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

\+ *Reserved on: April 08, 2019*
Pronounced on : April 29, 2019

CS(OS)2186/2011 & I.As.14251/2011, 4281/2012, 20377/2012, 20378/2012, 20379/2012, 1394/2013, 3395/2016, 5156/2018, 5157/2018, 5453/2018, 6035/2018, 6036/2018, 6523/2018

USHA JAIN & ORS ..... Plaintiffs

Through: Mr. Naveen R. Nath, Adv.

versus

SNEHALATA KUMUDINI BARNABAS ..... Defendant

Through: Mr. Rajiv Bajaj and Ms. Sagrika Wadhwa, Advs.

\+ **TEST.CAS. 45/2012 & I.A. 5449/2018**

SNEHALATA KUMUDINI JAIN ..... Petitioner

Through: Mr. Rajiv Bajaj and Ms. Sagrika Wadhwa, Advs.

versus

THE STATE & OTHERS ..... Respondents

Through: Mr. Naveen R. Nath, Adv.

CORAM: JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.

1. This judgment shall dispose of the consolidated suit [CS(OS) 2186 of

2011] and the testamentary case [Test Case No. 45 of 2012], wherein common evidence was led by the parties on interconnected issues arising from interrelated facts.

BRIEF FACTS

CS(OS) 2186/2011

[Plaintiff's case]

2. Smt. Usha Jain, Devna Dutt and Bhawna Jain, wife and two daughters of Late Satendra Jain, respectively, have instituted the present suit claiming that they constitute a Hindu Undivided Family (HUF). Plaintiff No. 1 (Mrs. Usha Jain) states that she is presently the karta of the family after the death of her husband-Satendra Jain. In the plaint, it is averred that Late Satendra Jain did not have any other children except Plaintiff Nos. 2 and 3. Plaintiff No. 1 and Late Satendra Jain were married on 26^{th} May 1959. Plaintiff No. 2 was born on 11^{th} November 1961 and Plaintiff No. 3 was born on 13^{th} October 1964.

3. Late Satendra Jain as karta of the HUF acquired three immovable properties during his lifetime. Reliefs are claimed in respect of Agricultural Land admeasuring 4 Bighas and 16 Biswas in Khasra Nos. 547 min. (3-12), 549 (1-4) situated in village Satbari, Tehsil Mehrauli, New Delhi (hereinafter 'suit property'). The suit property was acquired out of HUF funds and the payment made to the vendor was through a cheque drawn from the bank account of the HUF with Central Bank of India, Gol Market, New Delhi. The HUF status of the property is also reflected in the income tax returns filed with the income tax authorities. The Plaintiffs are paying

property tax in respect of the suit property. The suit property was acquired from Sh. Gajinder Kumar Loond through Agreement to Sell dated 13th October 1993 and registered sale deed in 1999. Late Satendra Jain was legally married to Plaintiff No. 1 and the marriage was subsisting on the date of his death. Plaintiffs are the legal heirs of Satendra Jain and succeed to his estates as well as to the HUF. They are entitled to one-third share each in the estate of Late Satendra Jain both under Hindu law as well as by virtue of Hindu Succession Act as amended in 2005. Defendant is a close acquaintance/friend of Late Satendra Jain. She is unmarried with no legal relationship or status with the Plaintiffs or Late Satendra Jain. She is in possession of the suit property and after the death of Satendra Jain, despite request by the Plaintiffs, she has not vacated the suit property.

4. Defendant is in possession of the original title deed of the suit property and of F-1/3, Hauz Khas Enclave, New Delhi- 110016. Apprehending that Defendant would misuse the title documents, a complaint was lodged with the Police Station, Mehrauli on 2nd September 2011. There is a possibility that Defendant in collusion with property dealers would create third party interest in the suit property to frustrate the rights of the Plaintiff. She does not have any right or claim in the suit property and has no legal status *vis-a-vis* Late Satendra Jain or the Plaintiffs. The prayer clause reads as under:-

> "[a] Pass a Decree of injunction prohibiting and restraining the Defendant, her relatives, agents, attorneys, assignees, servants or any such other persons claiming through her or otherwise from in any manner dealing with the Suit Schedule property being Khasra No. 547 min (3-12), 549 min (1-4), Village Satbari, Tehsil-Mehrauli, bound on the West by Khasra No. 548

min (3-12), on the East by Khasra No. 546, on the South by road, and to its further south by Khasra No. 549 min (1-5), situated at Village Satbari, Tehsil - Mehrauli, New Delhi, belonging to the Plaintiffs;

[b] Pass a Decree of Possession in favor of the Plaintiffs and against the Defendant her relatives, agents, attorneys, servants or such other person claiming through her and directing delivery of vacant and peaceful possession of the Suit Schedule Property forthwith;

[c] Pass a Decree of mandatory injunction in favor of the Plaintiffs and against the Defendant her relatives, agents, attorneys, servants or such other person claiming through her and directing her, as well as all of them, to hand over all documents of title, fixed deposits, demat accounts, securities, savings bank documents, etc., pertaining to the late Shri Jain's estate;

[d] Pass a Decree of permanent injunction in favor of the Plaintiffs and against the Defendant her relatives, agents, attorneys, servants or such other person claiming through her restraining them, as well as all of them, not to deal with any properties, assets, or entitlements of in respect of the late Shri Jain's estate;

[e] Pass any such other *orders* as may be deemed fit and proper."

Stand of the Defendant

5. Suit has not been properly valued. Defendant is in possession of the suit property in her exclusive right as its owner. Late Satendra Jain had executed a Will dated 8thMarch 2011 being his last Will and testament, whereby the suit property has been bequeathed to her. In addition to the suit property, two other properties were also bequeathed to her.In respect of Apartment

No. 801, Floor, Alexander-C Tower, Grand Woods, Sector 93B, Noida, UP, with Omaxe Build Home Pvt. Ltd., the Defendant had initiated proceedings before the State Commission under the Consumer Protection Act, the benefits payable therein, if any, were also bequeathed to her. The Will mentions that Satendra Jain had paid several crores of rupees to his daughters and sons-in-lawand that, he was tortured by his children. Late Satendra Jain divorced Plaintiff No. 1 and married the Defendant on 26th August 1982 and since then both of them lived together as husband and wife. Plaintiffs have not succeeded to the estate of Late Sh. Satendra Jain and do not have any subsisting right, title or interest in his property.

6. Defendant is mentioned to be the absolute owner of the properties in the Will dated 8th March 2011. The suit properties were not purchased out of the funds of the HUF and were his self acquired properties. The properties were bequeathed to the Defendant, to the exclusion of the Plaintiffs. The original title deeds of the properties are with the Defendant as the same were handed over to her with the Will dated 8th March 2011. Late Sh. Satendra Jain had a desire that all his properties should exclusively belong to the Defendant.

7. On 8th September 2011, when the suit was taken up for hearing, this Court granted ex-parte injunction against the Defendants. Thereafter, on completion of pleadings, the following issues were framed:-

> "1. Whether the Plaintiffs are entitled for the decree of possession in respect of suit property? OPP

2. Whether the Plaintiffs are entitled for decree of mandatory injunction with directions to the defendants for handing over the documents as prayed for? OPP

3. Whether the Plaintiffs are entitled for decree of permanent injunction as prayed for? OPD

4. Whether the defendant is in possession of suit property being owner of the same as per the Will dated 8th March, 2011? OPD

5. Whether the suit has been properly valued for the purposes of court fee and jurisdiction and proper court fee has been paid? OPD

6. Whether the Plaintiffs prove that the property situated at Satjai Orchard, 11-A, Green Meadow Farm (Khasra Nos.547 min. [3-12], 549 min. [1-4]), village Satbari, Delhi, as well as property situated at F-1/3, Hauz Khas Enclave, New Delhi-110016 are both HUF property of 'Satendra Jain HUF"? OPP

7. Relief."

TEST.CAS. 45/2012

Petitioner's Case

8. Smt. SnehalataKumudiniJ.N. (Barnabas) seeks grant of probate under Section 276 of the Indian Succession Act in respect of Will dated 8th March 2011 of Late Sh. Satendra Jain.

