

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

+ **RFA Nos. 600/2018 & 606/2018**

% **31st July, 2018**

1. RFA No.600/2018

RAJ PRAKASH NAYYAR Appellant

Through: Mr. S.S.Saini, Advocate.

versus

OM PARKASH NAYYAR Respondent

Through: Mr. M.L.Mahajan and Ms.
Meena Mahajan, Advocates.

2. RFA No.606/2018

RAJ PRAKASH NAYYAR Appellant

Through: Mr. S.S.Saini, Advocate.

versus

OM PARKASH NAYYAR Respondent

Through: Mr. M.L.Mahajan and Ms.
Meena Mahajan, Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

Caveat No. 681/2018 in RFA 600/2018

Counsel appears for the caveator. Caveat accordingly stands discharged.

CM No. 2999/2018 (Exemption) in RFA 600/2018
CM No. 30347/2018 (Exemption) in RFA 606/2018

Exemptions allowed subject to just exceptions.

CMs stand disposed of.

RFA No.600/2018 & CM No.29990/2018 (stay)
RFA No.606/2018 & CM No. 30346/2018 (stay)

1. These two appeals filed under section 96 of the Code of Civil Procedure 1908, CPC are filed against the common judgment of the Trial Court dated 17.3.2018 by which the trial court has decreed the suit filed by Sh. Om Prakash Nayyar (since deceased) now represented by his maternal grand-son Sh. Ajay Dhani in whose favour the subject registered Will dated 18.9.2004 Ex.PW2/D2 was made by Sh. Om Prakash Nayyar. The suit filed by Sh. Om Prakash Nayyar being the Suit No. 78374/2016 was a partition suit whereby the father Sh. Om Prakash Nayyar pleaded that he had 50% ownership rights in the suit property alongwith his son/defendant being the second floor Flat No. A-2/54, Varun Apartments, Sector-9, Rohini,

Delhi on an area admeasuring 875 sq. ft. as shown in the site plan Ex.PW1/10. The second suit being Suit No.78375/2016 was filed by Sh. Raj Kumar Nayyar against Sh. Ajay Dhani seeking a declaration with respect to the invalidity of the registered Will Ex.PW2/D2. The suit filed by Sh. Raj Kumar Nayyar/appellant, has been dismissed by the impugned judgment. Therefore, the net effect is that the suit filed by the father Sh. Om Prakash Nayyar, now represented through Sh. Ajay Dhani has been decreed for partition giving $\frac{1}{2}$ share to Sh. Ajay Dhani being the $\frac{1}{2}$ share of Sh. O.P. Nayyar and the suit for declaration filed by the appellant herein Sh. Raj Kumar Nayyar was dismissed and thereby the Will Ex.PW2/D2 has been held to be valid.

2(i) The undisputed position which emerges on record is that the suit property was allotted in the joint names of the father Sh. Om Prakash Nayyar and the son Sh. Raj Kumar Nayyar. The father Sh. Om Prakash Nayyar however had claimed that he had purchased the entire property by making payment through cheques to the Varun Vihar Cooperative Group Housing Society and possession was given to the father Sh. Om Prakash Nayyar on 25.6.1991. I may note that the impugned judgment passes a decree for partition giving half share

to the father Sh. Om Prakash Nayyar and half share to the appellant herein Sh. Raj Kumar Nayyar in view of the fact that as per the record the suit property is in the joint names of the father Sh. Om Prakash Nayyar and the appellant/Sh. Raj Kumar Nayyar.

(ii) The case of the father Sh. Om Prakash Nayyar when he filed the subject suit plaint for partition was that the since his wife, i.e the mother of the appellant was suffering from old age ailments, the appellant/son was invited by him to live with them in the suit property. However, within two years of shifting, the appellant/son and his family members started mistreating Sh. Om Prakash Nayyar and his wife (i.e the mother of the appellant) in various ways and resultantly the parents had to shift away from their own house to the house of their daughter Smt. Veena Dhani. The beneficiary of the subject registered Will dated 18.9.2004 Ex.PW2/D2 is the son of the daughter Smt. Veena Dhani namely Sh. Ajay Dhani. Sh. Om Prakash Nayyar in his plaint pleaded that he was diagnosed with blood cancer in 2004. In the plaint, it is pleaded by Sh. Om Prakash Nayyar himself that the subject registered Will dated 18.9.2004 was executed by him in favour of Sh. Ajay Dhani. On the pleading of existence of misconduct of

son/appellant/the defendant no.1 in the partition suit, the father Sh. O.P.Nayyar had applied for partition of the suit Flat.

