

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

% **Date of decision: 8th October, 2018**

+ **RSA 69/2017 & CM No.41911/2018 (for restoration of appeal)**

RAJNI SAXENA

..... Appellant

Through: Mr. S.S. Ahluwalia and Mr. Jatin
Teotia, Advs.

Versus

RAJINDER YADAV & ORS

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) was filed impugning the judgment and decree [dated 11th July, 2016 in RCA No.15/2015 of the Court of Additional District Judge (Central)] of dismissal of First Appeal under Section 96 of the CPC preferred by the appellant against the judgment and decree [dated 12th March, 2015 in Suit No.705/2014 (Unique ID No.0240K0040692011) of the Court of Civil Judge-05 (Central)] of dismissal of suit filed by the appellant/plaintiff for recovery of possession of immoveable property with *mesne* profits.

2. The appeal came up first before this Court on 3rd March, 2017 and thereafter on 8th March, 2017 when, without recording any satisfaction that the appeal entailed any substantial question of law and without framing any substantial question of law, notice of the appeal was ordered to be issued and the Trial Court record requisitioned.

3. On the next date of hearing i.e. 25th April, 2017, the counsel for the respondent/defendant No.1 stated that the respondent/defendant No.3 Smt. Kiran Yadav had expired. The appellant/plaintiff thereafter applied for substitution of heirs of respondent No.3 and which was allowed on 19th December, 2017. The counsel, who had earlier appeared for respondent/defendant No.1, thereafter appeared for the respondents/defendants No.1 to 3 i.e. Rajinder Yadav, Dinesh Yadav and the legal heirs of respondent/defendant No.3. The respondent/defendant No.4 Havaladar Yadav did not appear despite service and was on 22nd August, 2017 proceeded against *ex-parte*. On 6th September, 2018, though the counsel for the respondents/defendants No.1 to 3 appeared but none appeared for the appellant/plaintiff and the appeal was dismissed for non-prosecution. Subsequently, the counsel for appellant/plaintiff mentioned the matter and though he was heard on whether the appeal entailed any substantial question of law, to decide whether to restore the appeal, but could not satisfy the Court. Now today, an application for restoration of the appeal has been filed.

4. Need to hear the counsel for the respondents/defendants on CM No.41911/2018 for restoration of the appeal is not felt and for the reasons stated, CM No.41911/2018 is allowed. The appeal is restored to its original position and CM No.41911/2018 is disposed of.

5. The counsel for the appellant/plaintiff has been heard to determine whether this second appeal against consistent decisions of the Suit Court and the First Appellate Court entails any substantial question of law, to be entertained. Supreme Court, in *Surat Singh Vs. Siri Bhagwan* (2018) 4

SCC 562 and *Vijay Arjun Bhagat Vs. Nana Laxman Tapkire* 2018 SCC OnLine SC 518 has held that notice even of the Regular Second Appeal cannot be issued, without framing substantial question of law. Though the Trial Court record earlier requisitioned in this Court has been returned owing to the dismissal of the appeal for non-prosecution but the counsel for the appellant/plaintiff has been heard with the assistance of copies of the Trial Court record filed along with memorandum of appeal.

6. The appellant/plaintiff sued for recovery of possession and *mesne* profits, of 125 sq. yds. area of plot of land admeasuring 250 sq. yds. in Khasra No.140/1/2 situated in Gali No.23, Sant Nagar, Bengali Colony, Burari, Delhi, pleading (i) that one Smt. Ganga Dulari was the owner of the said plot of land and died leaving only two daughters, namely Vidhya Devi @ Vidhya Wati and Sundari Devi, as her heirs and each of the said daughters inherited the said property equally i.e. each having 125 sq. yds. of land; (ii) that the appellant/plaintiff is the daughter of Sundari Devi; (iii) that Vidhya Devi @ Vidhya Wati was married to one Ramadin Saxena and there was no issue from the said wedlock; (iv) that Ramadin Saxena expired 25/26 years prior to the institution of the suit and Vidhya Devi @ Vidhya Wati was residing in the house built on her part of the aforesaid plot of land; (v) that the appellant/plaintiff served Vidhya Devi @ Vidhya Wati in her lifetime; (vi) that Vidhya Devi @ Vidhya Wati expired on 26th July, 2008 at her another house bearing No.B-1011, Block-B, Jahangirpuri, Delhi; (vii) that Vidhya Devi @ Vidhya Wati, during her lifetime, executed a Will dated 11th March, 2003 and bequeathed her part of the property at Burari, Delhi, in favour of the appellant/plaintiff; and, (viii) that on 27th August, 2008, the

respondents/defendants No.1 to 4 trespassed into Vidhya Devi @ Vidhya Wati's 125 sq. yds. of the property at Burari, Delhi.

