

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

+ **RSA No.234/2017 and CM Nos. 34672-75/2017**

% **Reserved on: 20th September, 2017**
Pronounced on: 25th September, 2017

SUMITA @ LAMTA & ANR. Appellant

Through: Mr. Atul Agarwal, Advs.

Versus

DEVKI Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

CM No. 34674/2017 (Exemption)

Exemption allowed, subject to just exceptions.

CM stands disposed of.

CM Nos. 34675/2017, 34673/2017 (for condonation of delay in filing and re-filing the appeal)

For the reasons stated in the applications, the delay in filing and re-filing the appeal is condoned.

CMs stand disposed of.

RSA No. 234/2017 and CM No. 34672/2017 (stay)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendants in the

suit, impugning the concurrent judgments of the courts below; of the trial court dated 7.12.2016 and the first appellate court dated 23.3.2017; by which the courts below have decreed the suit of the respondent/plaintiff/mother against the daughter/appellant no. 1 and appellant no. 2 who is the second husband of the appellant no. 1.

2. The facts of the case are that the subject suit was filed by the respondent/plaintiff claiming ownership of the suit property being House no. 20/68, Second Floor, Trilok Puri, Delhi. Respondent/plaintiff/mother claims ownership of the suit property by virtue of the Will dated 28.8.2003 duly registered with Sub-Registrar, and executed by her husband Sh. Parshu Ram in her favour. Sh. Parshu Ram has also simultaneously executed other documents being the General Power of Attorney, Gift Deed etc. on the same date in favour of the respondent/plaintiff/wife Smt. Devki. It was pleaded in the plaint by the respondent/plaintiff that appellant no. 1/daughter who was guilty of bad behavior due to which she had to take divorce from the first husband on 30.11.2009 and whereafter the appellant no. 1 started living with the respondent/plaintiff. Appellant no. 1 thereafter said to have got married on 24.6.2010, with the appellant no. 2, the

second husband and who was a tenant in the suit property. The appellant no. 2 is alleged to be a habitual drinker who used to misbehave with the respondent/plaintiff and other family members in drunken condition and also used to create scenes. It was also pleaded that the appellant no. 1/defendant no.1/daughter had also started quarrelling and had misbehaved with the respondent/plaintiff/mother and other family members without any rhyme and reason. It is pleaded that appellants/defendants refused to vacate the suit property being the second floor of the suit property in spite of the request of the respondent/plaintiff, and therefore, the subject suit for permanent and mandatory injunction was filed.

3. The suit of the respondent/plaintiff was contested by the appellants/defendants and who pleaded that the suit property was not owned by the respondent/plaintiff but was owned by respondent/plaintiff's husband, i.e the father of the appellant no. 1/defendant no.1, namely Sh. Parshu Ram. It was pleaded that after the death of the father all the legal heirs including appellant no. 1/defendant no. 1 became owner of the suit property. Ownership of the respondent/plaintiff in terms of Will dated 28.8.2003 was denied.

4. After pleadings were complete, trial court framed the issues and parties led evidence and which aspects are noted in paras 5 to 9 of the judgment of the trial court, and these paras read as under:-

“5. On the basis of the pleadings of the parties, following issues were framed vide order dated 10.09.2014.

(1) Whether the plaintiff is entitled for the relief of mandatory injunction as prayed for? OPP

(2) Whether the plaintiff is entitled for the relief of permanent injunction as prayed for? OPP

(3) Relief, if any.

6. Thereafter, the evidence was led on behalf of the plaintiff who examined herself as PW1. She has reiterated the facts of plaint in his affidavit Ex. PW1A/A. She also relied upon the documents i.e. site plan Ex. PW1/A, copy of ration card Ex. PW1/B, electricity bill Ex. PW1/C, copy voter I card ex. PW1/D, copy of death certificate of husband of plaintiff Ex. PW1/E, copy of legal notice Ex. PW1/f, postal receipts Ex. PW1/G, copy of publication Ex. PW1/H, copy of property documents Mark A, mortgaged deed Mark B, affidavit of publication Mark C, copy of complaint dated 19.11.2012 Mark D and complaint to SHO mark E.

PW2 has supported the entire case of plaintiff in his affidavit Ex. P2. He is the neighbor of both parties and thus claimed to be aware about the facts of present case. He also is one of the witnesses to the Will and Gift Deed Mark A dated 28.08.2003.

PW3 is the official from Sub Registrar IV who proved GPA executed by late Parshu Ram in favour of plaintiff on 28.08.2003.

7. No other evidence was led on behalf of plaintiff.

8. Thereafter defendants led their evidence and got examined themselves as D1W1 and D2W1 respectively. Both of them reiterated their defence in their affidavit Ex. D1 and Ex. D2 respectively.

The D1W1 again reiterated her claim regarding she being co-owner of the suit property by virtue of LR of the owner late Parshu Ram.

