

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

+ **RFA No. 357/2018**

% **27th April, 2018**

DARSHAN SINGH (DECEASED) THR LRS. Appellants

Through: Mr. V.P. Rana and Ms. Pooja
Wason, Advocates.

versus

BHAGYA WANTI & ORS. Respondents

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 16955/2018 (for exemption)

1. Exemption allowed, subject to all just exceptions.

C.M. stands disposed of.

RFA No.357/2018

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) has been filed by the plaintiffs in the suit impugning the judgment of the trial court dated 23.12.2017 by which the trial court has dismissed the suit for partition filed by the appellants/plaintiffs with respect to property of the father of the

appellant/plaintiff. I may note that original plaintiff was Sh. Darshan Singh son of Sh. Udai Singh, who expired during the pendency of the suit and he was therefore substituted by his legal heirs who becomes the plaintiffs and are therefore appellants in this appeal. Reference to the plaintiff/plaintiffs or appellants will as per the context mean reference to the original plaintiff or the present appellants/plaintiffs.

3. The facts of the case are that the subject suit for partition and injunction was filed by the plaintiff pleading that his father Sh. Udai Singh died intestate leaving behind six immovable properties as under:-

- (i) Residential house bearing no. 153, admeasuring 225 square yards,
 - (ii) Plot of land bearing no. 28, measuring 160 square yards,
 - (iii) Plot of land bearing no. 32, measuring 152 square yards,
 - (iv) Plot of land bearing no. 33, measuring 152 square yards,
 - (v) Plot of land bearing no. 35, measuring 152 square yards,
 - (vi) Plot of land bearing no. 37, measuring 152 square yards,
- situated within the *lal dora* of village Barwala, Delhi-110039.

4(i). It was the case of the appellants/plaintiffs that since Sh. Udai Singh, the father of plaintiff Sh. Darshan Singh died *intestate*

leaving behind his widow, six sons, three daughters and legal heirs of one branch of one pre-deceased son Sh. Bhim Singh, therefore each of the children/branch of the pre-deceased son would have 1/11th share in the property left behind by the deceased Sh. Udai Singh.

(ii). Suit was contested on behalf of the respondents 1, 2, 4, 5 and 6. /defendants 1, 2, 4, 5 and 6. As per their written statement suit was prayed to be dismissed as the suit was not maintainable, appellant/plaintiff had no *locus standi*, suit was liable to be rejected under Order VII Rule 11 CPC, and most importantly that Sh. Udai Singh did not die *intestate* but he died leaving behind his last registered Will dated 6.11.1996. The Will was registered with the concerned Sub-Registrar bearing document no. 83184. As a result of the Will, the suit properties were given by the deceased Sh. Udai Singh, not to the appellant/plaintiff, but to his widow and three other sons.

5. After completion of pleadings the following issues were framed:-

“1. Whether the plaintiff has no locus standi to file the present suit? OPD 1, 2, 4 & 5.

2. Whether Sh. Uday Singh had executed a registered Will dated 06/7/96? If so, its effect? OPD 1, 2, 4 & 5.
3. Whether the suit has not been properly valued for the purpose of Court fee and jurisdiction? OPD 6.
4. Whether the defendant no. 6 is entitled to 1/4th share in the suit property? OPD 6.
5. Whether the plaintiff is entitled to the decree of partition as prayed for? OPP
6. Whether the plaintiff is entitled to decree of permanent injunction as prayed for ? OPP
7. Relief.”

6. The main issue, and the only issue argued before me, and which was also the issue on which decision of the suit would have turned, is whether late Sh. Udai Singh expired leaving behind his registered Will dated 6.11.1996.

