

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

+ **FAO No.387/2017**

% **Reserved on: 10th October, 2017**
Pronounced on: 13th October, 2017

KANCHAN BABBAR AND ORS. Appellants
Through: Mr. Gagan Deep
Sharma, Advocate.

Versus

STATE AND ANR. Respondents

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

FAO No.387/2017 and C.M. No.36356/2017 (stay)

1. This first appeal is filed under Section 299 of the Indian Succession Act, 1925 impugning the judgment of the probate court below dated 1.2.2017 which has allowed the petition and has granted probate with respect to the Will dated 23.9.1997 executed by the deceased testator Ex.MWO Nand Lal Surma with respect to his property being industrial plot no.38A, Functional Industrial Estate of Electronics, Okhla Industrial Estate Phase II, New Delhi. By this Will

the subject property was bequeathed in favour of the respondent no.2 herein, the son of the deceased testator by excluding the four daughters of the deceased testator. Probate petition was filed by the respondent no.2 herein who is the son of the deceased testator. The daughters of the deceased testator, i.e the sisters of the respondent no.2 herein were the respondents in the probate petition filed in the court below. The Will dated 23.9.1997 is duly registered with the Sub-Registrar office at Janakpuri, New Delhi vide registration no.60774 in Additional Book no.3 Volume No.129/4001.

2. The facts of the case are that the respondent no.2 herein/petitioner in the court below, applied for probate of the Will dated 23.9.1997 executed by his father Ex.MWO Nand Lal Surma. Respondent no.2 was appointed as the executor of the Will. In the probate petition, the four daughters of the deceased testator were arrayed as respondent nos.2 to 5. The objections which were filed by the respondent nos.2 to 4 in the probate court below were rejected vide order dated 18.8.2008 of the trial court and which order has become final. It is seen that the respondent nos.2 to 4 in the probate court below therefore have filed no objections/written statement, and have

therefore also led no evidence. The probate petition in the court below was contested by the respondent no.5 in the court below Smt. Kanchan Babbar and who is the appellant no.1 in the present appeal.

3. From the records of the probate petition, it is seen that the deceased testator owned two immovable properties. One property was the subject property being industrial plot no.38A, Functional Industrial Estate of Electronics, Okhla Industrial Estate Phase II, New Delhi. The second property was the residential property of the deceased testator being residential plot no.B-18, Nilamber Apartments, Rani Bagh, New Delhi. With respect to the aforesaid two properties being the industrial plot and the residential plot, there were a total of five Wills which were executed by the deceased testator. The five Wills were in two chains with one chain of Wills being only for the industrial plot and the other chain of the Wills was with respect to the residential plot. The first Will Ex.PW1/13 dated 19.2.1993 and the third Will dated 23.9.1997 Ex.PW1/2 (Will in question in probate case) were with respect to the industrial plot. The second Will Ex.PW1/14 dated 24/25.2.1993, the fourth Will Ex.PW1/15 dated 2.12.1998 and the fifth Will Ex.PW1/16 dated 20.5.2002 are with

respect to the residential property. Whenever the deceased testator Ex.MWO Nand Lal Surma made his Will, the Will was made only specific to one property i.e each of the five Wills deals with only either the residential property or the subject industrial plot. By all the Wills the son of the deceased testator was the beneficiary or the ultimate beneficiary.

4. The facts with respect to these five Wills are stated in paras 58 to 63 of the impugned judgment and these paras read as under:-

“58. The **first Will** Ex. PW-1/13 is dated 19.02.1993. The will is notarized and attested by two witnesses, namely, Sh. Vinod Kumar Sharma and Mrs Raksha Surma. No witness examined by petitioner. Witness Mrs Raksha Surma, stated to be died. This will states about the allotment of plot No. 136 (New No. 38 A) measuring 250 Sq. Yards in Functional Industrial Estate in favour of deceased testator by the Oakhla Authorities. In this will the beneficiary is Avinash, son and also appointed as executor. This will is not proved by the petitioner or respondents as per Section 63 (C) of Indian Evidence Act but it is essential to establish the fundamental intention to rely this will.

59. The **Second Will** is Ex. PW-1/14 dated 24-25.02.93. This will is a registered will. This will is attested by two witnesses namely, Sh. Tilak Raj Jaggi and Sh. G.P. Goyal, advocate. The deceased testator in this will states that he is owner of society built flat bearing No. B-18, Ground floor, Under MIG category, situated at Neelamber Appartment, Sainik Vihar, Pitam Pura, Delhi-34. In this will the deceased testator described about his son and daughters and the beneficiary is his wife Smt. Raksha Soor and after her death it shall devolve upon son and all four daughters jointly. It was as per submissions registered with Sub- Registrar on 24.2.1993. The first page of the will mentioned dated 25.02.1993. It seems to be bonafide error.

60. The **third Will** is dated 23.09.1997 Ex. PW-1/2 (Will in question). It was executed and also got registered. There are two attesting witnesses of this will i.e Sh. Anil Kumar and Sh. Rajan Mahajan, Advocate. The

deceased testator vide this will bequeathed a plot No. 38 measuring 220 sq. mtrs in Okhla in favour of the petitioner. It does not states regarding any other property i.e flat or any other movable property of the deceased. Petitioner examined PW-2 Sh. Rajan Mahajan advocate, the attesting witness.