9. In the petition, it is stated that Sh. Satendra Jain executed his last Will dated 8th March 2011 with full understanding, without any coercion, pressure or undue influence and revoked all his previous Wills and testaments. Smt. Snehalata Kumudini J.N. (Barnabas) has been appointed as

the sole executor of the Will. The Will has been duly attested by two witnesses. The Will was executed and attested in accordance with the provisions of law. The testator was married twice during his lifetime. His first wife, Smt. Usha Jain was divorced and he married the Petitioner on 26th August 1982. From the first marriage of the testator, two daughters were born. From his second marriage, no other child was born. The properties bequeathed in favour of the Petitioner have been mentioned in the Will dated 8th March 2011. Testator had his permanent place of abode at the time of death in Delhi and he also executed the Will at Delhi.

<u>Respondents' Objections</u>

10. Respondent Nos. 2 to 4 (Plaintiffs Nos. 1 to 3in suit) filed objections to the probate petition and disputed that Late Sh. Satendra Jain was married to the Petitioner. The marriage with Respondent No. 2 (Usha Jain) subsisted throughout the life of the testator and she was never divorced from her husband. He never divorced Respondent No. 2 and thus could not have performed a second marriage. In all public documents such as the passport of Late Sh. Satendra Jain and Respondent No. 2, there is a reference to Usha Jain as the wife. Petitioner's document gives her status as "unmarried". The properties mentioned in the Will, are HUF properties and as a karta, Late Sh. Satendra Jain had no right in the said properties. Petitioner's claim of being married to Satendra Jain is false and this becomes evident from the proceedings in RFA Civil Revision No. 100 of 2007 that arose out of eviction petition filed by Late Satendra Jain against the tenant in respect of one of the HUF properties. In the said proceedings, Respondent Nos. 2 to 4 were produced as witnesses in support of the Plaintiff (Late Satendra Jain) as

his wife and daughters. Sh. Satendra Jain died intestate and HUF properties devolved in favour of the Respondent Nos. 2 to 4.

11. On the basis of the pleadings in the said petition, the following issues were framed:-

> "(i) Whether the document dated 8th March, 2011 is the validly executed last Will of the deceased Sh. Satendra Jain? OPP
>
> (ii) Whether the petitioner was "married" to the deceased? OPP
>
> (iii) Whether the deceased, prior to the "marriage" with the petitioner had divorced the objector No.2? OPP
>
> (iv) Whether the document dated 8th March, 2011 is not the Will of the deceased for the reason of the contents thereof relating to title to the properties being contrary to the title documents and other records of the deceased? OPO
>
> (v) Relief"

Consolidation of proceedings

12. On an application filed by the Plaintiffs (in CS (OS) No. 2186/2011), this Court vide order dated 20th August 2014 consolidated the suit along with Test Case No. 45/2012. It was agreed between the parties that the suit would be the lead case. Learned Court Commissioner was appointed for recording the evidence.

Evidence led by parties

13. Ms. Bhawna Jain (**PW-1**), Plaintiff No. 3 deposed on behalf of the Plaintiffs, apart from her, the Judicial Assistant, RKD Branch, High Court of

Delhi, New Delhi (**PW-4**), Manager, Punjab National Bank, Hauz Khas Branch, New Delhi (**PW-2**), LDC, Passport Office, Bhikaji Cama Place, R.K. Puram, New Delhi (**PW-5**), Assistant Manager, United India Insurance Company Limited, Divisional, Office 7, Karol Bagh, New Delhi (**PW-5**), Senior Tax Assistant, Ward No.32(5) Income Tax Office Civic Centre, New Delhi (**PW-6**) also deposed for Plaintiff.On behalf of the Defendants, Smt. Snehalata KumudiniJ.N. (Barnabas) (**DW-2**)filed affidavit by way of evidence. Besides her, Mr.Sunil Dhawan(**DW-1**), deposed as the attesting witness of the Will and Junior Passport Assistant, at Regional Passport office, Bhikaji Cama Place, New Delhi (**DW-4**) and Manager of HDFC Bank Hauz Khas branch (**DW-5**) deposed for Defendant.

ANALYSIS AND CONCLUSION

14. Though separate issues were framed in both proceedings, however, subsequent to the consolidation of the proceedings, common evidence has been led by the parties on the issues framed in the suit and the testamentary case.

15. Having regard to the nature of the issues and the fact that it is not in dispute that the Plaintiffs in the suit are the only legal heirs of late Sh. Satendra Jain, it is considered appropriate to first deal with the issues framed in the testamentary case. This is also for the reason that the decision on the issues would have an impact on the outcome of the issues framed in the suit and also for the reason that it is the admitted position that Plaintiffs in the suit are the only surviving legal heirs. The issue nos. 2, 3 and 4 framed in the testamentary case are being taken up first as the same are necessarily to

be decided before arriving at a conclusion on Issue No. 1.

Issue Nos. 2 & 3 (Test Case No.45/2012)

16. The onus of proof on the afore-noted issues is on the Petitioner. She categorically states that she is the legally wedded wife of the Testator. It is also her stand that prior to her marriage, late Sh. Satendra Jain had divorced Objector No. 2 (Smt. Usha Jain). This question has significant bearing on the document in question purported to be the Will dated 8th March 2011. The document also contains declarations in line with the stand taken by the Petitioner *qua* her marriage with Late Sh. Satendra Jain. The learned counsel appearing on behalf of the Petitioner during the course of the arguments states that he could not adduce evidence on record to prove the factum of marriage between the Petitioner and LateSh. Satendra Jain. He also admitted that Petitioner has not been able to prove that Smt. Usha Jain and Sh. Satendra Jain got divorced. He candidly statesthat there was no direct evidence to prove the marriage of the Petitioner with Late Sh. Satendra Jain, except for the fact that both of them were living together for a sufficient period of time. The learned counsel also admitted that in the absence of a valid divorce between Satendra Jain and Usha Jain, the marriage of Satendra Jain with the Petitioner would be a void marriage.

17. Thus although the issues can be decided on the basis of the admission made by the counsel during the course of submissions, however the Court would like to arrive at a findings on these issues on the basis of the facts and the evidence on record. This is also necessary because the stand taken by counsels during the course of the arguments is often resiled and disclaimed

and are also not admissions made by the parties.

18. It is an admitted fact that Late Sh. Satendra Jain was married to Usha Jain. This marriage could have been annulled only by way of a divorce by the Court of competent jurisdiction. The relationship of husband and wife comes to an end on divorce. Since both Usha Jain and Satendra Jain are Hindus, the divorce by judicial intervention would only be as contemplated under Section 13 of the Hindu Marriage Act 1955. The divorce has to be as per law. There cannot be presumption of divorce where one of the parties to the relationship is already married. The Petitioner has also not produced any evidence which could show that Satendra Jain divorced Usha Jain. Petitioner's contention that, by taking into consideration that, she was lawfully married to Satendra Jain and was living with him continuously, the court should presume her relationship with Satendra Jain to be that of husband and wife cannot be countenanced. Since, Petitioner is not in a position to prove that prior to her marriage, Satendra Jain had lawfully divorced Usha Jain, her relationship with Satendra Jain would have to be given legal effect. This is for the reason that she claims her marriage was with the person who was already married.

