

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

+ **RFA No. 234/2018**

% **9th March, 2018**

SURINDER PAL SHARMA Appellant
Through: Mr. Ashish Mohan, Mr. Harsh
Ahuja, Mr. Kushal Kumar, Mr.
Vibhu Tripathy and Mr.
Abhishek, Advocates.

versus

RAJ KUMARI & ORS. Respondents
Through: Ms. Amita Sachdeva, Adv. for
R-1 to R-3.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

Caveat Nos. 186-187/2018

Counsel appears for the caveators. Caveats accordingly stand discharged.

CM No. 8861/2018 (Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

RFA No. 234/2018 & CM No. 8862/2018 (stay)

1. Respondent no.1 is on caveat. I have heard the counsels for the parties with respect to the appeal itself and therefore I am

proceeding to dispose of the Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC).

2. This RFA is filed by the defendant no.1 in the suit impugning the judgment of the trial court dated 17.1.2018 by which the trial court has decreed the suit filed by the respondent no.1/plaintiff for partition with respect to the suit property bearing no. 26, Duplex Flat, Gur Mandi, Delhi-07 (hereinafter referred to as suit property) by passing a preliminary decree holding that the respondent no.1/plaintiff is the owner of $1/4^{\text{th}}$ share in the suit property. The balance total $3/4^{\text{th}}$ share would be of $1/4^{\text{th}}$ share of the appellant/defendant no.1, the legal heirs of late Smt. Santosh Rani who was the widow of the brother of the respondent no.1/plaintiff as also the appellant/defendant no.1, and the remaining $1/4^{\text{th}}$ share would be of one other daughter Smt. Puran Devi and who was sued as defendant no.2 in the suit and is the respondent no.2 in the present appeal. It may be noted that the defendant nos. 2 and 3 namely Smt. Puran Devi and Smt. Santosh Rani (since deceased) did not contest the suit i.e they did not file their written statement nor they led any evidence in the suit.

3. Respondent no.1/plaintiff filed the subject suit pleading that the suit property was originally owned by the father Sh. Harbans Lal who expired in the year 1965 and on the death of the father the mother Smt. Suhagwanti became the exclusive owner of the suit property. As per the respondent no.1/plaintiff, Smt. Suhagwanti died intestate on 10.10.1999 and consequently it was pleaded that each of the four siblings, being the four children of Sh. Harbans Lal and Smt. Suhagwanti, would inherit 1/4th share each in the suit property. A decree for partition, injunction, rendition of accounts etc was prayed in terms of the following prayer clauses of the plaint:-

- “a) Decree of partition be passed in her favour and against D1 directing him to partition the suit property by giving respective and due share to her and D2 and D3. In the event of failing to partition the suit property by metes and bounds, a decree of disposing of the suit property and to divide the sale proceeds be passed accordingly.
- b) Decree of declaration be passed against D1 declaring that plaintiff is the owner of 1/4th unspecified and undivided share in the suit property.
- c) Decree of declaration be passed in her favour and against D1 thereby cancelling the mutation or any other documents creating exclusive right in favour of D1 in respect of the suit property to the exclusion of plaintiff and D2 and D3.
- d) Decree of rendition of accounts be passed against D1 directing him to render accounts of the rental and other income derived from the suit property.
- e) It is further prayed that decree of permanent injunction be passed against D1 thereby restraining him from transferring, selling, alienating or creating third party interest in the suit property.”

4. Appellant/defendant no.1 pleaded that it was not the father Sh. Harbans Lal who was the original allottee of the suit property but the suit property was allotted to the mother Smt. Suhagwanti. The mother Smt. Suhagwanti before her death on 10.10.1999 had executed a Will dated 2.1.1992 and which Will was registered before the concerned Sub-Registrar. In terms of the Will dated 2.1.1992 the suit property was bequeathed by the mother to the appellant/defendant no.1 exclusively. The suit was therefore prayed to be dismissed. As already stated above, the defendant nos. 2 and 3 did not contest the suit and did not file their written statements.