61. The **forth Will** is Ex. PW-1/15 dated 02.12.1998. This Will also attested by two witnesses i.e Sh. Satpal Taneja and Sh. R.K. Marwaha 'Gabbu' advocate. In this will deceased testator stated about flat No. B-18, Neelamber Apartments, Opposite, Sainik Vihar, Pitampura, Delhi-34. The Will has not mentioned about any industrial plot. It is also a registered Will. In this Will also the deceased testator intended that flat shall devolve upon his wife and after her death it devolve upon petitioner, his son subject to the condition that he shall pay daughters, a sum of Rs. 1 lac to Neelam Ahi, Rs. 1 lac to Ms Kiran Kanwar, Rs. 3 lacs to Ms Veena Thakur , Rs. 1 lac to Ms Kanchan Babbar and Rs. 50,000/- to Shiv Ashram Mauzaval, Naya Nangal Distt. Ropar, Punjab.

62. It is pertinent to mention here that it mentioned about the plot at Okhla and deceased testator that the sale proceed of the flat if wife is pre-deceased to the son will be utilised for construction of industrial plot at Okhla. It is further pertinent to mention that this will contain an important class of revocation of will executed sometime ago which is read as under:

"I the above said testator have executed a Will sometime ago, I hereby cancel and revoke the said Will and any other codicil of mine."

The petitioner examined PW-6 Sh. Satpal Taneja, the attesting witness to prove this will.

63. The **fifth Will** was executed by deceased testator on 20.05.2002 which is Ex. PW-1/16. In this will the deceased testator states about flat bearing No. B-18, Ground floor, AFNHB, Neelamber Apartment, Opp. Sainik Vihar, Pitampura, Delhi-34. It has been bequeathed to the petitioner. It reflects that his wife Smt. Raksha Soor might have died at the time of execution of this Will because he has not referred her name in the will. He has excluded all four daughters. This will attested by two witnesses, namely, Sh. Jaswant Singh and Sh. R.K. Jain, advocate. Petitioner examined PW-5 as one of the attesting witnesses. This will does not states regarding Okhla industrial plot and any other movable or immovable property of the deceased." (emphasis added)

5. As already stated above, we are only concerned with the validity of the third Will dated 23.9.1997 and which is a registered Will. The two attesting witnesses to this Will are Sh. Anil Kumar and

Sh. Rajan Mahajan. Sh. Rajan Mahajan one attesting witness deposed as PW-2 and he proved the subject Will dated 23.9.1997 as Ex.PW1/2. This is discussed and noted by the trial court in paras 38 to 40 in its impugned judgment and which paras read as under:-

“38. Petitioner further examined Sh. Rajan Mahajan, the attesting witness to the Will dated 23.09.1997 Ex. PW-1/2. He identified his signatures on the Will at point A & B. He also identified the signatures of other attesting witness Anil Kumar at point C. He deposed that Anil Kumar and deceased testator had concurrently signed the said will in his presence. He identified the signatures of deceased testator at point D, E & F.

39. In the cross-examination PW-2 deposed that he is an advocate by profession and enrolled in the year 1994. Since 1994 he has been drafting registration documents, especially of property documents. In the year 1997 he used to prepare two-three documents daily and can identify the registered documents by seeing the signatures and his seal.

40. He deposed that deceased testator used to take consultancy from him regarding the properties and for the first time came through a common friend. He deposed that he get register only two documents of deceased i.e Will Ex. PW-1/2 and a power of attorney. The deceased came into contact for the first time in the year 1995-96. He deposed that he does not know the other attesting witness Sh. Anil Kumar, personally who had come with the deceased testator.” (underlining added)

6. The subject Will Ex.PW1/2 dated 23.9.1997 with respect to which probate petition was filed reads as under:-

“**WILL**
This Will is made at New Delhi, on 23rd day of September, 1997, by Ex-MWO Nand Lal Surma, S/o Sh. Mool Raj, R/o B-18, Neelamber Apartments, Opposite Sainik Vihar, Pitam Pura, Rani Bagh, New Delhi (hereinafter called the Testator on the one part). IN FAVOUR OF: SHRI AVINASH SURMA, SON OF SHRI NAND LAL SURMA, RESIDENT OF EA-331, G-8 AREA, RAJOURI GARDEN, MAYA ENCLAVE, NEW DELHI (hereinafter called the Executor) of the other part.
Whereas I am the absolute owner/allottee of Plot which has been allotted as Plot No.38, measuring 220.90 sq. mtrs. in Functional Industrial Estate of Electronics in Okhla in 1 Area, Phase-II, New Delhi, at the rate of Rs.930/-

per sq. mtr. as tentative cost per sq. mtrs. by Commissioner of Industries Delhi Administration Delhi, vide Letter No.F-2(136)/Land/DI/83/CI/97/1273, Dated 27.8.1997, F-2(136)/Land/DI/83/CI/92/38/653, Dated Nil, F-2(136)/Land/DI/83/CI/92/2436, Dated 14.1.1993.

