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HIGH COURT OF DELHI AT NEW DELHI

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RFA 260/2008

Pronounced on: 9th May, 2016

RAJINDER TANDON

..... Appellant

Through: Mr. M.G. Vachar, Advocate

versus

MASTER PRINCE

..... Respondent

Through: Mr. Vivek Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. This is an appeal filed by the appellant against the judgment dated 9th May, 2008, by virtue of which the learned trial Court has passed a preliminary decree, holding that the respondent herein is having ½ share in property bearing No.7/544, Indira Park, Jawala Nagar, Shahdara, Delhi ('suit property'), while as the other ½ share belongs to the appellant.

2. Briefly stated, the facts of the case are that, the respondent/plaintiff, being a minor, filed a suit for partition through his mother and natural guardian, Ms. Asha Tandon, claiming that property bearing No. 7/544, Indira Park, Jawala Nagar, Shahdara, Delhi was the

property belonging to Nirmala Devi, the grandmother of the respondent/plaintiff. Nirmala Devi expired on 27th July, 2004, leaving behind two sons, namely, Raj Kumar Tandon and Pradeep Kumar Tandon. The respondent/plaintiff is the son of Pradeep Tandon, who unfortunately died on 20th October, 2004. Apart from the respondent/plaintiff, Pradeep Kumar Tandon was survived by his widow, Asha Tandon and two minor daughters, namely, Priyanka and Simran. It was stated by the respondent/plaintiff that, since Nirmala Devi had died on 27th July, 2004 intestate, therefore, her property had devolved in the proportion of ½ share each to her two sons, namely. Raj Kumar Tandon and Pradeep Kumar Tandon. It was also stated that Nirmala Devi was the owner of property bearing House No.302-D, behind Ram Lilla Ground, Shahdara, Delhi and she had transferred the said property in favour of the respondent/plaintiff during her lifetime as, on account of the death of her son, she never wanted the respondent/plaintiff and his mother to pay any rent.

3. The aforesaid suit for partition was contested by the appellant/defendant, who took the plea that Nirmala Devi, his mother, had made two Wills. By virtue of one Will, which was proved by him to

be as Ex. DW-2/A and mark '2', the suit property was allegedly bequeathed by Nirmala Devi to the appellant/defendant, while as the another Will was also executed on the same date, i.e., on 26th May, 1993 and which is Ex. PW-1/D1, by virtue of which property bearing No. 302-D, Ram Lilla Ground, Shahdara, Delhi was bequeathed to the respondent/plaintiff and her mother etc. This stand of the appellant/defendant was contested by the respondent/plaintiff by filing a rejoinder. On the pleadings of the parties, the following issues were framed:-

- “1. Whether the suit has been valued properly for the court fee and jurisdiction? OPP*
- 2. Whether the suit is bad for non joinder of necessary parties as alleged by the defendant? OPP*
- 3. Whether Smt. Nirmala Devi owner of the suit property died intestate as claimed by the plaintiff, if so its effect. OPP*
- 4. If issue no.2 is decided in favour of the plaintiff, whether the plaintiff is entitled for the partition of the suit property? OPD”*

4. The respondent/plaintiff, in support of his case, examined his mother as PW-1, AshaTandon. So far as the appellant/defendant is concerned, he entered into the witness box and examined himself as DW-1. In addition to this, DW-2, Suresh Chand, a witness, who had signed the Will, DW-3, Balbir Singh, who was working as an LDC in the Office of the Sub-Registrar, were also examined.

5. After hearing the arguments, the learned trial Court did not believe the version of the appellant/defendant that Nirmala Devi had executed two Wills, by virtue of which the two different properties were bequeathed to the appellant/defendant and the respondent/plaintiff. It was stated that there was absolutely no justification for Nirmala Devi to have executed two separate Wills on the same date, when she could have executed only one Will. It was also observed by the learned trial Court that, in one of the Wills, at the bottom, it is written that either of the parties will not sue the other party with regard to the suit property. The learned trial Court has examined not only the case law, but entered into detailed examination of the Wills to arrive at a conclusion that the Wills have not been proved and thereafter a preliminary decree of partition was passed.