9. No other defence evidence was led on behalf of the other defendants.”

5. Courts below have held, and rightly so, that respondent/plaintiff/mother is the owner of the suit property. It was held by the courts below that the respondent/plaintiff had pleaded that

original documents dated 28.8.2003, being the GPA, Gift Deed and Will were taken away by the appellants/defendants for creating mortgage and hence original of these documents could not be produced by the respondent/plaintiff. It is rightly held by the trial court that Will dated 28.8.2003 stood duly proved by the deposition of the attesting witness PW-2, namely, Sh. Kishore Chand. The trial court has also rightly observed that the admissibility of the Will dated 28.8.2003 was never questioned in the cross-examination of PW-1 on behalf of the appellants/defendants. This court would also like to note that in the cross-examination of the attesting witness PW-2, there is no suggestion that the Will is forged and fabricated or that the Will is not duly executed. The trial court has also rightly observed that the appellants/defendants took up a case in cross-examination that Sh. Parshu Ram, husband of the respondent/plaintiff, was not in a fit state of mind at the time of execution of Will, but this was not a defence in the written statement of the appellants/defendants. Trial court has noted that the appellants/defendants have taken three different defences at three different stages with respect to authenticity and validity of the Will i.e firstly at the time of the filing of the written

statement when in para 3 of the reply to the Will on merits there was only vague denial of the execution of the Will without pleading anything further with respect to alleged lack of authenticity of the Will. The second stage where a different defence was taken was in the cross-examination of PW-1/respondent/plaintiff wherein it was claimed that the signatures of Sh. Parshu Ram are forged i.e the document is forged and fabricated. The third defence was in the cross-examination of PW-2 where the case was that Sh. Parshu Ram was not in a fit state of mind in the year 2003 for execution of the Will.

6. Most importantly, the trial court has relied upon the mortgage deed executed by respondent/plaintiff in favour of one Sh. Narender Kumar, and this document was admitted by the appellant no. 1/defendant no. 1 as the appellant no. 1/defendant no. 1 had signed the mortgage deed as an attesting witness, and accordingly the trial court has rightly held that since mortgage can only be done by an owner of the property, therefore, once appellant no.1/defendant no. 1 admits her signatures on the mortgage deed as a witness, then this aspect clinches the issue of ownership of the suit property in favour of the respondent/plaintiff.

7. In my opinion the reasoning, findings and conclusions of the courts below do not suffer from any gross illegality or perversity for this Court to entertain this second appeal under Section 100 CPC.

8.(i) Learned counsel for the appellants/defendants argued that there was only a photocopy of the Will which was filed in the case and not the original Will and therefore it is argued that the Will dated 28.8.2003 of Sh. Parshu Ram in favour of the respondent/plaintiff should not have been relied upon by the courts below. This argument is misconceived because it is conceded by the counsel for the appellants/defendants that before commencement of cross-examination of PW-1 and PW-2 there was no objection raised that the Will cannot be proved inasmuch as the Will only is a photocopy. Once no objection is raised to the mode of proof on account of lack of original, then now the objection cannot be raised to the mode of proof as the objection to the mode of proof stands waived in view of the ratio as laid down in the judgment of the Supreme Court in the case of ***R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple and Another, (2003) 8 SCC 752.***

(ii) More importantly there cannot be any quarrel with respect to lack of production of the original Will, inasmuch as, the respondent/plaintiff had already deposed in her affidavit by way of evidence that she was not in possession of the original documents dated 28.8.2003 executed by her husband Sh. Parshu Ram in her favour as these original documents, including the Will, were taken away by the appellants/defendants for taking of the loan by mortgaging of the property and when the respondent/plaintiff demanded the original documents then the appellants/defendants refused to hand over all the original documents on one pretext or the other. In law, once explanation is given for non-production of the original documents being the primary evidence, then a person is entitled to produce secondary evidence with respect to the documents and which secondary evidence was the photocopy of the Will in the present case. It is also to be noted that in the entire cross-examination of PW-1/respondent/plaintiff no suggestion was put by the appellants/defendants that they have not taken away all the original documents dated 28.8.2003 and which was the case of the respondent/plaintiff both as per her plaint as also her affidavit by way

evidence. I would like to note that the counsel for the appellants/defendants have no answer to the admission made in the cross-examination of appellant no.1/defendant no. 1 wherein she admitted that the mother/respondent/plaintiff had executed a mortgage deed of the suit property and that appellant no. 1/defendant no. 1 was a witness to this mortgage deed, and therefore, it cannot be doubted, much less by filing of the second appeal, that it was not the respondent/plaintiff who was the owner of the suit property, and in fact she was.

9. In my opinion, therefore, the courts below have rightly held the respondent/plaintiff to be the owner of the suit property.

10. No substantial question of law arises. Dismissed.

SEPTEMBER 25, 2017

godara

VALMIKI J. MEHTA, J