3. The appellant contested the suit for partition filed by the father Sh. Om Prakash Nayyar and pleaded that actually he had paid all the monies with respect to the allotment and maintenance of the Flat. It was further pleaded by the appellant that he spent about Rs.70,000/- for renovation of the Flat between 1991 to 1999 and he had been paying electricity and water charges etc. It was also pleaded by the appellant that through cheques he repaid the loan of Rs.43,000/- taken by his father from Varun Vihar Cooperative Group Housing Society. The registered Will Ex.PW2/D2 in favour of Sh. Ajay Dhani was pleaded to be a forged and fabricated document.

4. Similar pleadings of the parties exist in the suit filed by the appellant Sh. Raj Kumar Nayyar pleading that the registered Will dated 18.9.2004 Ex.PW2/D2 was a forged and fabricated document.

5. The relevant issue to be decided by the trial court was with respect to the validity or otherwise of the Will dated 18.9.2004 executed by Sh. O.P.Nayyar in favour of Sh. Ajay Dhani, and this issue has been decided by the trial court in favour of Sh. Ajay Dhani

and it has been held that the Will dated 18.9.2004 Ex.PW2/D2 was duly executed and attested, as also registered by the maternal grandfather Sh. Om Prakash Nayyar in favour of Sh. Ajay Dhani. The main conclusions arrived at by the trial court in this regard, and with which conclusions I completely agree are as under:-

(i) The subject Will has been duly proved through the deposition of the attesting witness Sh. Sanjeev Chatrath who appeared as PW-3. Sh. Sanjeev Chatrath duly deposed with respect to the due execution and attestation of the Will, and his testimony remained unshaken in spite of cross-examination on behalf of the appellant.

(ii) There is a ring of truth with respect to the validity of the subject registered Will dated 18.9.2004/Ex.PW2/D2 inasmuch as the father Sh. Om Prakash Nayyar himself had filed the subject suit for partition and in this very subject suit for partition the father Sh. Om Prakash Nayyar had mentioned with respect to the fact that on account of mistreatment by the appellant of his father/Sh. Om Prakash Nayyar and his wife, he had executed the subject Will in favour of Sh. Ajay Dhani. It may be noted that the suit plaint for partition was signed by Sh. Om Prakash Nayyar.

(iii) The Will is a registered Will, and therefore, the factum that the Will has been proved to be a registered Will gives some reasonable presumption with respect to its genuineness and legality of its execution.

(iv) Minor discrepancies with respect to the signatures would not affect the due attestation and registration of the Will, and which is therefore to be taken as proved in view of evidence led by Sh. Ajay Dhani. On behalf of the appellant no evidence was led that the Will did not bear the signatures of Sh. Om Prakash Nayyar because the appellant did not file other admitted documents and a handwriting expert's report that the signatures on the subject Will were not the same as per the other admitted documents containing the signatures of the father/Sh. Om Prakash Nayyar.

At this stage, I may note that the appellant had filed a report of handwriting expert Sh. Deepak Jain and who was summoned as DW-2, however the handwriting expert Sh. Deepak Jain only appeared for partial cross-examination resulting in closing of his right to be further cross-examined on account of his absence and resultantly there was rejection of the entire testimony of the handwriting expert Sh. Deepak

Jain. This order of the Trial Court dated 23.8.2017 was challenged before this Court in CM (M) 1133/2017 but that challenge was dismissed by a learned Single Judge of this Court vide order dated 13.10.2017, and which order has become final, and therefore there is no evidence on behalf of the appellant that the subject Will does not bear the correct signatures of the father/Sh. Om Prakash Nayyar. The relevant observations of the trial court in this regard are contained in paras 16 to 23 of the impugned judgment and these paras read as under:-

“16. The onus to prove this issue was on PW1 Ajay Dhani, who was the plaintiff in the lead suit.

In order to prove the validity and legality of the Will PW2/D2 of his maternal grandfather O. P. Nayyar, PW1 Ajay Dhani apart from himself had examined his mother PW2 Veena Rani and attesting witness PW3 Sanjeev Chatharth.