7. The respondents/defendants contested the suit by filing a written statement, denying trespass and the Will of Vidhya Devi @ Vidhya Wati, on basis whereof the subject suit was filed, and pleaded (a) that Vidhya Devi @ Vidhya Wati and her husband Deputy Singh, vide registered deed, adopted Rahul Singh son of respondent/defendant No.1 as a son and also performed the religious ceremonies in this regard and the said Rahul Singh is thus entitled to succeed to all the properties of Vidhya Devi @ Vidhya Wati; (b) that the marriage of Vidhya Devi @ Vidhya Wati with Ramadin Saxena was denied and it was pleaded that after the death of her previous husband, Vidhya Devi @ Vidhya Wati had re-married with Deputy Singh; (c) that Vidhya Devi @ Vidhya Wati, though was the initial allottee from Delhi Development Authority of property No.B-1011, Block-B, Jahangirpuri, Delhi, but had transferred the same to her husband Deputy Singh.

8. On the pleadings aforesaid of the parties, the following issues were framed in the suit:

- “i) Whether the suit of the plaintiff is not properly valued for the purpose of jurisdiction? OPD*
- ii) Whether the suit of the plaintiff is bad for mis-joinder of parties? OPD*
- iii) Whether will dated 11.08.2008 is a forged and fabricated documents? OPD*
- iv) Whether the plaintiff has been in possession of the suit property till 27.08.2008? OPP*

- v) *Whether the defendant is in possession of the suit property? OPD*
- vi) *Whether the plaintiff is entitled to the relief of possession as prayed for? OPP*
- vii) *Whether the plaintiff is entitled to recover a sum of Rs.45,000/- as damages from 27.08.2008 to 14.01.2011 at the rate of Rs.1500/- per month as prayed for? OPP*
- viii) *Whether the plaintiff is entitled to recover a sum of Rs.1500/- per month from 15.01.2011 onwards towards the future damages? OPP*
- ix) *Relief.”*

9. The Suit Court, on the basis of the evidence led, decided the Issue No.(iii) aforesaid against the appellant/plaintiff and in favour of the respondents/defendants and hence dismissed the suit. The First Appellate Court, as aforesaid, has dismissed the First Appeal preferred by the appellant/plaintiff.

10. As would be obvious from the above, the Suit Court and the First Appellate Court have disbelieved the Will, on the basis whereof the appellant/plaintiff claimed title to the property and on basis of which title, the relief of possession and *mesne* profits was claimed. I have thus enquired from the counsel for the appellant/plaintiff, whether not the dispute is only of fact i.e. of proof of the document claimed by the appellant/plaintiff to be the validly executed last Will of Vidhya Devi @ Vidhya Wati and how does this appeal entail any substantial question of law. The law in this regard is clear as reiterated in ***Hero Vinoth Vs. Seshammal*** (2006) 5 SCC 545 and ***Damodar Lal Vs. Sohan Devi*** (2016) 3 SCC 78. The First Appellate Court

is the last Court of fact and the High Court cannot entertain the Regular Second Appeal unless the same entails or raises any substantial question of law. A question of fact, cannot qualify as a substantial question of law, unless the factual finding returned is based on no evidence. If there is even miniscule evidence for the factual finding returned, the Second Appellate Court, even if were to draw a different opinion, cannot, by returning the finding of fact to be perverse, entertain the Regular Second Appeal.

11. The counsel for the appellant/plaintiff, on enquiry states that the Will was not registered.

12. Else, the counsel for the appellant/plaintiff has contended (i) that the appellant/plaintiff produced both the witnesses to the document claimed to be the Will of Vidhya Devi @ Vidhya Wati and inspite of the said witnesses having proved the document, the Courts below have disbelieved the document to be the validly executed last Will of Vidhya Devi @ Vidhya Wati; (ii) that the respondents/defendants could not prove that Vidhya Devi @ Vidhya Wati, after the demise of her first husband, had re-married with Deputy Singh; (iii) that it was the appellant/plaintiff who was looking after and caring for her mother's sister and the respondents/defendants are mere trespassers over the land; and, (iv) that the First Appellate Court has merely reiterated the findings of fact of the Suit Court.