19. The marriage between Petitioner and Satendra Jain, without a divorce, is a nullity ***(YamunabaiAnantraoAdhavv.AnantraoShivramAdhav, 1988 (1) SCC 530.).***It is pertinent to note that such a marriage has also not been proved in accordance with law. No evidence has been shown to the court to prove the marriage of Petitioner and Satendra Jain. Satendra Jain passed away on 8th July 2011. The digitised copies of the passport applications of

Satendra Jain dated 15th February 2002 (**Ex. PW 3/A**) shows name of Usha Jain as his spouse. Likewise, digitised copies of passport applications of Usha Jain dated 21st November 2001, (**Ex. PW3/D**) mentions the name of Satendra Jain in the column where particulars have to be given of the spouse. The computerised copies of individual medi-claim policies of Satendra Jain **(Ex. PW 1/36 & Ex PW 5/A)**dated 8th May 2011 also mentions the name of Usha Jain as wife of Satendra Jain. The ration card dated 10th April 1996 of Satendra Jain (**Ex. PW 1/35**) also reflects Usha Jain as wife of Satendra Jain. Election Commission's Identity Card/Passports of the Plaintiffs(**Ex. PW 1/34**) also show Satendra Jain to be husband of Usha Jain.

20. From the above documents, it is clearly proved that Usha Jain continued to be wife of Sh. Satendra Jain on the date of his death. The documents of the Petitioner clearly belie the stand taken by her before this Court. The passport application of the Petitioner dated 2nd February 1999 (**Ex. PW3/B**) shows that in the column requiring particulars of the spouse is kept blank. It is only after the death of Satendra Jain that the Petitioner in her passport renewal application form dated **24th November 2011,** claimed herself to be spouse of Satendra Jain (**Ex. PW 3/C**). Moreover, in the cross examination dated 7th January 2016, she admits that the documents of identity of Late Satendra Jain bears the address F-1/3, Haus Khas Enclave, New Delhi, where the Plaintiffs/Respondents are staying. In her cross examination dated 3rd May 2016, she makes the following admissions:

> "I do have medical insurance. It is only for me. I am aware that

Mr. Satendra Jain had a family medical insurance. I am more or less aware of the financial affairs of Mr. Satendra Jain but not all. I am not aware of his status in the income tax. I am not aware if he filed his income tax return as a Hindu Undivided family. I know Mr. Sunil Dhawan. I met Mr. Sunil Dhawan for the first time sometime in 1970. Mr. Dhawan is the family friend including Satendra Jain. Mr. Satendra Jain did not know Mr. Dhawan prior to the meeting to both of us i.e. myself and Mr. Satendra Jain in 1970. I was present in, the farmhouse on 08.03.2011.; I think on the said date my husband made the Will. On; that day, Mr. Dhawan and his wife were also present. I don't recollect what was the last date prior to 08.03.2011, when Mr. Dhawan visited, because Mr. Dhawan was visiting frequently. It was evening of 08.03.2011, when Mr. & Mrs. Dhawan visited. They just dropped in as per their social visits. On that day we were four of us in the farmhouse. Two daughters of Mr. Satendra Jain and myself were looking after Mr. SatendraJain during his hospitalization before he passed away. It is correct that the hospital bills were settled by daughters. I was involved in carrying out the final rites of Mr. Satendra Jain. The children of Mr.; Satendra Jain were there, but Chacha asked me to performed the final rites. I follow the Methodist church. I am not, required to visit church. I do read the scriptures. I do practice fasting .during lent (only for a week). I still do. I remained a Christian all throughout.

At this stage attention of the witness is drawn to Para 6 of her affidavit and questioned as follows:

Q. You know the marital status of Mr. Satendra Jain as he told

Ans. It is correct.

At this stage attention of the witness is drawn to Para 5 of written statement, reply on merits.

Q. Do you say that your statement in Para 5 of the written statement, reply on merits, about the divorce of Mr. Satendra Jain and Plaintiff No.l is not correct?

Ans. What have written in para 5 is correct because I was told by Mr. Satendra Jain.

Q. Are you aware that the property in which you are staying today is HUF property of Mr. Satendra Jain?

Ans. I am not aware.
Q. Are you aware that the suit property in this you are staying was purchased by Mr. Satendra Jain from HUF bank account.
Ans. I am not aware.
Q. Is it correct that you are not in good terms with Plaintiff No. 2 & 3?
Ans. It is correct. It is correct that I have also no social contacts with Plaintiff No.l. I travelled Singapore etc. sometime in 1985 or so, but I am not sure.
Q. Have you ever seen and examined the passport of Mr. Satendra Jain?
Ans. I had seen but I never care to check the same.
Q. Are you aware that the passport of an individual contains the name of the spouse, if she/he is there?
Ans. I never checked so.
Q. Is there any procedure in travelling in a Cruise for verifying your matrimonial status in travelling in a cabin?
Ans. There is no such requirement.
Q. Do you have a marriage certificate of your marriage with Mr. Satendra Jain?
Ans. No.
Q. Please state in which mode the marriage between you and Mr. Satendra Jain was performed i.e. was ita Hindu marriage or Christian marriage, Parsi marriage or under the Special Marriage Act or under the Muslim marriage?
Ans. Our marriage was performed according to Hindu system. In our marriage pandit was there in the presence of 4 persons he declared us as married. Four persons were Chacha and Chachi of Mr. Satendra Jain and Sunil and Neelam Dhawan. This marriage was solemnized at the farmhouse.
Q. Is it correct that at the time of marriage as deposed by you, you were a Christian and you are still a Christian?
Ans. It is correct. Mr. Satendra Jain was proficient with computers.
Q. Was the Will typed by Mr. Satendra Jain?
Ans. No. He got the Will typed from someone. He did show me the Will about few months before he died. I do not recollect exactly. I did not ever start discussing about the Will with Mr.

> Satendra Jain.
> Q. Are you aware that Mr. Sunil Dhawan requestedMr. Satendra Jain to make a Will?
> Ans. Yes. I am aware.
> Q. Do you consider today Mr. Sunil Dhawan as your well wisher?
> Ans. It is correct."

21. In view of the aforesaid admissions in the cross examination, another critical fact that requires to be noticed is that Petitioner is a Christian. She contends to have been married to Sh. Satendra Jain as per Hindu law. This alleged marriage is legally impermissible by virtue of the bar under Section 5 of the Hindu Marriage Act. The only mode of marriage between two persons belonging to different religions is under the Special Marriage Act. ***(M v. A -CM(M) 140/2017 decided on 23rd March, 2018, Delhi High Court)***. The Petitioner's alleged marriage is therefore a nullity.