I willingly make this Will that after my death my rights, interest, liens and titles in the said property and the land thereunder be acquired, possessed and inherited by the Executor (my son) who may then get the same mutated/sub situated and transferred in his/her own name as owner and lessee, in the records of DDA, MCD, ESU, Commissioner of Industries Delhi, DSIDC, or any other concerned authority on the basis of this Will or its certified true copy.

That I, further declare that if the said Executor dies earlier than me, then his legal heirs and successors shall become the owners, of the said plot/property, without any objection by me and by my legal heirs and successors.

That I further declare that this is my first and last Will in respect of the said property and the land and has been executed by me on my own consent, without any force, fraud, compulsion, coercion or allurement from any corner whomsoever while in possession of sound health and disposing mind. IN WITNESS WHEREOF, I, the Testator have put my hand on this WILL at New Delhi, on the date, month and year hereinabove first mentioned in the presence of the following witnesses.

WITNESSES:-

- | | | |
|----|---|----------|
| 1. | SH. ANIL KUMAR
S/o RAJ KUMAR
R/o 2/96A, LAWRENCE ROAD,
K. PURAM, DELHI | TESTATOR |
| 2. | RAJAN MAHAJAN, ADVOCATE" | |

7. The affidavit by way of evidence filed by the attesting witness Sh. Rajan Mahajan, Advocate is reproduced as under:-

“EVIDENCE BY WAY OF AFFIDAVIT FOR AND ON BEHALF OF SH. RAJAN MAHAJAN (PW-2)

I, Rajan Mahajan, S/o Late Shri K.L. Mahajan, aged about 48 years, resident of Flat No.B-19, Ashoka Apartment, Plot-8, Sector-12, Dwarka, New Delhi-110075, practicing as an Advocate bearing Regn. No.D/341/94, do hereby solemnly affirm and declare and affirm as under:-

1. That I say, I am one of the attesting witnesses of the Will dated 23.09.1997 executed by Late Ex MWO Nand Lal Surma and competent to swear in this affidavit.

2. That I say, was known to Late Ex MWO Nand Lal Surma, S/o Late Mool Raj for the last many years as legal consultant to his family on 23.09.1997.

3. That I say, I vividly remember that Late Ex MWO Nand Lal Surma had called me in the morning of 23rd September, 1997 to know about my availability for some documentation on which I confirmed my availability and asked to come at my office. Late Ex MWO Nand Lal Surma along with Sh. Anil Kumar, the other attesting witness, came to my seat/office situated in the office of The Sub-Registrar-II West, Janakpuri District Centre, New Delhi-110058. I found that Late Ex MWO Nand Lal Surma was both mentally and physically fit. I explained in detail the process and drill that is to be followed for execution, attestation and registration of the Will that would take approximately 3 hours.

4. That I say, the testator had asked me to draft his Will and accordingly I drafted the Will as per his instructions and I presented draft of his Will for him to read and understand it properly. After reading it he requested me to incorporate some changes in respect to reference of documents related to fresh allotment, demand letters of Commission of Industries and appointment of Executor with the property disposition in respect of the Industrial Plot recorded therein. Late Ex MWO Nand Lal Surma had also requested me to sign the Will during his execution as attesting witness along with another witness Sh. Anil Kumar and I agreed upon for the same. When I enquired about Sh. Anil Kumar, the testator confirmed to me that he had also agreed to be an attesting witness in the testamentary document at the request of the testator.

5. That on 23rd of September 1997, I found that Ex MWO Nand Lal Surma was in good healthy physical and mental condition and was in full understanding of the property description and dispositions (after reading the revised draft Will and comparing with the original documents held in his personal record) being made by him in his Will dated 23.09.1997. After having understood the contents and effect of his recorded disposition made in his said Will the testator confirmed with cheerfulness his satisfaction. The testator had told me that this Will dated 23.09.1997 was his last Will and testament in respect of property disposition being made by him in this Will being executed out of his free will and volition.

6. That I say, I also vividly remember that upon being asked by me about the identification papers of the testator (Army Id Card) and other witness then these were made available to me by the testator and other attesting witness Sh. Anil Kumar (Driving licence). I verified documents of identification and its reference nos. as were recorded of the Will dated 23.09.1997. The other attesting witnesses Sh. Anil Kumar also endorsed his name and residential address along with his driving license No.

7. That I say, the testator, Ex MWO Nand Lal Surma asked us to simultaneously place our i.e. attesting witness's, signature at appropriate earmarked places. I along with the other attesting witness Sh. Anil Kumar

upon visually observing that, Ex.MWO Nand Lal Surma had put his left thumb impression followed by his signatures on his Will dated 23.09.1997, above the marked place at "TESTATOR" and also above his affixed photograph on the Will dated 23.09.1997. I along with Sh. Anil Kumar the other attesting witness simultaneously and concurrently signed the Will in the presence of each other and the testator. All of us endorsed our attestation/signatures upon the face of the Will dated 23.09.1997. The testator on completion of due execution and attestation acknowledged and declared/announced that the execution and attestation of Will has been done to his satisfaction and thanked the attesting witnesses.

