

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

+ **RFA No.24/2018**

% **Reserved on: 10th January, 2018**
Pronounced on : 18th January, 2018

HARJIT SINGH (DECEASED) THROUGH HIS LEGAL HEIRS

..... Appellants

Through: Mr. N.K. Kantawala, Advocate
with Ms. Akanksha Jain,
Advocate and Mr. Ayush
Agarwal, Advocate.

versus

SURENDER SINGH & ORS.

..... Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

C.M. No.924/2018 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

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2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellants, the legal heirs of the original plaintiff Sh. Harjit Singh and who were

substituted legal heirs of the plaintiff Sh. Harjit Singh during the pendency of the suit, impugning the judgment of the Trial Court dated 12.9.2017 by which the trial court has dismissed the suit filed by the appellants for partition of the suit property bearing no. 3425/IX, Gali Mahabir, Gandhi Nagar, Delhi situated on a plot admeasuring 100 sq. yds.

3. The facts of the case are that the appellants/plaintiff pleaded that the mother of the parties late Smt. Gurbachan Kaur was the owner of the suit property having purchased the same in terms of the sale deed dated 4.9.1962. As per the appellants/plaintiff the mother Smt. Gurbachan Kaur expired intestate on 23.9.1994. The husband of late Smt. Gurbachan Kaur, father of the parties, also subsequently expired on 14.7.1998 intestate. Therefore there remained a total of four legal heirs of late Smt. Gurbachan Kaur being three sons and one daughter. One son Sh. Harjit Singh was the plaintiff in the suit with another son Sh. Surinder Singh being the defendant no.1. The third son Sh. Sukhwant Singh was defendant no.3 and the daughter Smt. Jasbir Kaur Manchanda was defendant no.2 in the suit. Accordingly it was pleaded that all the four parties to the suit were

1/4th co-owners of the suit property and therefore the suit property be partitioned giving the appellants/plaintiff his 1/4th share in the suit property.

4. Suit was contested by the respondent nos. 2 and 3/defendant nos.2 and 3. Respondent nos. 2 and 3/defendant nos.2 and 3 have relied upon the registered Will dated 23.4.1992 executed by late Smt. Gurbachan Kaur bequeathing the suit property to the respondent nos. 2 and 3/defendant nos.2 and 3. It is pleaded in the written statement of the respondent no.2/defendant no.2 that she along with respondent no.3/defendant no.3 used to live with her parents in the suit property. Appellants/Plaintiff and the respondent no.1/defendant no.1 got married and left the family home in 1970 whereas the respondent nos. 2 and 3/defendant nos.2 and 3 continued to stay with their parents and serve them. It was therefore pleaded that suit be dismissed as respondent nos. 2 and 3/defendant nos.2 and 3 were owners in terms of the Will dated 23.4.1992 of the mother Smt. Gurbachan Kaur.

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

6. Issue no.1 with respect to the *factum* of due execution of the Will was proved on behalf of respondent nos. 2 and 3/defendant nos.2 and 3 by the depositions of the attesting witness Sh. Ramesh Vashistha who deposed as D3W2 and the respondent no.3/defendant no.3 who examined himself as D3W1, and thereby the Will of the mother dated 23.4.1992 is proved and exhibited as Ex.D3W1/1. The *factum* with respect to the respondent nos. 2 and 3/defendant nos.2 and 3 having proved the Will dated 23.4.1992 is found in terms of the following para of the impugned judgment:-

As per Section 63 of the Indian Succession Act 1925, to prove a WILL, it is necessary that the WILL ought to be subscribed by the two witnesses and Section 68 of the Indian Evidence Act make it mandatory that at least one of the attesting witnesses shall prove the WILL by deposing in the Court. In the present case, defendant no. 2 and defendant no. 3 alleged that their mother Gurbachan Kaur executed a WILL dated 23.04.1992. To prove the WILL, D-3 examined himself as well as one of the attesting witness as D3W2 Ramesh Vashistha.

