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

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Date of Judgment: 25.07.2022

+ **RFA 324/2022**

RAMJI YADAV

..... Appellant

Through: Mr. Rohit and Mr. Anish Chaudhay,
Advocates.

versus

ASHISH YADAV

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE GAURANG KANTH

GAURANG KANTH, J. (ORAL)

CM APPL 32357/2022 (Exemption)

1. Exemption allowed, to all just exceptions
2. The application stands disposed of.

RFA No. 324/2022 & CM APPL 32360/2022 (Stay)

3. The Appellant, by way of the present Appeal, has challenged the Judgment dated 05.05.2022 (“**Impugned Judgment**”) passed by the learned Additional District Judge-01(South), Saket District Courts, New Delhi in CS No. 8610/2016 titled as Ramji Yadav Vs Kalawati & Ors. Vide the said Judgment, the learned Trial Court was pleased to dismiss the Suit for declaration, partition, possession and permanent injunction filed by the Appellant against the original defendant No.1 to 3.



The facts relevant for the adjudication of the present Appeal are as follows:

4. The Appellant/plaintiff filed a Suit for declaration, partition, possession and permanent injunction against the original defendants with the following prayers:

- a) Pass a decree of declaration thereby declare the share of the plaintiff in the immovable property No. D-99, Saket, New Delhi to the extent of $2/3^{\text{rd}}$ share;
- b) Pass a preliminary decree of partition of built-up suit property bearing No. D-99, Saket, New Delhi by appointing a Local Commission to suggest the mode of partition;
- c) Pass a final decree of partition of built-up suit property bearing No. D-99, Saket, New Delhi in terms of mode of partition suggested by the Local Commissioner;
- d) Pass the decree of declaration in favour of the plaintiff and against the defendant No.2 thereby declaring that the WILL dated 3.12.2007 alleged executed by late Bachchu Ram Yadav in respect of suit property in favour of defendant No.2 as voidable and having no value in the eyes of law;
- e) Pass a decree of possession in favour of plaintiff and against the defendant No.2 & 3 thereby direct the defendant No. 2 to hand over the vacant peaceful possession of suit property No.D-99, Saket, New Delhi to the extent to $2/3^{\text{rd}}$ share to the plaintiff;
- f) Pass a decree of permanent injunction in favour of the plaintiff and against the defendant No.2 thereby restraining the defendant, his associates, agent from selling, transfer, alienating



and/or creating third party interest in the suit property No. D-99, Saket, New Delhi and also from getting the mutation of suit property from the office of defendant No.4 in his name;

g) Cost of the suit be also awarded in favour of the plaintiff and against the defendants;

h) Pass such other and further orders as this Hon'ble Court deem fit and proper under the facts and circumstance of the case in favour of the plaintiff and against the defendants.

5. It is the case of the Appellant that Late Sh. Bachchu Ram Yadav (father of the Appellant and Respondent No.1 & 2) married Late Smt. Shanti Devi in the year 1964 according to Hindu rites and customs. The Appellant was born out of the said wedlock. Late Smt. Shanti Devi was appointed as Assistant Teacher in Zila Basik Shiksha Teacher Parishad, Karchhdana, Allahabad, U.P. on 31.12.1973 and remained in service till her death on 12.02.1992.

6. In the meanwhile, Sh. Bachchu Ram Yadav got an employment with FCI, Delhi and started living in Delhi. During his stay in Delhi, Late Sh. Bachchu Ram Yadav kept Late Smt. Kalawati (original defendant No.1) as his mistress and Respondent No.1 and 2 were born out of the said relationship.

7. Late Sh. Bachchu Ram Yadav, during his lifetime applied with DDA for allotment of a plot under middle income Group Scheme and plot No.D-99, Malviya Nagar Extension, Saket, New Delhi measuring 200 sq.yards (**"Suit Property"**) was allotted to him by DDA vide letter dated 29.09.1975. It is the case of the Appellant that his parents managed to pay for the Suit Property from their joint earnings.



8. It is further the case of the Appellant that his mother died on 12.02.1992 at Allahabad and after her death, all the service benefits including the pension were received by his father, Late Sh. Bachchu Ram Yadav.