22. The Petitioner had produced certain photographs **Mark 'A' to 'J22'**, to suggest that he was having a relationship with the Satendra Jain. The character of this relationship was sought to be defined as that of "husband and wife". This was not true and therefore the character of this relationship in the eyes of law remained only that of a friend and nothing more.The judgement of the Supreme court in ***Pinakin Mahipatray Rawal v. State of Gujrat 2013 (10) SCC 48***, is squarely applicable on the issue. In the said case, it has been held that there must be clear evidence to show active participation of a third party to prove alienation of affection and mere acts of association are not sufficient. The judgment of the Supreme Court in ***Indira Sarma v. V.K.V. Sarma, 2013 (15) SCC 755***is also relevant and apt to the

facts of the case. The relevant paragraphs reads as under : -

> "**57.** The appellant, admittedly, entered into a live-in relationship with the respondent knowing that he was a married person, with wife and two children, hence, the generic proposition laid down by the Privy Council in *AndrahennedigeDinohamy* v. *WijetungeLiyanapatabendigeBalahamy* [(1928) 27 LW 678: AIR 1927 PC 185], that where a man and a woman are proved to have lived together as husband and wife, the law presumes that they are living together in consequence of a valid marriage will not apply and, hence, the relationship between the appellant and the respondent was not a relationship in the nature of a marriage, and the status of the appellant was that of a concubine. A concubine cannot maintain a relationship in the nature of marriage because such a relationship will not have exclusivity and will not be monogamous in character. Reference may also be made to the judgments of this Court in *Badri Prasad* v. *Director of Consolidation* [(1978) 3 SCC 527] and *Tulsa* v. *Durghatiya* [(2008) 4 SCC 520].
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> **58.** In *Gokal Chand* v. *Parvin Kumari* [AIR 1952 SC 231] this Court held that the continuous cohabitation of man and woman as husband and wife may raise the presumption of marriage, but the presumption which may be drawn from long cohabitation is a rebuttable one and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them. Polygamy, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage, that is, marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage.
>
> **59.** We may note that, in the instant case, there is no necessity to rebut the presumption, since the appellant was aware that the respondent was a married person even before the

commencement of their relationship, hence the status of the appellant is that of a concubine or a mistress, who cannot enter into relationship in the nature of a marriage. The long-standing relationship as a concubine, though not a relationship in the nature of a marriage, of course, may at times, deserves protection because that woman might not be financially independent, but we are afraid that the DV Act does not take care of such relationships which may perhaps call for an amendment of the definition of Section 2(*f*) of the DV Act, which is restrictive and exhaustive.

65. We may now consider whether the tests, we have laid down, have been satisfied in the instant case. We have found that the appellant was not ignorant of the fact that the respondent was a married person with wife and two children, hence, was party to an adulterous and bigamous relationship. Admittedly, the relationship between the appellant and the respondent was opposed by the wife of the respondent, so also by the parents of the appellant and her brother and sister and they knew that they could not have entered into a legal marriage or maintained a relationship in the nature of marriage. The parties never entertained any intention to rear children and on three occasions the pregnancy was terminated. Having children is a strong circumstance to indicate a relationship in the nature of marriage. No evidence has been adduced to show that the parties gave each other mutual support and companionship. No material has been produced to show that the parties have ever projected or conducted themselves as husband and wife and treated by friends, relatives and others, as if they are a married couple. On the other hand, it is the specific case of the appellant that the respondent had never held out to the public that she was his wife. No evidence of socialization in public has been produced. There is nothing to show that there was pooling of resources or financial arrangements between them. On the other hand, it is the specific case of the appellant that the respondent had never opened any joint account or executed any document in the joint name. Further, it was also submitted that the respondent never permitted to suffix his name after the name of the appellant. No evidence is forthcoming, in this case, to show that the respondent had caused any harm or injuries or endangered the health, safely, life, limb or well-being, or caused any physical or sexual abuse on the appellant, except that he did not maintain her or continued with the relationship.

66. The appellant had entered into this relationship knowing well that the respondent was a married person and encouraged bigamous relationship. By entering into such a relationship, the appellant has committed an intentional tort i.e. interference in the marital relationship with intentionally alienating the respondent from his family i.e. his wife and children. If the case set up by the appellant is accepted, we have to conclude that there has been an attempt on the part of the appellant to alienate the respondent from his family, resulting in loss of marital relationship, companionship, assistance, loss of consortium, etc., so far as the legally wedded wife and children of the respondent are concerned, who resisted the relationship from the very inception.

67. Marriage and family are social institutions of vital importance. Alienation of affection, in that context, is an intentional tort, as held by this Court in *Pinakin Mahipatray Rawal case* [*Pinakin Mahipatray Rawal* v. *State of Gujarat*, (2013) 10 SCC 48 : (2013) 4 SCC (Civ) 616 : (2013) 3 SCC (Cri) 801] , which gives a cause of action to the wife and children of the respondent to sue the appellant for alienating the husband/father from the company of his wife/children, knowing fully well they are legally wedded wife/children of the respondent.

68. We are, therefore, of the view that the appellant, having been fully aware of the fact that the respondent was a married person, could not have entered into a live-in relationship in the nature of marriage. All live-in relationships are not relationships in the nature of marriage. The appellant's and the respondent's relationship is, therefore, not a "relationship in the nature of marriage" because it has no inherent or essential

> characteristic of a marriage, but a relationship other than "in the nature of marriage" and the appellant's status is lower than the status of a wife and that relationship would not fall within the definition of "domestic relationship" under Section 2(*f*) of the DV Act. If we hold that the relationship between the appellant and the respondent is a relationship in the nature of a marriage, we will be doing an injustice to the legally wedded wife and children who opposed that relationship. Consequently, any act, omission or commission or conduct of the respondent in connection with that type of relationship, would not amount to "domestic violence" under Section 3 of the DV Act.
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> **69.** We have, on facts, found that the appellant's status was that of a mistress, who is in distress, a survivor of a live-in relationship which is of serious concern, especially when such persons are poor and illiterate, in the event of which vulnerability is more pronounced, which is a societal reality. Children born out of such relationship also suffer most which calls for bringing in remedial measures by Parliament, through proper legislation."

23. The learned counsel for the Petitioner has argued that the issues relating to marriage and divorce could not have been framed as the probate court is not competent to determine such issues. It is further contended that such issues should be struck off under Order 14 Rule 5 of the Code of Civil Procedure, 1908 and the Court is within its power to do so, at any stage. The learned counsel also relied upon the judgment of the Supreme Court in ***Kanwarjit Singh Dhillon v. Hardayal Singh Dhillon, AIR 2008 SC 306*** and argued that in view of the dictum of the Supreme Court, this Court lacks jurisdiction to give its findings on the above-noted issues and the Court can only determine the execution of the Will while exercising the jurisdiction in a probate case.

24. In the considered opinion of the Court, this contention is untenable for several reasons. Firstly, the Petitioner has taken a categorical stand on the question of her marriage with the deceased and the annulment of the marriage between Usha Jain and the deceased. Secondly, testators divorce and marriage have significant bearing on the Issue No. 1 and therefore it is necessary to adjudicate upon them. Thirdly, as the suit and the Testamentary case have been consolidated, the afore-noted issues are necessary to be adjudicated for deciding the suit. Lastly, in order to determine whether will is genuine or not, the question of suspicious circumstances have to be gone into. Therefore, it is within the jurisdiction of the Court to frame the issues on disputed questions giving rise to suspicious circumstances. It is pertinent to note that the decision of the Supreme Court in ***Kanwarjit Singh*** (Supra) is distinguishable in facts as well as law applicable to the case in hand. The Supreme Court therein held that grant of probate doesn't bar a claim for filing a declaratory suit challenging title of the testator to bequeath his estate. It is trite law that Probate court does not decide the title of the testator it only deals with the validity of the will. The aforesaid judgment is thus not applicable.

25. In view of the above discussion, there is no uncertainty for the court to hold that Petitioner has failed to prove that deceased Satendra Jain had divorced Usha Jain, prior to her alleged marriage. The Petitioner has also failed to prove that she was legally married to late Satendra Jain. Accordingly, both the issues are decided against the Petitioner and in favour of the Objectors.

Issue No. 1 (Test Case 45/2012)

26. Learned counsel for the Petitioner argued that the Will has been proved in accordance with law by examination of the attesting witness of the document dated 8th March 2011. The requisite onus in this regard being *onus probandi* has been discharged by the Petitioner beyond the requisite standard.