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further deposed that his mother had executed a WILL on 23.04.1992 and he was present at the time of execution of the WILL. He further deposed that his mother was in a sound disposing mind and good health at the time of execution of the WILL and further that he has seen the WILL (EX D3W1/1) and this WILL was first of all signed by his mother and thereafter his father signed as an attesting witness and after his father, Ramesh Vashisth signed the WILL as an attesting witness. He further deposed that his mother and the witnesses were all present at the same time of the execution of the WILL and its attestation and further deposed that my father had read over the WILL and made my mother to understand the contents thereof. He further deposed that after execution of the WILL (EXD3W1/1) Gurbachan Kaur had not executed any other WILL. He also deposed that he had gone to the office of Sub Registrar at the time of execution and registration of the WILL of his mother. They had gone to the office of Sub Registrar in Seelampur. He further deposed that my mother died on 23.09.1994 and the property was mutated on the basis of this WILL sometimes in 1997.

Defendant no. 3 examined Sh. Ramesh Vashistha as D3W2 who was one of the attesting witnesses of the WILL EX D3W1/1. D3W2/Ramesh Vashisth has deposed that Mrs. Gurbachan Kaur alongwith her husband and another gentleman had come to him and explained their desire to get the WILL registered. She informed him that she wanted to execute a WILL in respect of her property in Gandhi Nagar. He has further deposed that he got the WILL drafted thereafter and he has seen the original WILL EX D3W1/1, drafted by him and has been signed by him at two places at point A. He has further deposed that after he drafted the WILL, Trilochan Singh, husband of Mrs. Gurbachan Kaur explained the contents of the WILL to Mrs. Gurbachan Kaur, thereafter she signed the Will.

He further deposed that Gurbachan Kaur was in sound disposing mind at the time of the execution of this WILL and after the WILL was executed by Gurbachan Kaur, her husband signed it as an attesting witnesses and after Trilochan Singh had signed the WILL as an attesting witness, he signed the same as an attesting witness. He further deposed that at the back page 1, at the place of Registration, the name of Tirlochan Singh Manchanda has been shown as an attesting witness whereas his name has been mentioned as the person who identified the testator and the witness. He further deposed that testator Gurbachan Kaur has signed on the WILL at point B, in his presence. He has identified the signatures of the deceased on the WILL as well as the signatures of other witness who has since died. It was further stated that the deceased Gurbachan Kaur was in sound disposing mind at the time of signing the WILL. After he drafted the WILL, Mr. Tirlochan Singh explained the contents of the WILL to the deceased in his presence

and deceased had signed the WILL only after understanding the contents thereof.

He denied the suggestions put by counsel for plaintiff that testator did not execute any WILL in his presence or he did not draft the WILL D3W1/1 or that this WILL was not executed in his presence or that Gurbachan Kaur did not put her thumb impression on the WILL. He also denied the suggestion that WILL EX D3W1/1 and WILL EX D3W1/P1 are forged documents or that the same are forged at my instance.

He further deposed that he is a summoned witness and has denied that he came to the Court with the defendant no.3 and further deposed that he came with the clerk of the office of the Sub Registrar who is also a summoned witness. D3W2 has clearly stated that the WILL was executed by the deceased in his presence at the time when she was of sound disposing mind. Both the witnesses have stated that the WILL was duly understood by the deceased before she had signed the same.”

(underlining added)

7. The case of the appellants/plaintiff was that the Will Ex.D3W1/1 did not bear the signatures of the father Sh. Trilochan Singh as an attesting witness however the photograph affixed on the Will/ Ex.D3W1/1 registered before the Sub-Registrar was admitted on behalf of the appellants/plaintiff to be of the mother Smt. Gurbachan Kaur. Plaintiff had examined himself as PW-1 before his death. It is relevant to note, at this stage, that appellants were given opportunities to prove the Will by amending the list of witnesses to examine the handwriting expert so as to prove the signatures of Smt. Gurbachan Kaur and Sh. Trilochan Singh/father who is one of the attesting witness on the Will/Ex.D3W1/1, and which were to be compared with the admitted signatures on record of a cheque of the Punjab National