8. That I say, the testator had further requested me to get the said Will registered with the Sub Registrar –II West, District Janakpuri, New Delhi - 110058 on which I agreed and facilitated the same. At that time after some waiting Wg. Cdr. Avinash Surma, who had been made executor of the said Will by the testator, had also arrived at my office and the testator expressed satisfaction contents of the Will and its execution and attestation and expressed his gratitude. During the registration process on enquiry by the Sub Registrar the testator displayed cheerfulness and satisfaction that he had executed along with due attestation the Will out of this free will and volition. I as long with other witness and the executor were present before the Sub-Registrar during the Registration process. Upon being enquired from the sub-registrar I along with Sh. Anil Kumar had confirmed that we had simultaneously signed the said Will as attesting witnesses and the testator had also signed and affixed his left thumb impression in front of me and other attesting witness. After recording identification and receiving the confirmation of duly execution and attestation from the testator, attesting witnesses and duly appointed Executor, the Sub Registrar registered the Will dated 23.09.1997

Sd/-
DEPONENT

VERIFICATION

Verified by me at New Delhi, on this 22nd day of August, 2016, that the contents of this affidavit are true and correct to the best of my knowledge and belief and no part of it is false and nothing material has been concealed there from.

Sd/-
DEPONENT"
(underlining added)

8. The cross examination conducted of this witness PW-2

Sh. Rajan Mahajan on 27.8.2016 reads as under:-

“xxxxx by counsel for respondent No.5.

I am an advocate by profession. I was enrolled in the year 1994. I do drafting and registration of documents property documents since 1994. In the year 1997 I used to get prepared 2-3 documents daily. I identify my drafted and registered document by seeing my signature and my seal. I cannot recall the description of each and every client by pressing my memory but certain I do, who are regular. Deceased used to take consultancy from me regarding the properties. For the first time he came to my contact through a common friend. I cannot recollect the name of the common friend. I got registered only two documents of deceased Nand Lal Surma i.e. the Will in question Ex.PW1/2 and power of attorney. No other documents got registered by me on behalf of the deceased. I came into the contact for the first time with the deceased in the year 1995-96. I do not personally know the other attesting witness Sh. Anil Kumar, he had come with the deceased testator. I have not filed any document to show that the deceased testator consulted me on a regular basis for legal issues. It is wrong to suggest that I am deposing falsely.”

9. A reading of the evidence in the affirmative of Sh. Rajan Mahajan, Advocate with his cross examination establishes beyond doubt that the deceased testator Sh. Nanad Lal Surma has duly executed the subject Will dated 23.9.1997 Ex. PW1/2 and the same was duly attested by the attesting witnesses Sh. Rajan Mahajan and Sh. Anil Kumar.

10.(i) I have reproduced the aforesaid aspects of due execution and attestation of the subject Will though really counsel for the appellants has not argued any issue with regard to the fact that the Will dated 23.9.1997 of the deceased testator Sh. Nand Lal Sharma has not been validly executed and attested. What was the only issue

which was argued on behalf of the appellants was that the Will dated 23.9.1997 stood revoked and superseded by the subsequent Will dated 2.12.1998 and which contained the following lines:-

“I, the above said testator have executed as will same time ago, I hereby cancel and revoke the said will and any other codicil of mine.”

(ii) It is also argued by the appellants that the respondent no. 2 herein had concealed the execution of the Will dated 20.5.2002 Ex. PW1/16.

11.(i) The first argument and issue to be examined which is urged on behalf of the appellants is as to whether the lines of the Will dated 2.12.1998, Ex. PW1/15, and which lines are reproduced above, whether the same revoke the subject Will dated 23.9.1997.

(ii) I completely agree with the reasoning of the trial court that the aforesaid lines do not amount to revocation of the Will dated 23.9.1997 by the Will dated 2.12.1998 merely because in the Will dated 2.12.1998 it is found to be written that the testator cancels and revokes a Will made some time ago by him. Trial court in this has rightly observed that the Will dated 2.12.1998 is in that chain of Wills which only and exclusively dealt with the residential property and

therefore if there is any revocation by the subject lines in the Will dated 2.12.1998 these lines necessarily have to be read by revoking only the Will dated 24/25.2.1993 with respect to residential property because the Will dated 2.12.1998 was only *qua* the residential property and the earlier Will for the residential property was the one dated 24/25.2.1993. For the sake of convenience the Wills dated 24/25.2.1993 and 2.12.1998, and both of which deal only with the residential property of the deceased testator at Pitam Pura, Delhi, are reproduced as under:-

“Will dated 24/25.2.1993

DEED OF WILL

This Deed of Last will and Testament of Shri Nand Lal Soor aged about 70 years, son of late Sh. Mool Raj Soor, R/o B-18, Neelamber Apartment, Sainik Vihar Delhi-34, is made at Delhi on this 25th day of Feb. 1993.