PW1 Ajay Dhani in his affidavit deposed that the Will was executed by O.P. Nayyar on 18.09.2004 in presence of the attesting witnesses, which was then registered on 22.09.2004. He in his cross-examination stated that the age of his maternal grandfather O. P. Nayyar in the years 2000-2004 was 70-74 years ; that his maternal grandfather had told him about the Will having been typed in the office of his advocate Mr. Mahajan which was then registered in the presence of the attesting witnesses. He also stated that O. P. Nayyar had signed and put his thumb impressions on each & every page of the Will at the time of its execution. He further stated in his cross-examination that the Will after its registration on 22.09.2004 was handed over by his maternal grandfather O. P. Nayyar to his father and it was his father, who gave him this Will after the death of O. P. Nayyar. He further stated in the cross-examination that he along with the attesting witnesses were present before the Sub-Registrar for the registration of the Will and that PW2 Sanjeev Chatharth had attested the same in his

presence before the Sub-Registrar. He also admitted in his cross-examination that he was not present when O. P. Nayyar and another attesting witness Mr. Bhutani signed the Will before the Sub-Registrar.

17. On the above material particulars, the deposition of PW2 Ajay Dhani received substantial support from the testimony of the attesting witness PW3 Sanjeev Chatharth. He by his uncluttered testimony proved the legal & valid execution of the Will by O. P. Nayyar. He also identified the signatures and thumb impression of O. P. Nayyar on the Will having seen him signing and writing. He held his ground even during the cross-examination. In the cross-examination, he categorically deposed that that the Will was prepared in his presence on 18.09.2004 & the presence of O. P. Nayyar, another attesting witness Subhash Bhutani and Advocate Desh Raj Mahajan ; that the Will was prepared by advocate Mahajan on the instructions of O. P. Nayyar and that O.P. Nayyar had signed at four places after reading it after which it was signed by him & another attesting witness Subhash Bhutani. In respect of the registration of the Will, he stated in his cross-examination that he along with O. P. Nayyar, PW1 Ajay Dhani, Ranjeet Singh Dhani, T. P. Dhani and other attesting witness Subhash Bhutani reached the Sub-Registrar office on 22.09.2004 ; that O. P. Nayyar signed the same in the presence of the Sub-Registrar and that he also had signed at the time of the registration. Nothing could be elicited from this witness during his cross-examination by defendant No. 1 Raj Kumar Nayyar so as to impeach his credibility. There are no material contradictions between the testimonies of PW1 Ajay Dhani and PW3 Sanjeev Chatharth on the aspects of the execution and registration of this Will. Their testimonies, if read together, proves that the Will was executed on 18.09.2004 in the office of Advocate Desh Raj Mahajan in the presence of O. P. Nayyar, who signed the same at points A1 to A4 ; that the contents of the Will were understood by the Testator O. P. Nayyar before signing it ; that it was then signed by the attesting witnesses at point B & C ; that the Will was registered on 22.09.2004 ; that the Testator O.P. Nayyar had signed at A5 and A6 during registration and that the attesting witnesses had signed at points A & B during registration.

The registration of this Will is otherwise not disputed between the parties. The registered Will brings about the presumption of its genuineness and the legality of its execution.

18. The record shows that the plaint though was presented through PW1 Ajay Dhani as AR but it also bears the signatures of O. P. Nayyar. No evidence was led by the defendant No. 1 Raj Kumar Nayyar or defendant No. 2 Mukesh Nayyar to prove that the signatures on the plaint were not of O. P. Nayyar. It is thus to be accepted that the

plaint bore the signatures of O. P. Nayyar. This fact assumes significance because the plaint contains an admission by O. P. Nayyar himself (who filed the suit initially through AR PW1 Ajay Dhani) that he had executed the Will in favour of PW1 Ajay Dhani. This admission nails the case for PW1 Ajay Dhani regarding the voluntary and valid execution of the Will by O. P. Nayyar.

19. Nothing was produced by defendant No.1 Raj Kumar Nayyar or defendant No. 2 Mukesh Nayyar to dislodge the aforesaid plethora of evidence produced by PW1 Ajay Dhani qua the valid execution of the Will. The evidence of their handwriting expert DW2 Deepak Jain was discarded whereby his report on the alleged forgery of signatures of O. P. Nayyar on the Will is of no significance.

