

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

+ **RSA No.402/2015**

% **Reserved on: 3rd August, 2017**
Pronounced on: 10th August, 2017

DHARAMBIR Appellant
Through: Mr. Vikrant Sarin, Ms.
Madhulika Sarin, Advocates
versus

DAYABIR Respondent
Through: Mr. Dushyant Swaroop,
Advocate

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

1. This Regular Second Appeal under Section 100 of Code of Civil Procedure, 1908 (CPC) has been filed by the appellant/plaintiff whereby the suit filed by the appellant/plaintiff for possession of property being H.No. D-247 (Old No.D-245), J.J. Colony, Shakurpur, New Delhi has been dismissed. The appellant/plaintiff had also claimed damages/*mesne* profits for use and occupation of the subject house by the respondent/defendant. I note

that the defendant no.2 in the suit was Delhi Development Authority and which was subsequently deleted from the array of the defendants.

2. The facts of the case are that the appellant/plaintiff pleaded that he was the owner of the suit property inasmuch as originally owner of the suit property was one Sh. Dalel Singh son of Sh. Nihal Singh. Sh. Dalel Singh was a bachelor and before his death he had executed a Will dated 3.6.1978 in favour of the appellant/plaintiff as the appellant/plaintiff was treated by Sh. Dalel Singh as his own son. It was pleaded in the plaint that after the death of Sh. Dalel Singh, one Sh. Phool Singh claimed that he is the owner of the house as he is the brother of the deceased. It was pleaded in the plaint that the respondent/defendant Sh. Daya Bir had forcibly and illegally occupied the house and since the appellant/plaintiff was the owner in terms of the Will dated 3.6.1978 executed by Sh. Dalel Singh, the suit for possession and damages was filed and which was liable to be decreed.

3. The respondent/defendant contested the suit and prayed for dismissal of the suit on the ground that the Will alleged to be executed in favour of the appellant/plaintiff by Sh. Dalel Singh was

not a valid Will. The suit was also pleaded to be bad as it was pleaded that the brothers and sisters of Sh. Dalel Singh were not added as parties to the suit. It was also pleaded that in the absence of probate of the Will, no right can be claimed by the appellant/plaintiff in the suit property which was owned by Sh. Dalel Singh. It was further pleaded in the written statement that the suit property was built by Sh. Dalel Singh by taking loan from State Bank of India and this loan after the death of Sh. Dalel Singh was paid by brother of Sh. Dalel Singh, and therefore, Sh. Dalel Singh had no right to bequeath the suit property to anyone including the appellant/plaintiff. It was further pleaded in the written statement that the suit property has been allotted to the respondent/defendant by the DDA as the Will relied upon by the appellant/plaintiff has been forged and fabricated.

4. For disposal of this RSA, the following substantial question of law is framed:-

“Whether the courts below have not committed a complete illegality and gross perversity in dismissing the suit of the appellant/plaintiff although the admitted position which has emerged on record is that Sh. Dalel Singh, the owner of the

property had executed a Will dated 3.6.1978 in favour of the appellant/plaintiff and appellant/plaintiff already obtained letters of administration of the subject Will in terms of the judgment dated 24.7.2003 of the probate court and revocation petition under Section 263 of the Indian Succession Act, 1925 against the same, filed by the respondent/defendant, stands dismissed in terms of the judgment of the probate court dated 9.9.2009?”

5. I may note that the appellant/plaintiff had filed a probate petition seeking probate of the Will dated 3.6.1978 executed by Sh. Dalel Singh in his favour. This probate petition bearing no. 69/2000 was allowed by the judgment dated 24.7.2003 and the appellant/plaintiff had been allowed by the trial court to file the copy of the judgment obtained in the probate case in terms of the order of the trial court dated 24.8.2006, and this order reads as under:-

“ORDER

1. By this order, I shall dispose off an application U/s 151 CPC for taking on record the decree in probate case No.69/2000 and for taking judicial notice of the same. Arguments on application heard. Counsel for defendant has submitted the application is not maintainable. That during the pendency of the suit Defendant No.1 came to know for the first time regarding the factum of filing of Probate Petition on 23.3.2006. Ld. Counsel has submitted that Defendant No.1 is the original owner of the property and he was a necessary party in the probate petition and he has not been made a party.

2. I have gone through the contents of the application and its reply and have given my thoughtful consideration to the rival submissions. The case of the plaintiff in brief is that after the death of Sh. Dalel one Phool Singh claimed himself as owner of the suit property being brother of deceased and started claiming the property. Admittedly, defendant is claiming himself as owner of the property as brother of deceased. Defendant No.1 has taken the plea that the petitioner submitted a copy of the will in regard to the exclusive possession and ownership of the house. The claim of the defendant is that no probate from the competent court has been taken and in the absence of the probate the present suit is liable to be dismissed. Admittedly, during the pendency of the suit original will was taken and thereafter plaintiff will obtain the probate of the will. Court can always take judicial notice of the judgment passed by the court provided the judgment passed in other suits are relevant i.e. on different issues as to evidentially what value is to be attached regarding the probate obtained during the pendency of the present suit without making Defendant No.1 as party to the probate proceeding. Keeping in view the contentions of the Ld. Counsel for plaintiff that defendant No.1 was not a legal heir and the fact that the probate decree has been passed and same has not been set aside, application U/s 151 CPC is allowed.”

6. It is also noted that the present respondent/defendant had filed a petition under Section 263 of the Indian Succession Act for revocation of letters of administration granted to the appellant/plaintiff in terms of the judgment dated 24.7.2003 but this petition seeking revocation has been dismissed by the probate court vide its judgment dated 9.9.2009. This aspect is duly noted by the first appellate court in para 2 internal page 3 of the impugned judgment.

7. In law, the judgment of a probate court is a judgment in *rem*. It binds the whole world and even the persons who are not parties to the probate petition. A judgment in a probate petition is

final unless the judgment is revoked in terms of the revocation petition which is filed under Section 263 of the Indian Succession Act. In the facts of the present case, it is seen that the probate petition was allowed in terms of the judgment of the probate court dated 24.7.2003 granting letters of administration to the appellant/plaintiff of the Will Ex.PW2/1 dated 3.6.1978. Revocation petition has also been dismissed by the judgment of the trial court dated 9.9.2009. Therefore the Will of Sh. Dalel Singh dated 3.6.1978 in favour of the appellant/plaintiff is final and accordingly the appellant/plaintiff will become the owner of the suit property.

8. In view of the aforesaid discussion, the substantial question of law is answered in favour of the appellant/plaintiff. Suit of the appellant/plaintiff is decreed against the respondent/defendant and appellant/plaintiff is granted a decree for possession of the suit property being H. No.D-247 (Old No.D-245), J.J. Colony, Shakurpur, New Delhi. Decree sheet be prepared. Trial court record be sent back.

AUGUST 10, 2017
godara/Ne

VALMIKI J. MEHTA, J