Life is short. God knows when it may come to end. Hence I with my free will and consent/ without any force or compulsion from others execute this will in good health and sound mind.

That so long as I am alive I shall remain the owner of Society built Flat No.B-18, on Ground Floor, under MIG category, situated at Neelamber Appartment, Sainik Vihar, Pitam Pura, Delhi-34, which is my self acquired property with my own funds and sources. And after my death the above mentioned Flat alongwith lease hold rights of the land underneath and all other properties belonging to me at the time of my death shall go, devolve and bequeath to my wife Smt. Raksha Soor, W/o Sh. Nand Lal Soor, R/o B-18, Neelamber Appartment, Sainik Vihar, Delhi-34, and she shall have full right to hold, use, enjoy and transfer the same in any manner, She like and after her death the above mentioned Flat go and devolve on my son and daughters namely (1) Sh. Avinash Soorma (son), (2) Mrs. Neelam Ahi w/o Sh. Madan Mohan Ahi, (3) Mrs. Kiran Kanwar w/o Sh. Kanwar Subhash Chander, (4) Mrs. Veena Thakur w/o Sh. Rajeshwar Thakur and (5) Smt. Kanchan Babbar w/o Sh. Swadesh Babbar, in equal share and they shall, have full right to hold use, enjoy and transfer jointly, in any manner they like.

That in case any other person or relative comes forward and object in any manner, then their objections regarding the above mentioned properties, shall be considered as Null and void in the court of law or any panchayat etc.

IN WITNESS WHEREOF I have signed this Last will after understanding the contents of the same on the day, month and year first above written in the presence of the following witnesses, who have also signed in my presence after understanding the contents of the same.

TESTATOR

Sd/-

(Sh. Nand Lal Soor)

Signed by the above named Sh. Nand Lal Soor (Testator) in our presence at the same time and each of us have in the presence of the Testator signed our names hereunder as attesting witnesses. The contents of this will have been explained to the Testator and have been admitted by him as correct.

WITNESSES:

Sd/-

1. Sh. Tilak Raj Jaggi,
S/o Sh. (Late) Gian Chand Jaggi,
R/o 751-53, Gali Dore wali,
Paharganj, New Delhi

2. G.P. Goyal
Advocate
Delhi

TESTATOR:

Sd/-

(Sh. Nand Lal Soor)

G.P. Goyal
Advocate
Delhi

Will dated 2.12.1998

FAMILY-WILL

This last & final will is made and executed at Delhi, on this 02nd day of Dec. 1998 by, Sh. Nand Lal Soor, son of Late Sh. Mool Raj Soor, R/o MIG flat No.B-18, Neelamber Apartment Opp. Sainik Vihar, Pitampura, Delhi-34, (hereinafter called the Testator)

I, the above said testator have executed as will same time ago, I hereby cancel and revoke the said will and any other codicil of mine,

AND WHEREAS I am owner and occupier of Property No.B-18, Neelamber Apartments, Opp. Sainik Vihar, Pitam Pura, Delhi-110034, (hereinafter called the property).

AND WHEREAS I hereby bequeath that after my demise my above said property should go and devolve upon my wife residing with me and looking after me, to the exclusion of all my other legal heirs, daughters and successors. However I further declare that if my wife subject to the condition that my son Wing Commander Avinash Surma pay amounts to my four daughters mentioned as under:-

1. Neelam Ahi Rs. 1,00,000/- (Rupees One lac Only)
2. Kiran Kanwar Rs.1,00,000/- (Rupees One Lac Only)
3. Veena Thakur Rs.3,00,000/- (Rupees Three Lac Only)

4. Kanchan Babbar Rs.1,00,000/- (Rupees One Lac Only)
5. Shiv Ashram Mauzaval Rs.50,000/- (Rupees fifty thousand only)
Naya Nangal Distt. Ropar Pb.

In case my wife predeceases me my son shall have full rights to sell, mortgage, gift or otherwise deal with the said property after my demise and to pay the above said amounts to my daughters out of the sale proceeds derived thereof and the remaining amount, if any, be utilized by my son to further construct Industrial Plot of 250 sq. Yds. Situated at Okhla Industrial area Delhi.

I willingly cancelled this will

Sd/-

N.L. Surma

20.05.2002

I further declare and bequeath that after my death and demise of my wife all the ornaments and other movable properties owned by me should be distributed among my daughters in equal share.

IN CASE my other relative of any one else challenges this will, the same shall be treated as null and void, in the court of law or Panchayat etc.

I HAVE made this will in order to avoid any controversy over my said property which is self acquired.

AT PRESENT I, am in my sound mind and sound physique and I am in full sense and I know the consequences of my actions and I fully understand what I am doing and what is wrong or right.

THIS WILL HAS BEEN made by me without any coercion, Duress or under influence. I have made this will voluntarily and on my own free will and in the presence of witnesses. I have set my hand on this testament of my Will in the presence of the following witnesses and in the presence of each other on the day, month and year written first in above mentioned.