13. I may in this regard state that the address given of the appellant/plaintiff, in the memorandum of parties, is of 2/39, Roop Nagar, Delhi and not of the other half of the house at Burari, Delhi which was owned by the mother of the appellant/plaintiff.

14. A perusal of the judgment of the Suit Court shows the Suit Court to have found/observed/reasoned/held (a) that the decision of the suit filed by the appellant/plaintiff depended upon the proof of the Will on the basis whereof, the appellant/plaintiff claimed title to the property and on basis of which title, the relief of possession and *mesne* profits was claimed; (b) that the case of the respondents/defendants was that Vidhya Devi was never known as Vidhya Wati; (c) that the respondents/defendants had proved: (i) photocopy of Voter ID Card of Vidhya Devi as Ex. DW-1/1; (ii) photocopy of Voter ID Card of Deputy Singh, original of which was produced in the Court, seen and returned, as Ex. DW-1/2; (iii) photocopy of Deed of Adoption as Ex. DW-1/3; (iv) photocopies of document of allotment of house No.B-1011, Block-B, Jahangirpuri, Delhi as Ex.DW-1/4; (v) photocopies of General Power of Attorney, Affidavit, Receipt and Agreement to Sell executed by Vidhya Devi, as Ex.DW-1/5 to Ex. DW-1/8; (vi) photocopy of Admission Card of Rahul Singh as Ex.DW-1/9; (vii) photocopy of Death Report of Vidhya Devi as Ex.DW-1/12; and, (viii) photocopy of Death Certificate issued by Municipal Corporation of Delhi as Ex.DW-1/13, to show that the name of Vidhya Devi in none of the said documents was mentioned as Vidhya Wati; (d) that on the contrary, the appellant/plaintiff has placed on record a certified copy of Sale Deed informed to be with respect to house No.B-1011, Block-B, Jahangirpuri which was executed by Vidhya Devi @ Vidhya Wati; (e) that in view of the said controversy, the signatures of Vidhya Devi @ Vidhya Wati on the document claimed to be the Will were not proved to be of Vidhya Devi @ Vidhya Wati; (f) that the burden was on the appellant/plaintiff in this regard; (g) that though registered Deed of Adoption was produced in the Court and

seen and returned and Ex. DW-1/3 put thereon but in the document claimed by the appellant/plaintiff to be the Will, there was no mention of the said adoption; (h) that the documents aforesaid also proved marriage of Vidhya Devi @ Vidhya Wati to Deputy Singh; (i) that the Death Certificate of Vidhya Devi also showed the name of her husband as Deputy Singh; (j) that the document filed by the appellant/plaintiff claimed to be the Will of Vidhya Devi @ Vidhya Wati did not show the name of her husband as Deputy Singh but showed the name of her husband as Ramadin Saxena only; (k) that since the appellant/plaintiff had also produced original Death Certificate of Vidhya Devi @ Vidhya Wati bearing the name of her husband as Ramadin Saxena and the respondents/defendants had also brought original Death Certificate of Vidhya Devi @ Vidhya Wati showing the name of her husband as Deputy Singh, it was the duty of the appellant/plaintiff to clarify and the appellant/plaintiff had not produced any evidence in this regard; (l) that there were inconsistencies in the testimony of PW-2 and PW-3 examined by the appellant/plaintiff, being the witnesses to the alleged Will; (m) that the said witnesses could not tell the parentage of Vidhya Devi @ Vidhya Wati or her place of residence; (n) that one of the witnesses merely stated that he happened to be visiting the chamber of his father, a lawyer and was made to sign the alleged Will as a witness; (o) that the alleged Will also did not bear any photograph of the executant thereof; (p) that there were inconsistencies also as to the time when the executant of the alleged Will was claimed to have expressed desire to make the Will; (q) that though in the affidavit by way of examination-in-chief, the witness stated that the family of the executant was known to him but in cross-examination denied the

same; and, (r) that the appellant/plaintiff had miserably failed to discharge the onus of proof of the document as Will.