Perusal of the record shows that in the plaint plaintiff stated that his mother Gurbachan died on 23.09.1994 intestate while during cross examination he deposed that about 2-3 days before the death of our father, his sister Jasbeer Kaur told her about the WILL which shows that plaintiff has knowledge about the WILL (EX.D3W1/1) before the institution of the present suit. Hence, by his deposition in his cross examination, the plaintiff has contradicted his version taken in his plaint. Perusal of the record shows that I.A No. 1614/2000 filed on behalf of plaintiff u/s 45 of Evidence Act to refer the matter to the handwriting expert of CFSL to give a report whether the signatures appearing on the alleged WILL dated 23.04.1992 are that of late Smt. Gurbachan Kaur and late Shri Trilochan Singh. Record further shows that vide order dated 04.09.2000, the above said application was allowed and the plaintiff was permitted to include the name of an handwriting expert in his list of witnesses and summon him for purpose of comparison of the signatures of Trilochan Singh on the WILL dated 23.04.1992 with his admitted signatures on the cheque filed on record. Plaintiff will also be at liberty to summon the official of Punjab National Bank, Gandhi Nagar, Delhi alongwith Account opening Form or any other document on which the signatures of Gurbachan Kaur appear in the record of the Bank. Record further reveals that handwriting expert report is not on record. Plaintiff has neither examined handwriting expert as witness nor examined any bank official regarding the signature of Gurbachan Kaur and Trilochan Singh. No suspicious circumstances have been brought to the notice of the Court about the execution of the WILL. In the absence of suspicious circumstances surrounding the execution of the WILL, in my view, defendant no. 3 has been able to discharge the onus of proving issue no. 1. In the light of relevant circumstances and in view of the evidence produced on record, this court is satisfied that the WILL EX D3W1/1 is the last WILL and testament of the deceased. Issue no. 1 is therefore, decided in favour of defendant no. 2 & 3.” (underlining added)

8. In my opinion, once the Will is proved and which Will was a registered Will, and not only the attesting witness Sh. Ramesh Vashistha proved the due execution of the subject Will but the same also being proved through the deposition of the respondent no.3/defendant no.3, with the aspect that no suspicious circumstances

were brought to question the due execution or validity of the Will, the respondent nos.2 and 3/defendant nos.2 and 3 have rightly been held to have proved the Will/Ex.D3W1/1 and whereby respondent nos.2 and 3/defendant nos.2 and 3 had become owners of the suit property and consequently the suit for partition filed by the appellants/plaintiff had to be dismissed.

9. Learned counsel for the appellants/plaintiff argued before this Court the following aspects:-

(i) It was firstly argued that the Will is not attested as required by law because there are no signatures of the second attesting witness on the Will and that the second attesting witness was only a draftsman of the Will having signed as a draftsman. It is argued that in law signatures of the draftsman cannot be taken as signatures of an attesting witness.

(ii) It was then argued that active participation in making of the Will/Ex.D3W1/1 was taken by the beneficiaries being respondent nos.2 and 3/defendant nos. 2 and 3 and therefore such a Will cannot be sustained.

(iii) It was then argued that the plaintiff had joint business with the father and therefore there was no reason why the plaintiff would have been disinherited by the mother from the suit property in terms of the Will/Ex.D3W1/1.

(iv) Finally, it is argued that the signatures of the first attesting witness being of Sh. Trilochan Singh, father were not the signatures of the father/attesting witness/Sh. Trilochan Singh inasmuch as the father used to sign as Trilochan Singh Manchanda and not Trilochan Singh as is done in the subject Will/Ex.D3W1/1.

10. The first argument urged on behalf of the appellants/plaintiff that a draftsman can never be an attesting witness is an argument without merit because it has been consistently held in various judgments of the Supreme Court that even a draftsman can be taken as an attesting witness if the draftsman has signed on the Will having *animus attestendi*. The fact that there are signatures of the draftsman of the Will namely Sh. Ramesh Vashistha, Advocate is not disputed and both respondent nos.2 and 3/defendant nos.2 and 3 as well as attesting witness Sh. Ramesh Vashistha, Advocate have deposed with respect to the due execution and attestation of the Will.