5. After pleadings were complete, the trial court framed the following issues:-

- I. Whether the plaintiff is entitled to a decree of partition of the suit property or in the alternative to put the property to auction and to divide the sale proceeds in four shares? OPP
- II. Whether the plaintiff is entitled to a decree of declaration as prayed in sub paras (ii) & (iii) of the prayer clause? OPP
- III. Whether the plaintiff is entitled to a decree of rendition of accounts and perpetual injunction as prayed in sub paras (iv) and (v) of the prayer clause? OPP
- IV. Whether the suit of the plaintiff is not maintainable for being without any cause of action and for suppression of material facts? OPD-1
- V. Whether the Will dated 2nd January, 1992 is legal and genuine? OPD-1.
- VI. Whether this Court has pecuniary jurisdiction to entertain the present suit? OPD-1.
- VII. Relief.”

6. Parties thereafter led evidence and which aspects are recorded in paras 7 to 8.4 of the impugned judgment and these paras read as under:-

PLAINTIFF EVIDENCE

“7. Plaintiff in order to prove her case has examined herself as PW1 and tendered her evidence by way of affidavit Ex. PW1/A. She has relied upon the documents Ex.PW1/1 to Ex.PW1/4.

DEFENDANT NO.1 EVIDENCE

8. Defendant No.1 in order to prove his case has examined himself as DW1 and tendered his evidence by way of affidavit Ex.DW1/A. He has relied upon following documents.

- a. Ex.P-1 is the death certificate of Smt. Suhagwanti.
- b. Ex.DW1/2 is the Will.
- c. Ex.DW1/3 and Ex.DW1/4 are the receipts.
- d. Ex.DW1/5 is mutation letter dated 10.05.2000.
- e. Ex.DW1/6 is House tax receipt dated 31.03.2005.
- f. Letter of allotment issued by MCD as Ex.P-2.
- g. Ex.DW1/8 is the valuation report.
- h. Ex.P1/1 is the legal notice dated 25.09.2000 and Ex.P1/2 is the reply to the said legal notice.

8.1 DW 2 Smt. Kailash Sharma is the wife of D1. She has tendered her evidence by way of affidavit Ex.DW2/A.

8.2 DW3 is Parveen Kumar Rana. He is the UDC from office of Sub-Registrar. He proved the summoned record i.e. Original Will Ex.DW1/2 duly registered on 02.01.1992.

8.3 DW 4 is Sh. Deepak Goyal, UDC Assessment and Collection Department, NDMC. He proved the House Tax Receipts Ex.DW4/1.

8.4 DW 5 is Hemant Kumar, LDC, Land & Estate Department, NDMC. He proved the mutation certificate Ex.DW1/5. He also proved the allotment letter in the name of Smt. Suhagwanti as Ex.P-2. He also proved the receipts Ex.DW1/4."

7.(i) The crucial issue to be decided in the present case is issue no.5 as to whether the deceased Smt. Suhagwanti died leaving behind her Will dated 2.1.1992 as was the case of the appellant/defendant no.1 before the trial court.

(ii) Trial court has held this issue in favour of the respondent no.1/plaintiff by holding that appellant/defendant no.1 as DW-1 admitted that there is only one attesting witness to the Will, and which the trial court observes has been confirmed by the trial court by looking at the Will Ex. DW1/2 that there is only one attesting witness and accordingly trial court has come to a finding that since a Will requires at least two attesting witnesses as per Section 63 of the Indian Succession Act, 1925 therefore since the Will of the mother Smt. Suhagwanti is not proved to have been signed by two attesting witnesses therefore the mother has to be taken to have died intestate resulting in the respondent no.1/plaintiff being 1/4th owner of the suit property and hence entitled to the preliminary decree of partition. The relevant paras on the aspect of failure of appellant/defendant no.1 to prove the Will relied upon by the appellant/defendant no.1 are paras 9 to 10.6 of the impugned judgment and these paras read as under:-

"9. Heard, Ld. Counsel for the parties and perused the complete record file. It is an admitted fact that the suit property was the self acquired property. The plaintiff has based her claim for partition on the ground that the suit property was owned by her father and he has died intestate, while the defendant No.1 has refuted her claim on the ground that the suit property was owned by his mother and she has bequeathed the same to him vide registered Will Ex. DW 1/2. My issue wise findings are as follows :-

Issue No. V: Whether the Will dated 2nd January, 1992 is legal and genuine? OPD-1

10. The onus to prove this issue is on defendant No.1. This issue is taken first as the entire claim of defendant No.1 with respect to the suit property is based upon the Will dated 02.01.1992 executed by Smt. Suhagwanti.