Sd/-

TESTATOR

Signed by the Testator by the with in named testator as his last will and testament in our presence all being present at the same time. Thereafter at his request and in his presence and in the presence of each other we have subscribed our respective names.

Sd/-

TESTATOR

WITNESSES

1. Sh. Satpal Taneja
R/o B-4/129, Sec.7
Rohini, Delhi-110085
Election card No.DI/03/020/009800/DT/27/5/95

2.

I willingly cancelled this will

Sd/-

N.L. Surma

20.05.2002”

12. It is already stated above that when two chains of Wills were executed by the deceased testator Sh. Nand Lal Surma, each chain dealt with only one property i.e either the residential property or the industrial property i.e one chain of the Wills were for the bequest of the residential property at Pitam Pura, Delhi and the second chain was with respect to industrial plot at Okhla Industrial Area, Phase-II, New Delhi. Therefore, any language of revocation in the Will dated 2.12.1998 which was only for the residential property has necessarily to be read as referring to not the subject Will dated 23.9.1997 which was with respect to the industrial plot, and the lines of the Will dated 2.12.1998 revoking the earlier Will necessarily have to be read as revoking the earlier Will for the residential property dated 24/25.2.1993. I agree with the conclusion of the trial court that by the Will dated 2.12.1998 there was no intention of the deceased testator Sh. Nand Lal Surma to revoke the Will dated 23.9.1997. This relevant discussion of the trial court is in paras 64 to 70 of the impugned judgment and which paras are reproduced as under, and I completely agree with the reasoning and conclusions contained in the same:-

“64. It is now established on record that during the lifetime, the deceased had executed in total five will. According to the contents of all the five will he was having two immovable properties i.e one flat bearing No.

B-18, Neelamber Apartments, Opp. Sainik Vihar, Pitampura, Delhi-34 and one industrial plot allotted to him by Okhla Industrial authorities. The Will dated 24- 25/2/93 Ex. PW-1/14, the Will dated 2.12.98 Ex. PW-1/15 and Will dated 20.5.2002 Ex. PW-1/16. Whereby intention of the deceased testator has been established that he wish to devolved this flat for life time to her wife and thereafter in the first time to all his daughters and son and later on in subsequent will to the petitioner whereas in one he had put the condition on petitioner to pay specific amount to all the sisters. It is pertinent to mention here that the industrial plot is the subject matter of two wills i.e Will dated 19.2.1993 Ex. PW-1/13 and Will dated 23.09.1997 Ex. PW-1/2.

65. It is pertinent to mention here that the intention of the deceased testator Nand Lal Surma precipitate and crystallized after going through all the five will discussed in detail herein above. The fundamental intention of deceased testator was to bequeath his residential flat by way of independent separate will and industrial plot at Okhla by separate independent will. Therefore, he had executed two independent chains of Wills. In first chain, three wills were executed bequeathing the residential flat bearing No. B-18, Neelamber Apartments, Opposite Sainik Vihar, Pitampura, Delhi-34. In the second chain, two wills executed for bequeathing the industrial plot bearing No. 38 A, Functional Industrial Estate of Electronics, Okhla Industrial Estate Phase II, New Delhi measuring 220 sq mtrs in Okhla.

66. It is vital to note down that in both the sets of Wills there is no mention of either of the property in the will which he has not bequeathed. It means that, if he has been bequeathing the residential flat, then he has not stating anything about the industrial plot. Similarly when he is bequeathing industrial plot, then he is not stating about the residential flat.

67. Now vital question comes whether the Will dated 2.12.98 Ex. PW-1/15 if executed whether it superseded the Will dated 23.09.1997 Ex. PW-1/2. In order to analyze and understand the intention of the deceased testator, it is precipitated that the will dated 2.12.1998 Ex. PW-1/15 contains a clause which has been discussed herein above and reproduced i.e revocation clause according to which the deceased had revoked the Will sometime ago executed by him. It is not specify which will was executed sometime ago the contents reflects that it pertains to the residential flat, so the intention is to revoke earlier will with regard to residential flat i.e 24-25th February 1993 Ex. PW-1/14. In case the deceased testator had any intention to revoke the Will of 23.09.1997 Ex. PW-1/2 then he would have mentioned some lines with regard to the industrial plot.

68. On the other hand in the will 02.12.1998 Ex. PW-1/15 makes reference to the industrial plot and mention a wish that in case the residential flat is subjected to sale, then sale proceed shall be utilise for construction of it. It further corroborates the intention of deceased testator that he wish to preserve and keep alive the will dated 23.09.1997 Ex. PW-1/2 in respect of industrial plot. Hence in my considered opinion, the will

dated 02.12.1998 Ex. PW-1/15 has not superseded the will dated 23.09.1997 Ex. PW-1/2. The defacement of the Will dated 02.12.1998 Ex. PW- 1/15 has no effect on the will dated 23.09.97 Ex. PW-1/2.