7. The respondents 1, 2, 4, 5 and 6/defendants 1, 2, 4, 5 and 6 in support of their case of the subject Will examined both the attesting witnesses. The first attesting witness was Sh. Balbir Singh Mehra who deposed as DW2 and the second attesting witness was Sh. Rajesh Saini who deposed as DW3. Both these witnesses have duly deposed with respect to the factum of their presence at the time of execution of the Will as also registration of the Will. Both these witnesses have deposed extensively with respect to the Will having been signed by the testator in the presence of the attesting witnesses and the attesting witnesses having signed the Will in the presence of the testator. These

aspects are mentioned by the trial court in paras 13 to 15 of the impugned judgment, and which also deals with examination and cross-examination of DW1/Sh. Mahender Singh, and who was the defendant no. 4 in the suit. These paras read as under:-

“13. During his cross examination DW1 Mahender Singh deposed that the Will was executed in his presence and besides him, Rajesh Saini, Balbir Singh Mehra and his father were present at the time of execution of the Will. During his cross examination DW1 Mahender Singh further deposed that Will Ex. DW1/1 was not signed by him in any capacity, and about 10 to 15 days prior to the day of execution of the Will, the typist typed the Will on the instructions of his father and on the day of dictation of Will by his father only he accompanied him. During his cross examination DW1 Mahender Singh further deposed that his father was a teacher and, therefore, understood English. DW1 Mahender Singh further deposed that his father used to sign in Urdu and he signed each and every page of Will Ex. DW1/1. During his cross examination DW1 Mahender Singh further deposed that he had accompanied his father twice, that is at the time of dictation of the Will to the typist by his father and thereafter, when it was got executed and registered in the office of Sub-Registrar. During his cross examination DW1 Mahender Singh further deposed that his father had signed the Will first and the same was not signed by the typist. DW1 Mahender Singh further deposed that the Will was typed and got executed at the Office of Sub Registrar, Kashmiri Gate, Delhi.

14. DW2 Balbir Singh Mehra during his examination in chief deposed that Uday Singh was known to him as one of his sons was his colleague as they were working in the same office. DW2 Balbir Singh Mehra further deposed that on 06.11.1996 he visited the house of Mahender Singh, where his father Uday Singh told him that he wanted to execute a Will with regard to his properties. DW2 Balbir Singh Mehra further deposed that on the same day he went to the office of Sub-Registrar, Delhi where the said Will was ready with the document writer K.K. Verma, who read over the said Will to Uday Singh, who accepted the same as correct and thereafter, he alongwith Uday Singh appeared before the Sub-Registrar for registration

of the sale deed. DW2 Balbir Singh Mehra further deposed that Udai Singh had signed on the said Will in Urdu on each page and also put his thumb mark on the Will besides his signatures. DW2 Balbir Singh Mehra also deposed that he put his signatures as one of the attesting witness after signing of the said Will by Sh. Uday Singh and he put his signatures on the said Will in presence of Sh. Udai Singh and one another witness, who also signed in presence of him and Udai Singh. DW2 Balbir Singh Mehra further deposed that he appeared before the SubRegistrar alongwith Udai Singh and other witness Rajesh Saini and the Sub-Registrar asked some questions from Udai Singh, who gave reply to his satisfaction and thereafter, the Sub-Registrar ordered for registration of Will Ex.DW1/1 and thereafter, the Sub Registrar asked Udai Singh and witnesses to put signatures, thumb mark on the back side of the Will. DW2 Balbir Singh Mehra further deposed that Udai Singh was a teacher and he read and understood the contents of the Will explained to him by the document writer. During his cross examination DW2 Balbir Singh Mehra deposed that Udai Singh had complete knowledge of Urdu and had some knowledge of English also. During his cross examination DW2 Balbir Singh Mehra further deposed that Udai Singh expired within a year of execution of the said Will and he was 90 years old. During his cross examination DW2 Balbir Singh Mehra further deposed that Uday Singh himself informed him about his intention to execute the Will.