10.1 Section 68 of the Indian Evidence Act lays down the mode and manner in which the execution of the Will is to be proved. As per section 68, execution of Will must be proved by examining at least one attesting witness, if any attesting witness is alive, subject to process of the court and who is capable of giving evidence. The burden of proof that the Will has been executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he or she had put his or her signature out of own freewill having a sound disposing state of mind as has understood the nature and effect thereof.

10.2 In the present matter defendant No.1 has examined himself as DW 1 to prove the execution of the Will and DW 3 to prove that the Will was registered. DW 1 in his affidavit Ex. DW 1/A in para 5 has stated that Smt. Suhagwanti in her lifetime executed a Will dated 02.01.1992 which was duly registered in the presence of plaintiff and her husband bequeathing the property in his favour. The Will is Ex. DW 1/2. DW 1 During his cross-examination deposed that the husband of plaintiff was the attesting witness of the Will Ex. DW1/2. There is no other attesting witness to the Will except the husband of the plaintiff. He deposed that at the time of execution of Will, apart from plaintiff, Smt. Puran Devi, Veena D/o Late Sh. Madan Lal were alive and there is no mention about their share in the Will. He denied the suggestion that his late mother was not aware of the contents of the Will and she was told that in order to bar Veena, this document is written. He admitted the suggestion that the Will was not challenged by the plaintiff in any other Court of law as she came to know about the Will during the proceedings/ pendency of this case.

10.3. Defendant No.1 has not examined any other witness except himself to prove the due execution of the Will Ex. DW 1/2. DW 1 has admitted that there is only one attesting witness to the Will. The requirement of Section 63(c) of the Succession Act is that the Will is required to be attested by two or more witnesses, each of whom had seen the testator sign and who have themselves signed in the presence of and at the direction of the testator at the same time. I have perused the document Ex. DW 1/2. There is signature of only one attesting witness on the document. The other person who has signed the said document is Sh. M.N. Sharma, Advocate. From the document, it is evident that he has signed being the draftsman and counsel and not as an attesting witness. Since the Will has not been signed by two attesting witnesses, which is the mandate of law, same cannot be considered to be a valid document.

10.4 As regards, the arguments of the Ld. Defence Counsel that the Will is registered and the Registration has been duly proved from the testimony

of DW3 is concerned, it is settled law that the proof of signatures of at least one of the witnesses being in his handwriting is the main component to prove the Will under Section 68 of the Indian Evidence Act. DW-3 is UDC from the Office of Sub-Registrar. His testimony does not satisfies the condition of proof of Will. The concerned Registrar in whose presence the testator had signed has not been examined by D-1.

10.5 Further, D1 cannot be allowed to prove the signatures of the attesting witness on the Will through the testimony of PW 1 who is the wife of the attesting witness, without making any efforts to summon the said attesting witness who is still alive. The signatures of the attesting witness cannot be said to have been proved merely from the cross-examination of PW 1, wherein she has deposed that her mother had obtained signature of her husband who is totally illiterate on the document on the pretext that she intend to disown her niece and that her husband had signed in the office of Sub-Registrar. It is settled law that an admission by the person signing the Will and by the witnesses of having signed the Will is not an admission of the fulfilment of conditions of Section 63 of Succession Act. Even otherwise also when PW 1 was shown the Will, she deposed that she cannot identify signature of her husband on the same. She further deposed that she had never seen her husband signing any document.

10.6 There is no unequivocal deposition of DW 1, neither in his examination in chief nor in cross-examination, identifying the signature of the testator. From the above discussion, it is evident that defendant No.1 has failed to prove the Will Ex. DW 1/2 as a legal and genuine document and has further failed to prove the Will as per Section 68 of Indian Evidence Act. Once the Will on the basis of which DW 1 claimed to be exclusive owner of the property is held to be not proved, the entire edifice of the case of D1/ defendant No.1 falls. This issue is accordingly decided against defendant No.1."