69. Now comes to the another vital issue, what would be the impact of will dated 20.05.2002 Ex. PW-1/16 on the Will dated 23.09.1997 Ex. PW-1/2 as discussed in detail hereinabove. The will dated 20.05.2002 Ex. PW-1/16 is in respect to the residential flat bearing no. B-18, Neelamber Apartments, Opposite Sainik Vihar, Pitampura, Delhi-34 and it specifically revoked the will dated 02.12.1998 Ex. PW-1/15. In the entire body of the will dated 20.05.2002 Ex. PW-1/16 there is no mention of industrial plot. The will dated 20.5.2002 Ex. PW-1/16 also revoked the will dated 02.12.1998 Ex. PW-1/15 with a specific clause. Hence the intention established that the Will dated 20.05.2002 Ex. PW-1/16 has no impact on the Will dated 23.09.1997 Ex. PW-1/2. The analysis, scrutiny and crystallization of all the facts on record established the intention of the deceased testator was to keep alive and preserve the Will dated 23.09.1997 Ex. PW-1/2 with regard to the industrial plot. A special reference in the will of 2.12.1998 Ex. PW-1/15 further corroborates the fact with regard to preservation of keeping the Will alive dated 23.09.1997 Ex. PW-1/2 by the deceased testator.

70. On the basis of above observation and discussion it is concluded that deceased testator intended to keep alive and preserve the will dated 23.09.1997 with regard to the plot bearing no. Plot No. 38 A, Functional Industrial Estate of Electronics, Okhla Industrial Estate Phase II, New Delhi at Okhla Industrial area and it is not impacted and effected by any other Will executed by the deceased during his life. Accordingly issue No. 4, 5, 6, 7 & 8 decided accordingly in favour of the petitioner and against the respondents.”
(underlining added)

13. I therefore hold that the trial court has rightly held that the subject Will dated 23.9.1997, Ex. PW1/2, is not superseded by the Will dated 2.12.1998 Ex. PW1/15 i.e the third Will is not superseded by the forth Will because both pertain to separate subjects i.e the subject Will deals only with the industrial plot and the Will dated 2.12.1998 deals only with the residential property at Pitam Pura, Delhi.

14. So far as the arguments urged on behalf of the appellants that the respondent no. 2 herein had concealed the existence of the Will dated 20.5.2002 it is seen that nothing turns upon this argument because this fifth Will dated 20.5.2002 Ex. PW1/16 is only with respect to residential property. This Will does not deal with the Okhla Industrial Area plot. Therefore, once there are two chains of Wills with one chain dealing with the residential property and other chain dealing with the industrial plot, then in such a case no advantage was derived by the respondent no. 2 herein of not having originally filed the Will dated 20.5.2002. In fact the misconceived objection being raised by the objector/appellant no.1 of concealment by the respondent no. 2 of the Will dated 20.5.2002, the respondent no. 2 herein not only filed this Will dated 20.5.2002 but got the same proved as Ex. PW1/16 by calling one attesting witness to this Will PW-5 Sh. Jaswant Singh. Therefore, in my opinion there is no substance in the argument urged on behalf of the appellants that the probate petition had to be dismissed because the respondent no. 2/probate petitioner had concealed the factum with respect to the Will dated 20.5.2002 executed by the deceased testator Sh. Nand Lal Surma.

15. Finally, it is required to be noted that learned counsel for the appellants sought to argue that there was no reason for the deceased testator to exclude his daughters and that such an objection was taken by the appellant no. 1, respondent no. 5 in the trial court in paras 6.7 of the written statement/objections, however, it is noted that the affidavit by way of evidence filed by the appellant no. 1 in the probate court below when examined, it is found that nothing is stated by appellant no. 1 in her affidavit by way of evidence with respect to contents of para 6.7 of the written statement that there was no reason for the deceased testator to disinherit his daughters. In any case contents of para 6.7 of the written statement filed by the appellant no. 1 in the probate court below were only cryptic and they did not contain any details, and even assuming that the details could be added by in terms of evidence being led, this was however not so done by the appellant no. 1 who did not utter even a single line in her affidavit by way of evidence that the deceased testator could have no intention to disinherit the daughters including the appellant no. 1 as all the daughters had good relations with the deceased testator. For the sake of convenience para 6.7 of the written statement filed by the appellant

no.1 and the affidavit by way of evidence of appellant no. 1 is reproduced below:-

“Para 6.7

6.7 The contents of para 7 are wrong and denied. It is in the personal knowledge of the answering defendant that the deceased Sh. Nand Lal Surma had no special love for his son and he never wished to exclusively handover any property to his son, who never treated his father properly. In the last few years of the deceased Sh. Nand Lal Surma, he was forcibly confined in his house by the petitioner and the health and mental status of the deceased had been severely affected due to his utter neglect in all respects.