15. DW3 Rajesh Saini during his examination in chief deposed that Udai Singh was his grand father (nana), who was very affectionate towards him. DW3 Rajesh Saini further deposed that Udai Singh expired on 13.6.1997 and during his life time he executed a Will. DW3 Rajesh Saini further deposed that he was called by Udai Singh and was asked to come to the office of Sub-Registrar, Kashmiri Gate, Delhi as he was interested to execute the Will. DW3 Rajesh Saini further deposed that he signed as a witness on the Will dated 06.11.1996, which was executed by Udai Singh. DW3 Rajesh Saini further deposed that he signed the Will and other witness Balbir Singh Mehra, who was present at that time also put his signatures as a witness. DW3 Rajesh Saini further deposed that he also appeared before the Sub-Registrar and the Sub-Registrar asked question from Udai Singh regarding the Will.” (underlining added)

8. A reading of the aforesaid paras show that the attesting witnesses have stood the test of cross-examination both with respect to execution and attestation of the Will and also the subsequent registration of the Will before the concerned Sub-Registrar when the testator and the attesting witnesses had appeared. The further discussion of the trial court in this regard is in para 18 of the impugned judgment which is reproduced in the next para of this Judgment. In my opinion, therefore the trial court was justified in arriving at the conclusion that the subject Will was proved to be duly executed by the testator/father of the appellant/plaintiff namely Sh. Udai Singh. The original will had been produced by DW1 Sh. Mahender Singh during his deposition, and the original will was seen and returned and the copy of the will was exhibited.

9. I may note that the trial court has also referred to the fact that the widow of the plaintiff Smt. Bimla Devi who appeared as PW1 in her cross-examination on 31.3.2010 admitted that her father-in-law had executed a registered Will in the year 1996. Trial court has therefore on the basis of this admission held that it is established that in the year 1996 Sh. Udai Singh had executed the subject Will which

is the registered Will dated 6.11.1996. The relevant observations of the trial court in this regard are contained in paragraph 18 of the impugned judgment, and this paragraph reads as under:-

“18. As already mentioned, the plaintiff himself has not appeared in the witness box for his examination as he is a person of unsound mind. His wife Smt. Bimla appeared as the sole witness in support of his claim. PW1 Smt. Bimla was cross examined on 03.9.2009 and 31.3.2010. On 31.3.2010, during her cross examination PW1 Smt. Bimla affirmed that her father in law Udai Singh had executed a registered Will in the year 1996. Although, she further deposed that she did not know whether the said Will was with reference to the suit property, but from her testimony it has been established that in the year 1996 Udai Singh had executed a registered Will and PW1 Smt. Bimla was aware about the same. The Will dated 06.11.1996 was produced by DW1 Mahender Singh before this court on 10.10.2017 at the time of his evidence and regarding the said Will, the copy of which is Ex. DW1/1, both the attesting witnesses, namely, DW2 Balbir Singh Mehra and DW3 Rajesh Saini were also examined. From the testimonies of DW1 Mahender Singh, DW2 Balbir Singh Mehra and DW3 Rajesh Saini it has been proved that Udai Singh had worked as a teacher and he was conversant with Urdu and English languages. From the testimonies of DW1 Mahender Singh, DW2 Balbir Singh Mehra and DW3 Rajesh Singh it has been proved that Udai Singh wanted to execute a Will and for this purpose he called DW2 Balbir Singh Mehra to witness its execution and to attest the same and subsequently, at the request of Udai Singh, DW2 Balbir Singh Mehra accompanied by DW3 Rajesh Saini and DW1 Mahender Singh visited the office of Sub-Registrar and executed a Will, which was produced before the court by DW1 Mahender Singh and a copy of which is Ex.DW1/1, which was attested by DW2 Sh. Balbir Singh Mehra and DW3 Rajesh Saini in presence of each other after execution of the Will by Udai Singh. From the testimonies of DW1 Mahender Singh, DW2 Balbir Singh Mehra and DW3 Rajesh Saini it is established that Udai Singh wanted to execute a Will, therefore, no fault can be found in his conduct or in the conduct of the witnesses in having prepared the said Will Ex. DW1/1 in advance. A perusal of Ex.DW1/1