The Will has been proved to have been executed by the testatrix Smt. Gurbachan Kaur in the presence of the attesting witnesses and the attesting witnesses signed the Will as an attesting witnesses in the presence of the testatrix Smt. Gurbachan Kaur. It is also required to be noted that the attesting witness Sh. Ramesh Vashistha has signed not only as an attesting witness to the Will at the time of execution of the Will but also signed as an attesting witness at the time of registration of the Will before the Sub-Registrar as the signatures of Sh. Ramesh Vashistha, and which are really in the form of very short signatures, are also found on the back page of the first page of the Will which contains the stamps and endorsements of the registration of the Will. As per Section 114 of the Indian Evidence Act, 1872, official acts have to be taken to have been properly performed and therefore in the facts of the present case where the Will is found to be registered, Sub-Registrar being an official is presumed to have correctly performed his function of seeing that the Will has been executed by the testatrix who was present before the Sub-Registrar and who signed before the Sub-Registrar as the testatrix/executant of the subject Will and that the Will was also signed in front of the Sub-Registrar by the

two attesting witnesses being Sh. Trilochan Singh, the father of the parties and husband of the testatrix, as also Sh. Ramesh Vashistha, Advocate as the second attesting witness. The photograph of the mother on the Will is not disputed to be that of the mother. In my opinion therefore trial court has rightly held that the Will has been duly executed and registered as required by law.

11. The second argument urged on behalf of the appellants/plaintiff that the beneficiaries being respondent nos.2 and 3/defendant nos. 2 and 3 have taken active participation in making of the Will for the Will to be discarded, is an argument which is without merit because the doctrine of a beneficiary taking active part in the making of the Will has to be accompanied with the fact that consequently the mind of the testatrix was prejudiced and seriously affected so as to lose her discretion for making of the Will, however in the facts of the present case nothing has been pointed to show as to how the mind of the testatrix was allegedly prejudiced or manipulated by the beneficiaries of the Will, and once that is so it cannot be held that the Will should be set aside on the theoretical ground of the beneficiaries taking active participation in making of the Will.

12. The third argument urged on behalf of the appellants/plaintiff was that the plaintiff had joint business with the father and therefore there was no reason to disinherit the plaintiff, is once again an argument without merit for two reasons. Firstly, no documentary evidence whatsoever has been filed on behalf of the appellants/plaintiff of the late plaintiff carrying on joint business with the father and secondly even for the sake of arguments if we take that the plaintiff was having a joint business with the father, however since admittedly it has been found on record that respondent nos.2 and 3/defendant nos. 2 and 3 were living with the parents in their old age, there is thus valid basis for the deceased testatrix/mother to have executed the Will in favour of the respondent nos.2 and 3/defendant nos.2 and 3. In such circumstances, it cannot be held that there was no reason for the testatrix to disinherit the plaintiff. In any case the object of making the Will is to alter the ordinary line of succession and once there is some evidence to show why the normal line of succession should be interfered with, with the fact that the Will is duly proved to have been executed and attested as required by law, in such fact situation Courts will not set aside the Will merely on the ground that

the one or more children of the testatrix has been disinherited by her. This argument of the appellants/plaintiff is also therefore rejected.

13. The last argument of the appellants/plaintiff was that the father used to sign as Trilochan Singh Manchanda and not Trilochan Singh as has been done in the subject Will/Ex.D3W1/1 is an argument though it would be appealing on the first impression, however the argument has to be rejected for the reason that the appellants/plaintiff could well have led evidence of the bank accounts of the father Sh. Trilochan Singh to show his admitted signatures on the same that the father used to sign as Trilochan Singh Manchanda and not Trilochan Singh, however no documentary evidence has been led on behalf of the appellants/plaintiff including the bank account of the father Sh. Trilochan Singh and therefore this argument urged on behalf of the appellants/plaintiff has necessarily to be rejected inasmuch as a civil case is decided on preponderance of probabilities and in the facts of the present case since the Will is not only proved by the attesting witnesses but is also found to be duly registered and that official being the Sub-Registrar would have duly discharged his function as required by law in view of Section 114 of the Evidence Act. As stated above,

therefore, in my opinion on this sole ground, it cannot be held that the respondent nos.2 and 3/defendant nos.2 and 3 have failed to prove due execution and validity of the Will of the mother Smt. Gurbachan Kaur.

14. In view of the above, there is no merit in the appeal.
Dismissed.

JANUARY 18, 2018

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VALMIKI J. MEHTA, J