Affidavit of appellant no.1

I, Kanchan Babbar, W/o Sh. Swadesh Babbar, R/o B-1/911, Tower-9, Silver City-II, Purvanchal, Sector Pi-II, Greater NOIDA, UP, Presently at Delhi, aged about 55 years do hereby solemnly affirm and declare as under:-

1. I say that I am Defendant No.5 in the present petition.
2. I say that the petition for grant of probate of alleged Will dated 23rd September, 1997 of Late Ex.MWO Nand Lal Surma, S/o Late Sh. Mool Raj is not maintainable. I say that, to my knowledge, Late Sh. Nand Lal Surma has not left behind any valid WILL. I say that after the death of Shri Nand Lal Surma on 30.10.2003, the petitioner himself sent to the deponent, the Letters dated 06.11.2003, 10.03.2004, 18.03.2004, 22.03.2004 and 01.04.2004 the copy of the WILL dated 20.05.2002 asserting the latter Will to have been executed by the deceased Shri Nand Lal Surma. I say that the petitioner concealed, in the first instance, from this Hon'ble Court the existence of WILL dated 20.05.2002, and thus played a fraud on this court. I say that the contents of the said letters show that the petitioner wants to deprive his four sisters of their legitimate shares in the properties of the deceased Shri Nand Lal Surma. The letters dated 05.11.2003, 10.03.2004, 18.03.2004, 22.03.2004 and 01.04.2004 are exhibited herewith respectively as Mark A, Exhibit PW-5/2, Exhibit PW-5/3 Exhibit PW-5/4 and Exhibit PW-5/5.
3. I say that after the Written Objections of Respondent no.5 were filed the petitioner was compelled to disclosed and bring on record the Wills dated 02.12.1998 and 20.05.2002.
4. I say that the Late Ex. MWO Nand Lal Surma was not a permanent resident of EA-331, Maya Enclave, New Delhi-110064.
5. I say that Late Ex. MWO Nand Lal Surma, to my knowledge had not executed any WILL of his own volition and free will in respect of any of his properties. I further say that since all 5 registered wills have been produced and filed by, Sh. Avinash Surma therefore the Will dated 20.05.2002, be read as the last and final Will of the deceased.

6. I say that Late Ex. MWO Nand Lal Surma, S/o Late Shri Mool Raj has left behind one son (the petitioner) and four daughters (defendants 2 to 5), and was never a permanent resident of EA 331, Maya Encalve, New Delhi-110064. I deny that the earlier address of the petitioner was B-18, Neelamber Apartments, Opposite Sainik Vihar, Pitam pura, Ranibagh, New Delhi; I say that the said property was in fact the sole property of deceased Shri Nand Lal Surma.

7. I say that Late Sh. Nand Lal Surma had not executed the WILL dated 23.09.1997. I deny that the petitioner is the sole executor of any WILL of Late Shri Nand Lal Surma.

8. I deny that Late Shri Nand Lal Surma had, voluntarily and of his free Will, written the letter dtd. 29.10.2003 to Dy. Director of Industries. I say that on 29.10.2003 the Late Nand Lal Surma was mentally and physically extremely weak and feeble and in no position to speak, read or write and in fact passed away the very next day on 30.10.2003. I further say that the signature on the said Letter is forged and expert opinion in that respect is exhibited herewith as Exhibit DW-5/6. I say that in any event the alleged letter has no bearing on the validity of the said WILL OF 23.09.1997.

9. I say that the deceased Sh. Nand Lal Surma had no special love for his son and lie never wished to exclusively handover any property to his son, who never treated his father properly. I say that in the last few years of the deceased Sh. Nand Lal Surma, he was forcibly confined within his house by the petitioner and the health and mental state of the deceased had been severely affected due to his utter neglect in all respects.

10. I say that the alleged General Power of Attorney of the deceased Sh. Nand Lal Surma is invalid. I deny that any amount towards the cost of the industrial plot of the deceased Sh. Nand Lal Surma was paid/contributed by the petitioner.

11. I say that there is no valid WILL executed by Late Sh. Nand Lal Surma on the basis of which the said industrial plot is to fall exclusively in the hands of the petitioner.

12. I say that no liabilities have been left behind by the deceased Sh. Nand Lal Surma, which were/are required to be discharged by the petitioner. I say that the petitioner in fact is illegally withholding the substantial assets left behind by the deceased Sh. Nand Lal Surma and fraudulently refusing the distribution of the same amongst his sisters as per law.

13. I say that the petitioner is not entitled to grant of probate on the basis of the present petition in respect of WILL dated 23.09.1997. I deny that the alleged WILL dated 23.09.1997 is the last valid WILL of Late Sh. Nand Lal Surma. I say that the contents of the other documents referred in this Paragraph no.13 are false and wrong.

14. I say that in the facts and circumstances of the case the present petition is liable to be dismissed against the petitioner and in favour of the defendant with exemplary costs.

Sd/-
DEPONDENT

VERIFICATION

Verified at Delhi on this 05th day of November, 2016, that the contents of the above affidavit are true upon my knowledge and belief and that nothing material been concealed therefrom.

Sd/-
DEPONDENT"

16. Therefore, in my opinion there is no merit in the argument urged on behalf of the appellants that the deceased testator would not have intended to disinherit his daughters by the subject Will dated 23.9.1997 for the industrial plot.

17. No other issue or argument is urged before this Court on behalf of the appellants.

18. There is no merit in the appeal. Dismissed.

OCTOBER 13, 2017
Ne/godara

VALMIKI J. MEHTA, J