reveals that the Will is bearing signatures of Udai Singh on each page and was registered. It is correct that at the last page of the Will at two places word 'testator' has been mentioned for signatures, whereas the signature and thumb mark of Udai Singh is appearing only at once place, but there is no requirement in law that the last page of the Will should bear signatures at two places. A perusal of Ex. DW1/1 also reveals that before executing the said Will Ex.DW1/1, Udai Singh, the testator declared that he wanted to revoke his previous registered Wills dated 03.5.1995, 17.5.1995, 20.9.1989 and 02.8.1991 indicating that Udai Singh had executed Wills from time to time, but no other Will was executed by him in the year 1996. This fact further strengthen the fact that when PW1 Bimla admitted Uday Singh having executed a registered Will in the year 1996, she was meant the Will dated 06.11.1996 only, the copy of which is Ex. DW1/1, and no other Will. From the testimonies of DW1 Mahender Singh, DW2 Balbir Singh Mehra and DW3 Rajesh Saini and contents of Ex. DW1/1 it has been proved that Udai Singh executed Will dated 06.11.1996, the copy of which is Ex. DW1/1. The issues no. 2 is decided in favour of the defendants no. 1, 2, 4 and 5 and against the plaintiff.”

(emphasis is mine)

10(i). I agree with the reasoning and conclusion of the trial court contained in para 18, as also the reasoning and discussion given in paras 13 to 15 of the impugned judgment already reproduced above, showing that the subject Will was proved, the counsel for the appellants/plaintiffs however argues that the admission of the appellant/plaintiff's widow Smt. Bimla Devi on 31.3.2010 should not be read against the appellants/plaintiffs inasmuch as the subject Will itself states that the deceased Sh. Udai Singh had executed the earlier Wills, and therefore admission of Smt. Bimla Devi should be read to be

admission not with respect to the subject Will but with respect to earlier Wills.

(ii) I cannot agree with the argument urged on behalf of the appellants/plaintiffs in this regard because the admission of appellant no.1/Smt. Bimla Devi, is specific with respect to a registered Will of the year 1996, and when we see the subject Will it is seen that the subject Will does not refer to any earlier Will of the year 1996 but it reference to Wills which are of years 1989, 1991 and 1995. Trial court has discussed this aspect in para 18 of its judgment which is reproduced above. Therefore, once there is a specific admission by the appellant no. 1/Smt. Bimla Devi herself in her cross-examination on 31.3.2010 that there was registered Will of the year 1996 of Sh. Udai Singh, it is not permissible for the appellants/plaintiffs to now argue that there is no admission with respect to the subject Will on the ground that the subject Will contains reference to earlier Wills and admission made by appellant no.1/Smt. Bimla Devi was only with respect to earlier Wills. This argument on behalf of the appellants/plaintiffs is also rejected.

11. Learned counsel for the appellants/plaintiffs then argued that the Will should be held to be shrouded in suspicious circumstances because the deceased was of 90 years of age when the Will was

executed, however, it is an undisputed position on record that the soundness of mind of the testator has not been challenged by the appellants/plaintiffs by leading any evidence, much less documentary evidence with respect to lack of soundness of the mind of the testator for executing the subject Will.

12. Learned counsel for the appellants/plaintiffs also argued that both the attesting witnesses have admitted that the Will was neither dictated nor typed in their presence so the will should be rejected, however I have failed to understand this argument because issue is never with respect to the Will being typed on the same date of execution because the Will can always be got typed earlier by the testator, and therefore merely because the attesting witnesses have admitted that the will was not prepared in their presence cannot mean that the Will is not proved in accordance with law.

13. There is no merit in the appeal and the same is hereby dismissed.

APRIL 27, 2018/^{AK}

VALMIKI J. MEHTA, J