that there are various other circumstances which raise a suspicion about the authenticity and validity of the Will. I may now state the said suspicious circumstances.

43. A perusal of the testimony of DW-3 Sh.Vijay Kumar Gupta shows that he was not a confidant or a close associate of the testator-Sh.Kundan Lal or his family. In his cross-examination, he was asked as to whether he had met Sh.Kundan Lal before 1983, the year of execution of the Will. He answered in affirmative but failed to give any proper details of as to how he met Sh.Kundan Lal. Reference may be had to the said cross-examinations that took place on 18.03.2009 which reads as follows:-

- “Q. Have you met Sh. Kundal Lal before 1983?
- A. Yes because he was having a restaurant in Connought Place in the name of Gupta Restaurant.
- Q. Who was the owner of Gupta Restaurant?
- A. It was of Sh.Kundan Lal Gupta.
- Q. When you meet Sh. Kundant Lal Gupta lastly before 04.02.1983?
- A. I used to meet him. It might be one and half month before 04.02.1983.”

44. He admits on the same date in his cross-examination that after 04.02.1983 he never met Sh.Kundan Lal. He admits that he did not receive any information about the death of the testator but gives a vague answer that he heard about the death later. In his cross-examination on 19.03.2009, he admits that he does not know the details of the family of

Sh.Kundan Lal. He states that Sh.Kundan Lal was having two sons but does not know how many total children he had. He admits that he did not know his wife. He admits that he has never attended any marriage or any other function in the family of Sh.Kundan Lal. DW-3 also admits that he was being brought in court by defendant No.13 Sh. Shiv Kumar Tyagi. In his cross-examination on 18.03.2009, he admits that he knows Sh.Shiv Kumar Tyagi since his childhood/knows the elder brother of Sh.Shiv Kumar Tyagi who was of his age.

45. From the evidence led by DW-3, it is clear that he is a person who appears to be not acquainted at all with Sh.Kundan Lal. Normally, one would expect that a testator would request a known friend or a person who is well known to come and attest his Will. It is also evident that DW-3 appears to have had a better relationship with defendant No.13 than Sh.Kundan Lal.

46. Further, the Will was allegedly attested by three witnesses. DW-3 is one of them. One of the witnesses, namely, Sh.Arun Kant Gupta is stated to have expired in 2010. He was an interested person as his mother inherited the suit property as per the Will. The third witness, namely, Tej Pal Singh was not examined. In fact, nobody is aware as to who Tej Pal Singh is or his whereabouts or his connection with Sh.Kundan Lal. It is clear that other than Sh. Arun Kant Gupta who was an interested witness, the other two independent witnesses appear to be persons who had no connection or equation with the testator. There is no explanation why Sh.Kundan Lal chose these unknown persons as witnesses to attest his alleged Will a solemn and important document (Reference ***Smt. Jaswant Kaur vs. Smt. Amrit Kaur, AIR 1977 SC 74***).

47. Another suspicious circumstance is the conduct of defendant No.1 after Sh.Kundan Lal died on 20.04.1983. Defendant No.1 in her cross-examination admits that she has taken no steps whatsoever to assert her ownership rights in the suit property after the death of Sh.Kundan Lal. There were number of tenants in the property. No attempt was made to ask them to start paying rent to her. No attempt was made to issue notices to the defaulters or take legal action against them. There was no attempt even made to get the property mutated in her name. No attempt was made to effect probate of the Will. In fact, she admits in her cross-examination that she did not inform anybody about the Will including defendants No.9 to 12. Hence, despite having allegedly inherited the suit property, no attempt was made to assert her ownership rights for 9 years after the death of Shri Kundan Lal. Suddenly, thereafter on 31.01.1992, she has without informing any of the legal heirs of Sh. Kundan Lal executed a sale deed in favour of defendant No.13.