20. During his cross-examination, PW1 Ajay Dhani admitted that there were few discrepancies between the various signatures of O. P. Nayyar appearing on the Will. He admitted that signatures at point A1 & A4 had “dot” between the letters “O” & “P” while there is no such “dot” in the signatures at point A2, A3, A5 and A6.

He also admitted that the letter “YAR” is separate in the letter “Nayyar” in the signatures at point A1 & A4 while it is connected at point A2, A3, A5 and A6.

All these are minor discrepancies keeping in view the fact that the Testator O. P. Nayyar was aged 74 years at the time of the execution & registration of the Will whereby such discrepancies in his handwriting were bound to exist. The execution and registration of the Will has otherwise been proved by the impeccable testimonies of PW1 Ajay Dhani and PW3 Sanjeev Chatharth. These discrepancies in the signatures of O.P. Nayyar are otherwise also insignificant, particularly when O. P. Nayyar himself admitted about the execution of the Will in the plaint signed by him in the lead CS No. 78374/16.

21. It is pleaded by defendant No. 1 Raj Kumar Nayyar and defendant No. 2 Mukesh Nayyar in their pleadings that the Will is invalid and forged because O. P. Nayyar had executed the same qua the entire flat instead of his half share. This plea is not sustainable because the Will shall only be read qua the extent of the half share of O. P. Nayyar in the flat.

22. The testimonies of PW1 Ajay Dhani and PW3 Sanjeev Chatharth on the point that O.P. Nayyar was in sound and disposing mind at the time of the execution and registration of the Will have corroborated each other on material aspects. The contesting parties basically PW1 Ajay Dhani and defendant No. 1 Raj Kumar Nayyar are

at loggerheads with regard to the nature of the Cancer suffered by O. P. Nayyar.

PW1 Ajay Dhani stated that O. P. Nayyar suffered from blood cancer in 2004 while the defendant No. 1 Raj Kumar Nayyar stated that he was suffering from lung cancer.

Nature of these cancers, be that lung or blood, is inconsequential when it is well known that none of them effects the mental faculties of the patient

23. In view of my discussion as above, PW1 Ajay Dhani has proved that the share of O. P. Nayyar in the flat in question was bequeathed to him vide legal & valid Will PW2/D2. Accordingly this issue is decided in favour of PW1 Ajay Dhani.”

6. Learned counsel for the appellant has argued that the trial court ought to have held the Will not to be validly proved and for this purpose firstly reliance has been placed by the counsel for the appellant upon the cross-examination of the attesting witness Sh. Sanjeev Chatrath on 11.4.2012 and where Sh. Sanjeev Chatrath stated that the testator was not present at the time of drafting of the Will in the office of the Advocate Mr. Desh Raj Mahajan. I cannot agree with the argument urged on behalf of the appellant because a testator even if he is not present at the time of drafting of the Will would not mean that the Will is not duly executed and attested. In the very same cross-examination dated 11.4.2012 the attesting witness has specifically deposed with respect to the Will being prepared by Sh. Desh Raj Mahajan, Advocate on instructions of Sh. Om Prakash Nayyar and the

Will was signed by Sh. Om Prakash Nayyar only after reading the said Will. The Will was read by Sh. Om Prakash Nayyar on his own and it was not read over to him by anyone. Sh. Sanjeev Chatrath further deposed with respect to the testator signing the Will in his presence inasmuch as at four places and thereafter all the attesting witnesses including Sh. Sanjeev Chatrath signing the Will in the presence of the testator. The following portion of the cross-examination of Sh. Sanjeev Chatrath shows that the Will has been duly proved to have been executed and attested.

“On 15.10.2004, only power of attorney was registered. The WILL was registered on 22.09.2004. The WILL was executed at about 5:30 PM or 6:00 PM on 18.09.2004. It is correct that the power of attorney Ex.PW1/5 does not bear the date of execution on any page including below my signatures. Myself, Mr. O.P. Nayyar, Mr. Subhash Bhutani, Mr. Deshraj Mahajan and his staff were present on 18.09.2004 at the time of execution of WILL. As far as I remember his staff consisted of two persons, who were present there. The WILL was prepared by Mr. Mahajan on instructions of Mr. O.P. Nayyar. The draft prepared by Mr. Mahajan was typed in the adjoining cabin. First of all, the WILL was signed by Mr. O.P. Nayyar, who had signed after reading it. Mr. O.P. Nayyar had read the WIL on his own and it was not read over to him by anyone. He signed the WILL in my presence. He signed at four places on the WILL. Thereafter, I put my signature on the WILL. Thereafter, Mr. Subhash Bhutani put his signature on the WILL. We all had signed on the WILL with the same pen lying there. I had signed only on the last page of the WILL.