8.(i) In my opinion the trial court has fallen into a very grave error because when we see the Will Ex.DW1/2 it is seen that there is not one attesting witness but in fact there are two witnesses who have signed as attesting witnesses to the Will. First witness to the Will is Sh. Ramesh Kumar and who is none other than the husband of the respondent no.1/plaintiff. It is conceded by the respondent

no.1/plaintiff during her cross-examination as PW-1 that the Will of Smt. Suhagwanti Ex.DW1/2 dated 2.1.1992 does bear the signatures of the husband of the respondent no.1/plaintiff as the first attesting witness. Therefore it is only to be seen that whether the Will is attested by only one attesting witness or there is also a second attesting witness. When we look at the subject Will, it is found that at the exact place where the place exists of signatures of the second attesting witness there are signatures as also the stamp of an Advocate Sh. M.N. Sharma. It is not the case of the respondent no.1/plaintiff by cross-examining the appellant/defendant no.1 that Sh. M.N. Sharma was only a draftsman to the Will and Sh. M.N. Sharma did not intend to nor signed as the attesting witness to the Will. Appellant/defendant no.1 had made all efforts to summon this attesting witness Sh. M.N. Sharma by getting notices issued through the court, but the attesting witness did not come. This however in my opinion will not be taken as against the appellant/defendant no.1 for holding that the subject Will is not proved inasmuch as requirement of law is that once there are two attesting witnesses as to the Will then the Will can be proved through the deposition of at least one attesting witness. In this case

there was no need of the deposition of the attesting witness because the respondent no.1/plaintiff admits that the first attesting witness is none other than husband of the respondent no.1/plaintiff and who had signed as an attesting witness to the Will. In my opinion, this is sufficient compliance of Section 68 of the Indian Evidence Act, 1872 which requires that to prove a Will only one attesting witness is required to depose.

(ii) In fact, it is now settled law that even if both the attesting witnesses do not appear and support the due execution and attestation of the Will, or the attesting witnesses have already expired or are not traceable, and therefore there are no depositions of the attesting witnesses, even then a Will is proved in terms of Section 69 of the Indian Evidence Act which requires that the Will can be proved by proving that the signatures of the person(s) appearing on the Will is of the attesting witness(s). It has been held by the Supreme Court in the judgment reported as ***M.B. Ramesh (Dead) by Lr's Vs. K.M. Veeraje Urs (Dead) by Lr's (2013) 7 SCC 490*** that the Will even in the absence of appropriate deposition of one attesting witness as required by Section 68 of the Indian Evidence Act, yet the Will is to be taken to

be proved under Section 71 of the Indian Evidence Act. The relevant paras of this judgment are paras 18, 24 and 25 and these paras read as under:-

"18. That takes us to the crucial issue involved in the present case viz. with respect to the validity and proving of the will concerned. A will has to be executed in the manner required by Section 63 of the Succession Act. Section 68 of the Evidence Act requires the will to be proved by examining at least one attesting witness. Section 71 of the Evidence Act is another connected section "which is permissive and an enabling section permitting a party to lead other evidence in certain circumstances", as observed by this Court in para 11 of *Janki Narayan Bhoir v. Narayan Namdeo Kadam* and in a way reduces the rigour of the mandatory provision of Section 68. As held in that judgment Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but would otherwise be let down if other means of proving due execution by other evidence are not permitted. At the same time, as held in that very judgment the section cannot be read to absolve a party of his obligation under Section 68 of the Evidence Act read with Section 63 of the Succession Act to present in evidence a witness, though alive and available.

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24. In the present case, we may note that in Para 21 of his cross-examination, P. Basavaraje Urs has in terms stated, "Mr Mallaraje Urs and Smt Nagammanni, myself and one Sampat Iyanger were present while writing the will". One Mr Narayanmurti was also present. In Para 22 he has stated that Narayanmurti had written Ext. 3 (will) in his own handwriting continuously. The fact that M. Mallaraje Urs was present at the time of execution of the will is not contested by the defendants by putting it to PW 2 that M. Mallaraje Urs was not present when the will was executed. As held by a Division Bench of the Calcutta High Court in a matter concerning a will, in para 10 of *A.E.G. Carapiet v. A.Y. Derderian*: (AIR p. 362)

"10. ... Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. ... It is a rule of essential justice."