48. Defendant No.13 has also acted in a curious manner. Defendant No.1 was not in physical possession of any portion of the suit property. Defendant No.13 is also not in possession of any portion of the suit property. None of them i.e. defendant No.1 or defendant No.13 have the original sale deed executed in favour of Late Shri Kundan Lal. Defendant No. 13 has got the mutation done in the records in his favour but has made no attempt since 1992 to recover the rent from the tenants of the suit property. He admits that he has knowledge that two tenants have handed over physical possession of the portion of the property in their occupation in 1996 to the plaintiff. He admits that he has taken no steps to regain the possession from the plaintiff. Hence other than getting

mutation done in his name, he has not asserted any rights on the suit property, which he bought for valuable consideration in 1992.

49. Hence, it follows that the contesting defendants have failed to prove the signatures of Sh. Kundan Lal on the said Will or to prove that he comprehended the contents of the said Will before allegedly signing the same. There are several suspicious circumstances about the Will. No explanation is given to explain them. In the light of those facts, in my opinion, the contesting defendants have failed to prove the execution, validity or legality of the Will dated 04.02.1983 allegedly executed by Sh. Kundan Lal.

50. Hence, on issue No.5 I hold that the Will dated 4.2.1983 propounded by defendant No.1 is not legal or valid and was not executed by late Shri Kundan Lal. The effect of this would be that the defendants No.1 to 8 had only $1/5^{\text{th}}$ share in the suit property being the legal heirs of the deceased son of Late Shri Kundan Lal. The sale effected to defendant No.13 of the full suit property would be invalid. Regarding issue No.6, I hold that the plaintiff would be entitled to seek partition of the suit property in respect of his $4/5^{\text{th}}$ share.

51. Coming to issue No.1,2 and 3, no submissions have been made in this regard by either of the parties. Hence, I hold that the present suit is not liable to be stayed. I also hold that the plaintiff has paid sufficient Court Fees and that the suit is properly valued for the purpose of Court Fee and jurisdiction.

52. Hence, the plaintiff has $4/5^{\text{th}}$ share in the suit property while defendant Nos.1 to 8 have $1/5^{\text{th}}$ share in the suit property. As there are no pleadings or counter claim regarding the rights of defendant No.13, the

said defendant would be free to assert his rights, if any, as per law.

53. A preliminary decree for partition is passed of the suit property declaring the parties to have shares as mentioned in the above para.

54. I now come to the other suit, namely, CS(OS)1430/2012. The said suit was filed before the Senior Civil Judge in 1997 by the plaintiff seeking a decree of declaration that he is the lawful, sole and absolute owner in possession of 4/5th undivided share of the property. Declaration is also sought that the Sale Deed dated 30.01.1992 executed by defendant No.1 (in Suit No.1430/2012) in favour of defendant No.2 (in Suit No.1430/2012) be treated null and void. A decree of permanent injunction is also sought against the defendants to restrain them from using the said Sale Deed dated 30.01.1992 or from transferring, alienating or creating any kind of charge in the suit property.

55. On 30.4.2007 in IA No.10935/2013, by consent of parties this suit filed before the Civil Judge was agreed to be consolidated with the present suit. It was directed that the evidence led in CS(OS) No.1969/2003 may also be read in CS(OS) 779/2002. None of the parties have made any submissions regarding the present suit.

56. Issues were framed in this case by the Civil Judge on 20.9.2003 which read as follows:-

- “1. Whether the plaintiff is entitled for a decree declaring the plaintiff to be lawful, sole and absolute owner in possession of the 4/5 undivided share in property bearing No.5207, Vasant Road, Darya Ganj, New Delhi? OPP
2. Whether the sale deed dated 30.01.1992 executed by defendant No.1 in favour of the defendant No.2 is liable to be declared as illegal, null and void? OPParties
3. Whether the plaintiff is entitled for a decree of permanent

injunction against the defendant thereby restraining them from using the sale deed dated 30.01.1992 in any manner and from transferring, alienating and any kind of charge on the said property? OPP

4. Relief.”

57. I have recorded my findings in CS(OS)1969/2003 and passed a preliminary decree. Accordingly, nothing survives in the present suit. The present suit is disposed of accordingly.

58. List before the Joint Registrar on 29.01.2016 for further proceedings as per law.

(JAYANT NATH)
JUDGE

JANUARY 15, 2016

n/v/rb