On 22.9.2004, we all i.e. Myself, Mr. O.P. Nayyar, Mr. Ajay Dhani, Ms. Ranjeet Singh Dhani, Mr. T.P. Dhani and Mr. Subhash Bhutani had together gone to the office of Sub Registrar. Nobody else had signed the WILL after our reaching the office of Sub Registrar and before the

WILL was submitted for registration. We remained in the office of Sub Registrar for about 1 or 1½ hours.”

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“On 15.10.2004, we had reached the office of Sub Registrar at about 10:30 AM or 11:00 AM. On 11.09.2004, we had reached the office of Sub Registrar at about 11:00 AM or 11:15 AM. I do not know how many copies of the WILL were submitted in the office of Sub Registrar alongwith original WILL. The signature of Mr. O.P. Nayyar was taken on the WILL in the presence of the Registrar. I had also signed in the presence of the Registrar. The signature of Mr. O.P. Nayyar on page no. 1, 2 & 2 marked as A1, A2 and A 3 were done by him in the chamber of Mr. Mahajan, Advocate. It is correct that there is only one signature of Mr. O.M. Nayyar on each of the front pages of the WILL. I do not know who had put the fluid on the reverse of the page no.1 of the WILL and for what purpose. After registration, the original WILL was not returned in my presence. It is wrong to suggest that Mr. Bhutani was not present with me on that day at the office of Sub Registrar. Mr. O.P. Nayyar did not affix his thumb impressions on the WILL in the office of Mr. Mahajan, Advocate. I do not know whether the copies submitted with the original WILL in the office of sub Registrar were photocopies or the duplicate/carbon copies.”

7. I may note that Sh. Sanjeev Chatrath has very strenuously denied in his cross-examination that the Will is a forged and fabricated document or that the Will was not duly executed and attested in that it does not bear the signatures of the testator Sh. Om Prakash Nayyar or the signatures of the attesting witnesses.

8. I therefore reject the argument urged on behalf of the appellant that the Will has to be held to be not proved because the testator was not present when Will was drafted.

9. The next argument urged on behalf of the appellant was that the substituted plaintiff Sh. Ajay Dhani when he appeared as PW-1 conceded in his cross-examination on 16.8.2010 that the testator Sh. Om Prakash Nayyar had not signed the Will in the presence of Sh. Ajay Dhani. This argument also of the appellant in my opinion has no substance because the Will besides being proved through Sh. Ajay Dhani has been directly proved through the attesting witness Sh. Sanjeev Chatrath who appeared as PW-3. Also, it is not necessary that a testator must sign in the presence of the attesting witness because Section 63 of the Indian Succession Act, 1925 clearly provides that the signatures of the testator can be proved when the testator himself gives an acknowledgment that he had put his signatures on the Will. Accordingly, even this argument urged on behalf of the appellant has no merits and is accordingly rejected.

10. The fact of the matter is that the appellant/son drove away his own parents from their own house. Parents were thereafter forced to live with their daughter. This is an admitted position on record that the parents were not living with the appellant/son in the property of the father which is the suit property, and which can only

be if the parents were harassed to such an extent by the appellant and his family members that they had to give up their own house had to stay with their daughter's family. Therefore, it is nothing unusual if the father Sh. Om Prakash Nayyar in such circumstances executed the subject Will Ex.PW2/D2 in favour of the son of his daughter Sh. Ajay Dhani being the son of the daughter Smt. Veena Dhani and with whom the parents lived till they breathed their last.

11. In view of the above facts, the entire litigation initiated by the appellant either with respect to seeking declaration with respect to the invalidity of the subject registered Will dated 18.9.2004 Ex.PW2/D2 and also falsely contesting the suit of the father for partition is false to the knowledge of the appellant, and therefore these appeals being absolutely meritless are dismissed with costs of Rs.2 lacs. Costs shall be paid by the appellant to respondent no.1/Sh. Ajay Dhani within a period of six weeks from today.

JULY 31, 2018/ib

VALMIKI J. MEHTA, J