27. The Testator at the time of execution of the Will was in the sound and disposing state of mind. The Will has been attested by the attesting witnesses in the presence of the Testator, who has also seen the attesting witnesses sign the same. It was further argued that notwithstanding the fact that the declaration made in the Will on the issue of the divorce of Usha Jain and the marriage to the Petitioner may not be found to be true, the Petitioner would still be entitled to a probate. Petitioner has proved the Will by examining the attesting witness and the intention of the Testator has to be gathered by reading the Will as a whole and not from the usage of certain words/descriptions in isolation.

28. The use of the term 'Wife' by the Testator before the name of the Petitioner would not invalidate the Will even if the marriage between the Testator and the Petitioner was found to be void or irregular or invalid. The question of validity of the Will should be decided by applying the principles of harmonious construction and a comprehensive reading of the Will which shows that the intention of the Testator was to bequeath the properties in favour of the Petitioner in her individual capacity and not as being the wife

of the Testator. There is specific mention in the Will regarding the reasons for disinheriting the Objectors. This is evident for the phrase/ expression "*my divorced wife and my daughter*" used while excluding them from the Will. The Petitioner also argued that doctrine of *persona designate* is also applicable and the Court should look into the Will and notice that the intended beneficiary of the bequest is not the "Wife" but the Petitioner. Reliance was placed upon the judgments of the Supreme Court in the case of ***AL. PR. Ranganathan Chettiar v. AL. PR. AL. Periakaruppan Chettiar AIR 1957 SC 815.***

29. It was further argued that even if the issues pertaining to the validity of marriage and proof of divorce are decided in favour of the Respondents, yet the Petitioner would be entitled to the probate on the basis of the doctrine of *persona designata.* The designation attributed to the Petitioner would be sufficient under the aforesaid doctrine, even if the marriage is found to be invalid in the eyes of the law. The bequest would still be good in law. The Court should not delve into the nature and contents of the bequest being beyond the scope of its jurisdiction. On this subject, the learned counsel for the Petitioner has relied upon the following judgments ***Smt. Uttami v. Shri Ram Dass, ILR 1973 2 HP 962***and ***Siddaramappa v. Smt. Gouravva AIR 2004 Kant 230.***

30. Per contra, the learned counsel for the Objectors has argued that there are suspicious circumstances in the execution of the Will and thus Petitioner is not entitled to the probate. The Will omits wife and children, the natural line of succession and the entire estate of the Testator has been bequeathed

to the Petitioner and the same makes it suspicious. Petitioner being the propounder of the Will has failed to discharge the suspicious circumstances. Therefore, in order to determine the validity of the will, this court has to consider the suspicious circumstances surrounding the will and it is only after the propounder has cleared the suspicious circumstances, this court can grant probate of the will. (***Uma Devi Nambiar v. T.C. Sidhan (dead), AIR 2004 SC 1772***). The sole attesting witness produced by the Petitioner has also made admissions that he is not aware of the legal status of the Petitioner with Satendra Jain. While granting a probate, the Court is not merely required to go by the testimony of the attesting witness. Several suspicious circumstances pointed out by the Objectors have not been dispelled by the Petitioner. The declarations made in the alleged Will are false and untrue and add to the suspicion surrounding the Will.

31. Before dealing with this issue, it is necessary to note the contents of the alleged Will/ document dated 8th March 2011which is stated to be last executed Will of late Sh. Satendra Jain. The document reads as under:-

"LAST WILL AND TESTAMENT

I, Satendra Jain, age 74 years, son of Late Shri Sham Lai Jain, resident of Satjai Orchards, 11A Green Meadows Farms, Satbari, New Delhi - 110030, being in a sound disposing state of mind do hereby declarethis will to be my last WILLAND TESTAMENT in respect of the properties and assets detailed below :

1. (a) Satjai Orchards, 11A Green Meadow Farms, Satbari, New

Delhi - 110030
(b) F 1/3 Hauz Khas Enclave, New Delhi - 110016
(c) I have booked an apartment with M/s. Omaxe Buildhome Pvt. Ltd. and they have allotted Apartment No. 801, Floor, Alexander-C Tower, Grand Woods, Sector 93B, Noida, UP in 2006-2007 and I have paid more than Rs.Fifty Lakhs to the Omaxe Buildhome Pvt. Ltd. towards the purchase price. Due to deficiency on the part of the Omaxe Buildhome Pvt. Ltd., I had to file a complaint before the State Commission for several relief, including refund of money with interest. The said complaint is still pending. All the said properties were purchased by me in my own name out of my own funds and I,as an owner, am competent to make any dispositions with regard to the said properties.

2. I have, in my life, given in plenty to my divorced wife and to my daughters, but each one of them has tried to fleece me in my life. My daughters, one of whom is still unmarried (i.e. Bhavna Jain) and my son-in-law have given me so much trouble in my life that I do not want to give them any share in my property.

3. All my bank balance, deposits, securities, bonds where no nominations have been made by me, shall be owned by my wife Mrs. Snehalata K. Jain. Wherever assets are held jointly by me with someone else the said assets shall go to the nominee.

4. In the event of my demise, the aforesaid two properties, namely a) Satjai Orchards, 11A Green Meadow Farms, Satbari, New Delhi - 110 030 and b) F1/3 Hauz Khas Enclave, New Delhi - 110 016 forever belong to and absolutely owned by my wife Mrs. Snehalata K. Jain, daughter of Shri John Barnabas, resident of SatjaiOrchards, 11A Green Meadow Farms, Satbari, New Delhi - 110 030, who has served me through thick andthin for decades. Besides all benefits payable or receivable by me in respect of the said litigation against the Omaxe Buildhome Pvt Ltd. shall be exclusive property of my wife Mrs. Snehalata K Jain.

> 5. I, hereby appoint my wife Mrs. Snehalata K. Jain the sole executor of this my last WILL ANDTESTAMENT.WITNESS WHEREOFF, I, Satendra Jain have signed this my last WILL ANDTESTAMENT in thepresence of the witnesses named below, who have at my request also signed in my presence and in the presence of each other at New Delhi on the 8th Day of March, 2011."

32. The Testator in para 2 of the propounded will, as a statement of fact, declares a) he has given plenty to his divorced wife and to his daughters, b) the wife and daughters have tried to fleece him , c) one of the daughters who is unmarried namely Bhawna Jain i.e. Objector No.2 and his son-in-law have given trouble to him.

33. Para 4 and para 5 uses the expression that the two properties i.e. 1) Satjai Orchards, 11A Green Meadow Farms, Satbari, New Delhi - 110030 and 2)F1/3 Hauz Khas Enclave, New Delhi - 110016, forever belonged to and were absolutely owned by Testator's wife- Snehalata K. Jain, who has served him through thick and thin for decades. In para 5, Testator appoints his "wife" Smt. Snehalata. K. Jain, the sole executor of the Will.

34.Keeping in view the afore-noted contents of the Will, now the Court shall proceed to examine the plea of suspicious circumstances.

35.While deciding the question as to whether an instrument produced before the Court is the last Will of the Testator, the Court is deciding a solemn question and it must be fully satisfied that it has been validly executed by the Testator who is no longer alive ***(H. Venkatachalla Iyengar v. B.N.***

Thimmajamma, AIR 1959 SC 443). The intention of the Testator has to be found out on a reading of the Will and there cannot be any hard and fast rule for interpreting the intention. The intention has to be gathered essentially from the language of the document which is to be read as a whole. In construing the Will, the Court must consider surrounding circumstances, the Testator's position, his family relationships, the probability that he would use his words in a particular sense and many other things summed up in the picturesque phrase. The Court shall put itself in the Testator's arm chair ***(Surendra Pal v. Saraswati Arora (Dr), (1974) 2 SCC 600)***. The onus of proving the Will is on the propounder. In case of suspicious circumstances surrounding the execution of the Will, it is necessary for the propounder to satisfy the Court on all such aspects before the Court would accept the Will as genuine. The constitution Bench of the Supreme Court in ***Shashi Kumar Banerjee v. Subodh Kumar Banerjee AIR 1964 SC 529***, succinctly laid the position in law relating to mode of proving a Will in the following words:-

> "4. The principles which govern the proving of a will are well settled; (see H. Venkatachala Iyengar v. B. N. Thimmajamma, AIR1959SC443 and Rani Purnima Devi v. Khagendra Narayan Dev, [1962]3SCR195).The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus

> is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested."