15. The First Appellate Court, in addition held (I) that the appellant/plaintiff had also failed to prove that she was at any earlier point of time in occupation of the property, for which the suit was filed, as was claimed in the plaint; (II) that while one of the witnesses to the alleged Will in examination-in-chief stated that Vidhya Devi @ Vidhya Wati had expressed a desire to make a Will with respect to subject property when she visited his house in March, 2008, he, in his cross-examination denied any knowledge of mother or children of Vidhya Devi @ Vidhya Wati and claimed that he had been meeting Vidhya Devi @ Vidhya Wati only in the law chamber of his father; (III) that it had also come on record that the appellant/plaintiff, prior to the institution of the subject suit, had instituted another suit with respect to another property of Vidhya Devi @ Vidhya Wati and which fact the counsel for the appellant/plaintiff had not disclosed; the said suit was also dismissed vide a detailed judgment on merits; (IV) that in the said other suit, the appellant/plaintiff had failed to prove that she was at any time residing with Vidhya Devi @ Vidhya Wati; (V) that in yet another legal proceeding, the claim of the appellant/plaintiff to succession certificate with respect to the property at Jahangirpuri of Vidhya Devi @ Vidhya Wati had also been dismissed; (VI) that in case Vidhya Devi @ Vidhya Wati wanted her entire estate to be bequeathed to the appellant/plaintiff, the Will claimed by the appellant/plaintiff with respect to the subject property would also have included the other property at Jahangirpuri and other estate of Vidhya Devi @ Vidhya Wati and there was admittedly no Will with respect

to Jahangirpuri property to which the appellant/plaintiff had claimed title on the basis of succession certificate.

16. It would thus be seen that the First Appellate Court, besides agreeing with the reasons given by the Suit Court for dismissal of the suit, has also given its own reasons for deciding against the appellant/plaintiff.

17. A bare perusal of the aforesaid narrative would show that it cannot be said that the findings of fact of the Suit Court and the First Appellate Court against the appellant/plaintiff are based on no evidence. There was plenty material before the Courts below, on the basis whereof they held that the appellant/plaintiff had failed to prove title to the property under the alleged Will.

18. The counsel for the appellant/plaintiff, while the dictation was going on was interrupting and was requested to wait till the end to say whatsoever he wants to say.

19. He has now (A) drawn attention to paras 10 to 14 of ***Sridevi Vs. Jayaraja Shetty*** (2005) 2 SCC 784 to contend that the document stood proved as the Will on the basis of testimony of the attesting witnesses; (B) that the documents with respect to Jahangirpuri property proved by the respondents/defendants were of suspicious nature and did not give the name of the husband of Vidhya Devi @ Vidhya Wati as Deputy Singh; (C) that a Will is not necessarily required to be registered; reliance is placed on ***Raman Mahindra Vs. Adarsh Bala Sud @ Adarsh Kumari*** (2015) 217 DLT 490; (D) that it was the case of the appellant/plaintiff that the appellant/plaintiff had been dispossessed and the appellant/plaintiff had lodged a police complaint also in this regard; (E) that the Suit Court and the First Appellate

Court did not consider the deposition of PW-4 examined by the appellant/plaintiff, being a neighbour of the subject property who deposed that the appellant/plaintiff had been residing in the subject property and the respondents/defendants were tenants therein.

20. I have considered the aforesaid contentions. Mere testimony of the attesting witnesses cannot be proof of the Will if there are a large number of other circumstances which raise doubts and suspicion of the document having been executed by the purported executant thereof. Both the Courts below have given detailed reasons in this regard and the Suit Court has also cited precedents qua suspicious circumstances. The question to the counsel for the appellant/plaintiff about registration was only as a matter of course, inasmuch as at least in the city of Delhi, the photograph of the executant on a registered document has been made compulsory. What the First Appellate Court has held is that there was no evidence of possession of the appellant/plaintiff of the property prior to the dispossession claimed by the appellant/plaintiff in the suit and merely because mention has not been made in the judgment of the testimony of PW-4 would be immaterial, inasmuch as the other reasons have been given therefor.

21. The dispute is thus purely factual and the appeal does not raise any substantial question of law.

22. Dismissed.

RAJIV SAHAI ENDLAW, J.

OCTOBER 08, 2018

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