6. On the face of it, I feel the learned Additional District Judge ('ADJ') has unnecessarily dealt with the case law and the detailed discussion with regard to the proof of the Will, when ex facie the Will is not validly executed.

7. The appellant/defendant, feeling aggrieved by the preliminary decree, has preferred the present appeal.

8. I have gone through the impugned judgment, heard the learned counsel for the appellant and thoughtfully considered the record.

9. Before dealing with the submissions made by the learned counsel for the appellant, which has been essentially that Nirmala Devi owned two properties – one each was bequeathed to the two sons, namely, the appellant/defendant and the grandson, the respondent/plaintiff, who was survived on account of the death of the second son, Pradeep Kumar Tandon of Nirmala Devi.

10. Before dealing with the proof of the Will, it will be pertinent here to reproduce Section 63 of the Indian Succession Act, 1925 and Section 68 of the Evidence Act, 1872, which read as under:-

“63. Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or a mariner at sea, shall execute his Will according to the following rules:—

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the

signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

68. Proof of execution of document required by law to be attested.—*If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:”*

11. A cumulative reading of the aforesaid provisions would make it amply clear that the requirement of proof of a Will is that, it must be made by the deceased/testator in a sound state of mind in respect of the property owned by him/her and there have to be two attesting witnesses to the Will – one of whom has to testify before the Court and the three persons, namely, the two attesting witnesses and the deceased/testator must sign simultaneously, except in one occasion, where one of the witnesses has signed in the absence of the other witness, but the deceased/testator has given an assurance to the second witness that the other witness has signed in his presence.

12. Further, a Will is to be proved if both the attesting witnesses are alive, at least by one of the attesting witnesses, who has to come to the

witness box and testify. While accepting the Will to be genuine and valid Will, there should be no suspicion about execution of the Will.

13. Coming back to the facts of the present case, though the learned ADJ has taken the Will to be proved through the testimony of the appellant/defendant himself as Ex. DW-2/A in respect of the suit property and Ex. PW-1/D1 in respect of property bearing No. 302-D, behind Ram Lilla Ground, Circular Road, Shahdara, Delhi, which is purported to have been given to the respondent/plaintiff, but the fact of the matter remains that, simply execution of a document by a person would not be deemed to be proof of the Will, as has been stated hereinabove. At least, one of the attesting witnesses should have testified before the Court in proof of the Will. In the instant case, both the Wills, which have been exhibited by the appellant/defendant, are signed by only one attesting witness, while as the other signature is that of an advocate in the capacity of person who has drafted the Will. Therefore, this cannot be treated to be a valid Will at all. The factum of the Will being registered or the witness, namely, appellant/defendant, or even the respondent/plaintiff admitting that the Will was signed by Nirmala Devi does not take the case of the appellant/defendant any further. That is not sufficient requirement of law

in order to uphold the defence of the appellant/defendant to resist the suit for partition. Therefore, I feel, in the absence of valid execution of the Will, it was totally unwarranted on the part of the learned ADJ to have entered into the long discussion with regard to the proof of Will or cite number of case law to arrive at a conclusion that the defence of the appellant/defendant is not credible. Issue No.3, which was recast during the trial so as to read whether Nirmala Devi had left behind a Will in favour of the appellant/defendant in respect of the suit property and, if so, to what effect, is not proved and consequently it was held that Nirmala Devi died intestate and on account of her death intestate, the respondent/plaintiff, being the grandson, is entitled to ½ share in her property, which happens to be the suit property bearing No. 7/544, Indira Park, Jawala Nagar, Shahdara, Delhi along with his two minor daughters and his mother, though they have not been impleaded as parties and the ½ share is owned by the appellant/defendant.

14. I accordingly feel that there is no illegality or infirmity in the impugned judgment in arriving at a conclusion, and so far as respondent/plaintiff is concerned, he has ½ share in the suit property.

Accordingly, the present appeal is totally misconceived and the same is dismissed.

V.K. SHALI, J.

MAY 09, 2016
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