36. Keeping in view the dicta of the Supreme Court in the afore-noted case, the Court is thus conscious of the duty casted upon this Court. The Objectors/Caveators have pointed out several suspicious circumstances and therefore, the Petitioners contention that since the attesting witness has proved the Will thatwould be sufficient for this Court to accept the Will is untenable and flawed. The propounder-Petitioner in the present case is bound to remove the suspicious circumstances. It is well settled in law that an order granting probate is a judgment in rem. The Court's conscious is thus required to be satisfied before it would grant a probate. There cannot be any straight jacket formula for deciding as to what would constitute as suspicious circumstance. Each case must be determined in the fact situation

arising therein. The Petitioner's contention that since the legal formalities for proving the Will have been complied with and therefore it is sufficient to grant a probate, is not the correct approach having regard to the facts and circumstances of the present case. The Will in question, makes categorical statements of fact, as noted above. This document seems to suggest that the Testator was unhappy with his wife and his daughters. He divorced his first wife and married the sole beneficiary i.e. the Petitioner. These statements of facts are asserted by the Petitioner herself. The case of the Petitioner is thus completely in sync with the declaration in the Will. Therefore, the description in the Will of beneficiary/executor/Petitioner as "Wife" cannot be brushed aside as insignificant. These are glaring statements of fact that cannot be ignored.

37. Moreover, it is significant to refer to the decision of the constitution bench of the Supreme Court in ***Yelamanchilisiva Panchakshamma Godavaru vs. Yalamanchili Cheva Abhayi and Ors., AIR 1967 SC 207,*** relevant para of which reads as under:

> "5. <u>The question involved in this appeal is whether the disposition of the properties to the plaintiff is as a persona designata or by reason of his fulfilling a particular legal status, namely, the adopted son of the testator. The question in such a case is really one of intention of the testator which must be ascertained from the language of the various clauses of the will and the surrounding circumstances of the execution of the will.</u> As pointed out by the Judicial Committee in Fanindra Deb Raikat v. RajeswarDass 12 I.A. 72 :
>
> "The distinction between what is description only and

> what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances."”

(underlining added)

38. As discussed above while giving findings on Issue Nos. 2 and 3, the Court has come to the conclusion that the Testator had never divorced his wife Usha Jain and also that the marriage between him and the Petitioner was not a valid one. There is no material placed on record which could contradict or disprove the above position of fact. Even in her affidavit as evidence there is no averment to prove the stand taken in para 4-5 of written statement, reply on merits, regarding the averse, relationship of Satendra Jain with his daughter and Usha Jain. Therefore, except for the Will, there is no other basis for the Court to assume this fact. The Petitioner has prove that she has been living in the property Satjai Orchards, 11A Green Meadow Farms, Satbari, New Delhi – 110030and that she was wife of the Testator. She has tried to givecredibility to her case by stating that she is in possession of the original title documents relating to F1/3 Hauz Khas Enclave, New Delhi - 110016. This, however is not sufficient. In absence of any other documentary or oral evidence before the Court which would corroborate the stand taken by the Petitioner w.r.t. her marriage, the declaration in the Will, becomes highly suspicious and the Court has no hesitation to say that the structure of the Will appears to be tailor-made to support the plea advanced by the propounder of the Will. The witnesses, of the Petitioner also could not say that he was aware of the legal relationship between the Petitioner and deceased Testator. The passports, judicial proceedings, ration card,

medical insurance; all contradict the stand taken by the Petitioner and the writings in the Will. There is also no evidence to prove that Testator and Petitioner cohabited continuously as husband and wife. **Ex. PW 4/1**shows that late Satendra Jain was living at F 1/3 Haus Khas, New Delhi with his wife Usha Jain.

39. There is another factor that gives rise to suspicious circumstances. The Will is unnatural, as it completely cuts off the wife and children. The Supreme Court in ***Uma Devi*** (supra), held:

> "16. A Will is executed to alter the ordinary mode of succession and by the very nature of things it is bound to result in earlier reducing or depriving the share of natural heir. If a person intends his property to pass to his natural heirs, there is no necessary at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstances specially in a case where the bequest has been made in favour of an offspring. As held in PPK Gopalan Nambiar v. PPK Balakrishnan Nambiar and Ors. [1995]2SCR585 it is the duty of the prop under of the Will to remove all the suspected features, but there must be real, germane and valid suspicious feathers and not fantasy of the doubting mind. It has been held that if the propounder succeeds in removing the suspicious circumstances, the Court has to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations (See Puspavati and Ors. v. Chandraja Kadamba and Ors. AIR1972SC2492 . In Rabindra Nath Mukherjee and Anr. v. Panchanan Banerjee (dead) by LRs. and Ors. AIR1995SC1684 , it is observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to

> interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly."

40. No doubt in some of the decisions, the Courts have observed that deprivation of natural heirs should not raise any suspicion, however, each case will turn on its facts. In the present case; the exclusion is shrouded with grave suspicion. Petitioner has also not brought any witness on record which would remotely suggest or indicate the reason for the Testator to exclude Usha Jain and his daughters from his estate. It is therefore imperative for the court to take into consideration this factor before granting probate of the Will. The recitals appear to have been introduced in the Will only to justify the exclusion of the legally wedded and the natural born children. Strong word/sentences have been used in the Will such as *"I have in my life given plenty to my divorced wife and to my daughters, but each one of them has tried to fleece me in my life" and "my daughters, one of whom is still unmarried (i.e. Bhawna Jain) and my son-in-law have given me so much trouble in my life that I do not want to give any share in my property."* If such was indeed the case, there would have been some evidence to corroborate these facts. None has been forthcoming. The Petitioner was required to adduce evidence to the satisfaction of the Court for the Testator to have wished what is stated therein. The alleged reasons for exclusion being hurtful conduct of his daughter. Sour relationship between the Testator and his family; the acts of deceit attributed against the Respondents, are all unsubstantiated. No evidence has been shown to the court to prove this fact. In absence of any such evidence brought on record to prove the exclusion of

the Respondents from the estate of the deceased makes the suspicion more pronounced. The circumstances narrated above give rise to a doubt as to whether the Testator was acting of his own free will in executing the Will. Satendra Jain died at the age of 74. The documents on record indicate that till the time of his death, he was married to Usha Jain. There is no evidence to suggest that he was not having a healthy relationship with his wife and daughters. He in his documentation referred above, has always described Usha Jain as his spouse/wife.

41. The Supreme Court in ***Indira Sarma***(***supra***) has already commented upon the legality of such a relationship, and the Court need not discuss the same any further. However, for the purpose of deciding the present Will, it can be noted that this relationship adds to the suspicion surrounding the execution of the Will. No doubt the Testator could have desired to give his entire estate to a friend or a person with whom he had a relationship outside the marriage, however, it was for the propounder to remove the suspicion from the mind of the Court by producing cogent and a satisfactory evidence. The alleged declarations made in the will regarding the status of Petitioner's marriage are found to be false and untrue and they add weight to the suspicious circumstances. The will is drafted and structured to justify the bequest to the Petitioner. Thus this court would tread with caution and circumspect. It is evident from the above discussion that the Petitioner has not discharged the *onus probandi* and the Court's conscious is not satisfied that the document in question propounded is the last Will of late Satendra Jain. The document is improbable, unnatural and unfair instrument and contains recitals, which are found to be untrue.