As noted earlier the will was executed on 24-10-1943 in the office of Advocate Shri Subha Rao situated at Mysore, and was registered on the very next day at Mysore. The fact that the will is signed by Smt Nagammanni in the presence of PW 2 on 24-10-1943 has been proved,

that PW 2 signed in her presence has also been proved. Can the signing of the will by Smt Nagammanni in the presence of M. Mallaraje Urs and his signing in her presence as well not be inferred from the above facts on record? In our view, in the facts of the present case, the omission on the part of PW 2 to specifically state that the signature of M. Mallaraje Urs on the will (which he identified) was placed in the presence of Smt Nagammanni, and that her signature (which he identified) was also placed in the presence of M. Mallaraje Urs, can be said to be a facet of not recollecting about the same. This deficiency can be taken care of by looking to the other evidence of attendant circumstances placed on record, which is permissible under Section 71 of the Evidence Act.

25. The issue of validity of the will in the present case will have to be considered in the context of these facts. It is true that in the case at hand, there is no specific statement by PW 2 that he had seen the other attesting witness sign the will in the presence of the testatrix, but he has stated that the other witness had also signed the document. He has proved his signature, and on the top of it he has also stated in the cross-examination that the other witness (Mr Mallaraje Urs), Smt Nagammanni, himself and one Sampat Iyanger and the writer of the will were all present while writing the will on 24-10-1943 which was registered on the very next day. This statement by implication and inference will have to be held as proving the required attestation by the other witness. This statement along with the attendant circumstances placed on record would certainly constitute proving of the will by other evidence as permitted by Section 71 of the Evidence Act."

9. It is also required to be noted that a presumption as to validity of the subject Will has to be drawn in favour of the appellant/defendant no.1 with respect to the subject Will which is a registered Will inasmuch as Section 114 of the Indian Evidence Act provides that judicial and official acts have to be presumed to be validly carried out. Sub-Registrar is a person holding public office. Therefore, such an official person is presumed to have correctly done his duty of requiring that the Will must have two attesting witnesses. It

is seen that the Will is duly attested as it bears the signatures of Sh. M.N. Sharma, Advocate as a second attesting witness and this position is reiterated by Sh. M.N. Sharma signing again at the place of endorsement showing registration of the Will at the back of the Will. Thus the witness Sh. M.N. Sharma has in fact signed as the second attesting witness to the subject Will besides the signatures on the Will appearing of one Sh. Ramesh Kumar who is none other than the husband of the respondent no.1/plaintiff. Therefore, for this reason also in my opinion it has to be held that the subject Will was duly executed and attested as required by law.

10. In view of the aforesaid discussion, the finding and conclusion of the trial court that the deceased Smt. Suhagwanti did not leave behind a valid Will as the subject Will is allegedly only signed by one attesting witness, is a finding which is incorrect on the face of it and therefore is set aside.

11.(i) Learned counsel for the respondent no.1/plaintiff drew the attention of this Court to the cross-examination of the witness DW-5 who was the LDC from the Delhi Municipal Corporation, and relying on this deposition of DW-5 it is argued that in the record of the

MCD the appellant/defendant no.1 had illegally got mutation done in his name of the suit property and that in the MCD record there is neither any certified copy of the Will, and nor are certain letters dated 5.5.1961 and 16.4.1961 on the record of MCD. It is argued that the case of the respondent no.1/plaintiff was that her signatures were forged on the NOC/undertaking for the purpose of obtaining mutation in favour of the appellant/defendant no.1 in the MCD record.

(ii) In my opinion this argument urged on behalf of the respondent no.1/plaintiff at best will show that mutation was got illegally done by the appellant/defendant no.1 but that has no bearing on the aspect of due execution and attestation of the Will and which aspect has been proved by the appellant/defendant no.1 as already discussed above. Illegal mutation does not mean that the Will on the basis of which mutation was got done has therefore to be taken as not to be duly executed and attested.

12. In view of the aforesaid discussion, this appeal is allowed. The impugned judgment of the trial court dated 17.1.2018 is set aside. Suit of the respondent no.1/plaintiff would stand dismissed. Parties are left to bear their own costs.

MARCH 09, 2018/ib

VALMIKI J. MEHTA, J