42. On this issue, it becomes noteworthy that Sunil Dhawan, the attesting witness, during his cross examination on 8th September 2015 has deposed as under:-

> "I am a business man dealing in chemicals, since1976. I am a Civil Engineer graduated from IIT Kanpur. I knew Ms. Snehlata Barnabas since 1982. Imoved in Safdarjung Enclave in the year 1980 and came in contact with her in the year 1982, who was a resident of Farm House at Satbari. I first met her inthe house of common friend Mr. Vijay Sahini. Thereafter, I used to visit her farm house at Satbari. I do not recollect when for the first time I met her ather farm house at Satbari. It must be; in 1982 itself. She was staying in the farm house at that time. I became close to Satender Jain since we were meeting regularly and even visited outside Delhi together. I came to know Satender Jain together with Ms. - Snehlata as family. I did not, meet them individually for the first time. I met them together. I believe that they were husband and wife. I have stated the facts in my affidavit the, facts from point A to A because at that time when I met both of them Usha Jain was not living with Mr. Satender Jain. I was told by Mr. Satender Jain during meting withhim about Ms. Usha Jain about his past life. I did see Usha Jain when Satender Jain passed away. Prior to that I never met her. I am not aware of, any, divorce between Usha Jain and Satender Jain, I have never seen the passport of Sh. Satender Jain. I have also not seen the passport of Ms. Snehlata Barnabas. I say Portion Bto B in my affidavit since I knew the man and believed them to be husband and wife. **I did not see Satender Jain signing any document prior to the signing of the Will Ex.PW-l/A before me.** I am not familiar with the signatures of Sh. Satendra Jain except that which is signed before me. There was no special reason of my visit to, the farm house at Satbari on 08.03.2011. I am not aware who typed the Will Ex.PW-l/A. I was not told by Satender Jain as to who typed the Will Ex.PW-l/A. As far as my memory goes Mr.

Satender Jain had fair knowledge of the use of computer. The actual signing of of Ex.PW/lA took place in the living room of the farmhouse. It was in the evening about 7.30 .or 8.00 p.m when Ex.PW-l/A, the Will was signed. On that day I remained in the farm house for about, 2-3 hours. I remained there up to 10.30 or 11.00 p.m. Ms. Snehlata was present when signing of Ex.PW-l/Awas done. I did not visit, the hospital when Satender Jain was admitted in hospital since I was getting information about his health from his wife Ms. Snehlata Kumudini Jain. I am personally not aware as who was looking after Satender Jain in the hospital, but the information was received from Snehlata I say that she was looking after Sh. Satender Jain in the hospital. I know only this much that he was very sick in the hospital but what kind, of ailment he suffered exactly I do not know. If my memory is correct, then Satender Jain was admitted in Max Hospital at Saket. It is correct that eye sight of Satender Jain was very weak and, that was the reason of his admission in the hospital. I don't think that Satender Jain had the problem of hearing. I am not aware that Satender Jain was being, looked after by Usha Jain and children in the hospital. I am also not aware who made the payments of the bills of the hospital. I am also not aware about the health insurance taken by Satender Jain. I am not aware the status of the property at Hauz Khas and at Satbari and if it is an HUF property. I am not aware about the filing of income tax returns by Satender Jain on behalf of HUF. Lastly I met Satender Jain in2011 but I do not recollect the date and month. **Vol.:**I met him even after the execution of Will Ex.PW-1/A. I am aware that Satender Jain got hospitalized after the execution of the Will. His wife Ms. Snehlata Kumudini Jain told me about the hospitalization after the execution of the Will. It was Max Hospital if my memory is right. I did not visit him when he was hospitalized after the execution of Will in, the hospital. My visit to Satender Jain after the execution of Will was a social visit like in the past. It was just a causal, visit and nothing special happened on that day. He did not see me off at the driveway. I cannot answer why he did not see me off driveway on that visit. I do not recollect if this visit was after 1 month, 2 months or 3 months after the execution of the Will. I am not sure that in the visit after the execution of the Will Sh. Satender Jain was not in a position to walk. I consider myself close to both Satender Jain as well as Snehlata. It is, correct to the best of knowledge that Satendra Jain and Snehlata Jain felt that they were close to me. I never met any Tejinder Yadav. I am not now making social call to Snehlata since she was hard of hearing. I have not visited her since long time. She did call me once in a blue moon. Mr. S.P. Mehta, Counsel told me about the pendingcase. The affidavit was drafted in the office of Mr. Mehta. I do not know who drafted the same. Ms. Snehlata never asked me about the affidavit, Mr. Mehta contacted me and enquired of me about the affidavit to be given. I did read the carefully theaffidavit before singing the same.

Q. Where did you sign the affidavit actually?

The statement of the affidavit has been read by the witness after the witness was administered the oath by the Court Commissioner. The statement today is on oath. Therefore, the questions relating to signing of the affidavit on any particular day are meaningless, but still the counsel wants the answer to be record, the answer will be recorded.

Ans. I signed the affidavit at the High Court.

It is incorrect to suggest that I have deposed falsely. It is incorrect to suggest\that no Will was executed by Stander Jain on 08.03.2011. It is incorrect to suggest that in connivance with Snehlata I have got fabricated the Will Ex.PW-l/A. It is incorrect to suggest that by deposing in court I am helping the Snehlata to deprive the legal heirsof Satender Jain from their property.

Local Commissioner:

Q. On 08.03.2011 what was the health of Satender Jain?

Ans. His eyes were weak. He had vision problem butmentally he was alert."

43. The said attesting witness, during his earlier cross-examination, has also made several contradictions. Notably being that the Petitioner was present at the time of attesting the Will, which contradicts the statement made by way of examination-in-chief (para 6 of the affidavit by way of evidence). Thus, keeping in mind all the attending circumstances and the words used in the Will, his family relationships, altogether aid this Court to come to only one conclusion that the Will in question is not the last Will and testament of the Testator. The onus of proof lay on the Petitioner and the same has not been satisfactorily charged and therefore the document dated 8th March 2011 cannot be said to be the last Will of the Testator. In light of the above discussion, it is held that the document dated 8th March 2011 is not the last Will of the deceased Late Satendra Jain. The issue is decided against the Petitioner and in favour of the Objectors.

Issue No. 4

44. Though, the Court has already given its findings on Issue No. 1 holding the document not to be the last Will of the Late Sh. Satendra Jain, however, for the sake of completeness, this issue is also being decided.

45. There are two immovable properties mentioned in the Will a) Satjai Orchards, 11A Green Meadow Farms, Satbari, New Delhi – 110030b)F1/3 Hauz Khas Enclave, New Delhi - 110016. Besides, there is another property which was subject matter of litigation with the builder Omax Builder Ltd and on the date of writing of the document, perhaps the complaint before the

State Commission seeking refund in respect of Omax was pending. In the present petition, is in respect of the above noted two properties.

46. Learned counsel for the Petitioner argued that the question of title cannot be examined in probate proceedings. Relying upon ***Kanwarjeet Singh Dhillon (supra)*** and other judgments, the learned counsel argued that the grant of probate is only conclusive of validity of Will and the Court is not competent to determine the question of title of suit property and therefore, the Court should not go into the question whether the suit properties bequeathed by the Will were HUF properties or self acquired properties of the Testator. Learned counsel for the Objector, on the other hand, has argued that the suit property and the Hauz Khas property were HUF properties and the Testator did not have the capacity to write a Will for the entire HUF property. The learned counsel further argued that even though explanation appended to Section 30 allows a Hindu Male to dispose of his interest in the HUF property by a Will, however, under the Will in question, the bequest has been made of the entire HUF properties which are contrary to Section 6 of the Hindu Succession Act 1956.

47. The question relating to the title of the properties in question is being decided in the suit, and therefore, in view of the consolidation of the two proceedings, the Petitioner's objection in a way looses significance. The Petitioner may be right in saying that while deciding the question relating to the validity of a Will, the Court would not decide the question of title, and such a question can be entertained only by a Civil Court of competent jurisdiction.However, in the present case the issue as framed is in different

context. The issue is not with respect to the title of the property. It is, whether the document dated 8th March 2011 is not the Will of the Testator for the reason of mis-describing the title of the properties mentioned in the Will? Therefore, while deciding this issue, the Court will only decide whether such mis-description would affect the question of validity of the Will. The mis-description of the title of the immovable properties becomes significant in view of the findings given on Issue no. 1.In the Will, the Testator states *"all the said properties were purchased by me in my own name, out of my own fund and I as a owner, am competent to make any dispositions with regard to the said properties."*This statement is contradicted by the evidence brought on record by the Respondents. Petitioner has produced documentary evidence in support of the HUF status of suit properties. The said documents are as under:-

1.Ex. PW- 1/2: The Cheque Slips by producing the original bearing handwriting of Late Satender Jain.

2.Ex. PW- 1/5 to 1/9: Receipt issued by the Vendor dated 26th July 1993, for the suit property along with Cheque slips and pass book entries.

3.Ex. PW- 1/27 to 1/29: Income Tax Assessment Orders of the HUF.

4. Mark PW- 1/10 to 25: HUF Balance Sheets

5. Income Tax filings in respect of HUF.

48. From the above, it clearly emerges that the properties mentioned in the Will were being treated as HUF in the income tax record. There is sufficient

material on record to show that the Testator was treating the properties as part of the HUF. This is thus additional reason which adds to the suspicious circumstances surrounding the execution of the Will. With these observations and in view of the findings given on Issue No.1, this issue is decided in favour of the Respondents and against the Petitioner.

Issues in the suit

49. The issues framed in the suit are not being taken up in seriatim and such issues that can be decided on the basis of the findings given above are being taken up first.

Issue Nos. 4

50. In view of the findings given in Issue No. 1 (Test case) holding that the document/Will dated 8th March 2011 is not the last Will and Testament of late Sh. Satendra Jain, it cannot be said that the Defendant is the owner of the suit property. Since the Defendant does not title in the suit property, her possession cannot be said to be that of an owner as per the document dated 8th March 2011. The necessary corollary is that the possession of the Defendant in the suit property was only permissive. This issue is decided against the Defendant and in favour of the Plaintiff.

Issue No. 1

51. In light of the finding on issues in the testamentary case and on Issue No. 4 above and also in view of the admitted position that the Plaintiffs are the only surviving legal heir of Late Sh. Satendra Jain, irrespective of the title of the suit property being that of HUF or that that of joint ownership by

succession, the Plaintiffs are entitled to a decree of possession in respect of the suit property. This issue is decided in favour of the Plaintiffs and against the Defendants.

Issue No. 2

52. Plaintiffs are the joint owners of the suit property after the death of Late Sh. Satendra Jain, as the remaining members of HUF and even as surviving heirs of Late Sh. Satendra Jain. The Defendant has no right, title or interest in the suit property.It has already been held that the document dated 8th March 2011 is not the Will of Satendra Jain. Thus, the Defendant has no right to retain the original title deeds of the suit property and that of the Haus Khas property. The possession of the original title deeds is admitted in para 11 of the written statement. Plaintiffs are thus entitled to a decree of mandatory injunction and directions to the Defendant for handing over the original title documents of the suit property and the Hauz Khas property. This issue is accordingly decided in favour of the Defendant and against the Plaintiffs.

Issue No. 3

53. The Defendant having no right in the suit property and being in possession thereof along with the original title documents raises apprehension in the minds of the Plaintiff that the Defendant would create third party interest in the suit property. This Court has already granted ex-parte injunction against the Defendant, vide order dated 8th September 2011 directing the Defendants not to create third party interest in the suit property. The said injunction was subsequently confirmed. In light of the findings

given above, the Plaintiff is entitled to a decree of permanent injunction as prayed for. This issue is decided in favour of the Plaintiffs and against the Defendant.

Issue No. 5

54. The Plaintiff has valued the suit property for the relief of declaration and possession as Rs. 60 lacs and paid *ad valorem* court fees thereon. The onus on this issue was on the Defendant. Except from denying that the suit property has been wrongly valued, the Defendant has not produced any material to contradict the valuation of the suit property. This issue is thus decided against the Defendant and in favour of the Plaintiffs.

Issue No. 6

55. The finding on this issue would not in any way impact the outcome of the suit for the reason that the Plaintiffs are the only Class- I surviving heirs of Late Satendra Jain. After 1956, Hindu Undivided Family/Joint Family can come into existence when an individual's property is thrown into a common hotchpotch. The creation of HUF is primarily for the purposes of Income Tax. While deciding the Issue No. 4 (Test Case), the Court has noted that the Plaintiffs have produced sufficient material on record indicating that late Sh. Satendra Jain treated the suit property as part of HUF. The HUF balance sheet produced by the Plaintiffs were originally **marked PW 1/10 to 25**. During the recording of evidence, the question of exhibiting the said document was deferred subject to production of Income Tax records, as noted during the cross-examination of **PW-1** on 7th November 2014. The HUF Income Tax Records have since been produced

and accordingly the said balance sheets are now exhibited as **PW 1/10-25**. The Income Tax filings in respect of the HUF was being done by late Sh. Satendra Jain from 1993 till 2011, the year he passed away. The Defendant has not been able to show any material to controvert the above position. Accordingly, it is held that the suit property and Hauz Khas property is a part of Satendra Jain HUF. After his death, the property devolved on the surviving coparceners in equal shares. This issue is accordingly decided in favour of the Plaintiffs and against the Defendant.

Relief

56. In view of the findings given in the Issues noted above, the following directions are given:-

a) The Suit CS (OS) 2186 of 2011 is decreed in the following terms:

(i) Decree of possession is in respect of Satjai Orchards, 11A Green Meadow Farms, Satbari, New Delhi – 110030is passed in favour of the Plaintiffs and against the Defendant directing her to deliver vacant and peaceful possession of the suit property to the Plaintiffs.

b) Decree of mandatory injunction in favour of the Plaintiffs and against the Defendant directing her to hand over complete original title documents in respect of the property (a) Satjai Orchards, 11A Green Meadow Farms, Satbari, New Delhi - 110030 and (b) F1/3 Hauz Khas Enclave, New Delhi – 110016 to the Plaintiffs.

c)Decree of permanent injunction in favour of the Plaintiffs and against the

Defendant restraining her from selling/alienating/dealing or creating any third party interest in respect of property being Satjai Orchards, 11A Green Meadow Farms, Satbari, New Delhi - 110030.

d) Plaintiffs shall be entitled to cost of litigation that is assessed as Rs.1,00,000/- to be paid by the Defendant.

57. The suit is decreed in above terms. Decree sheet be drawn up the pending applications are disposed of.

Test Case

58. The Petition is dismissed. Respondent Nos.2 to 4 shall be entitled to cost of Rs.1,00,000/- to be paid by the Petitioner.

SANJEEV NARULA, J.

APRIL29, 2019

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