9. It is further contended on behalf of the Appellant that Late Bachchu Ram Yadav did not have cordial relations with the Respondents and thus stayed with the Appellant at Allahabad till 28.11.2007. He was ill during this period. Later, Sh. Bachchu Ram Yadav came to Delhi. The Respondent No.1 & 2 and their mother quarrelled with him and a police complaint in this regard was made. Sh. Bachchu Ram Yadav died on 10.12.2007. However, the Appellant could not perform last rites of his father because the Respondent No.1 performed the last rites of Late Sh. Bachchu Ram Yadav even before the Appellant reached Delhi.

10. It is the case of the Appellant that the Suit Property and all the title documents related to the Suit Property were in possession of Late Sh. Bachchu Ram Yadav and after his death, the Respondents were in possession of the same. The Appellant further contends that the Respondent No.1 in collusion with the witnesses and Registrar concerned got a fabricated Will executed and registered on 03.12.2007 in his favour.

11. On 20.02.2008, the Appellant applied for mutation of built-up Suit Property in the records of the Respondent No.3, DDA (original defendant no.4). During the said process, the Appellant came to know that the Respondent No.1, on the basis of the forged and fabricated Will dated 03.12.2007, had applied for mutation of the Suit Property in his name claiming himself to be the sole legal heir of Late Bachchu Ram Yadav. The Appellant claims that after the demise of Late Sh. Bachchu Ram



Yadav, the Appellant is entitled to inherit 1/3rd share in the movable property and 2/3rd share in the Suit Property and Respondent No.1 and 2 will inherit 1/3rd share in the Suit Property left by his father. Hence, after the death of Late Sh.Bachchu Ram Yadav, the Appellant filed a Suit for declaration, partition, possession and permanent injunction against the original defendants.

12. The Respondent No.1 and 2 along with their mother jointly filed written statement raising the preliminary objection regarding its maintainability. Regarding the merits of the case, the Respondents stated that Late Bachchu Ram Yadav had got married to Late Smt. Kalawati and Respondent No.1 and 2 were born out of the said wedlock. The Respondents further stated that the mother of the Appellant, Late Smt.Shanti Devi was known to Late Bachchu Ram Yadav as she was wife of one of the close friends of Late Bachchu Ram Yadav and the said friend had expired after few years of his marriage with Late Shanti Devi, when the Appellant was a minor. Late Sh. Bachchu Ram Yadav regularly used to visit Allahabad to provide financial help to Late Smt. Shanti Devi. It has further been contended by the Respondents that Late Sh. Bachchu Ram Yadav never got married to Late Smt. Shanti Devi but he permitted his name to be used as the father of Appellant and husband of Late Smt.Shanti Devi.

13. It is further the case of the original defendant No.1 to 3 that Late Sh.Bachchu Ram Yadav, after his marriage with Late Smt. Kalawati, was originally residing in property No.WZ-174, Palam Colony, New Delhi. The Suit Property was allotted to him by DDA in the year 1975. Late Sh.Bachchu Ram Yadav had taken a loan from the Government of NCT of



Delhi, Housing Loan Department, Vikas Sadan from account No.20/171-M. During the period 1980-1992, Late Sh. Bachchu Ram Yadav was suspended from his job and was not working anywhere. Hence, the repayment of loan taken by Late Sh. Bachchu Ram Yadav was made by the Respondent No.1 who was then working as PGT with the Delhi Administration. The said repayment of loan was made by the Respondent No.1 for about 25 years. It is the case of the Respondents that Late Sh. Bachchu Ram Yadav with his wife Late Smt. Kalawati and their children, Respondent No.1 and 2 were residing in the Suit Property from the date of its allotment till date.

14. The Respondent No.3, DDA also filed a written statement in which it is stated that the Suit Property was allotted to Late Sh. Bachchu Ram Yadav under the MIG Scheme. It is further submitted that possession of the said plot was handed over to him on 29.03.1976 and lease deed was executed on 22.11.1976. Mortgage permission was also given to Late Sh. Bachchu Ram Yadav on 16.03.1978 to raise construction of building over the said plot. It is further stated that Late Sh. Bachchu Ram Yadav, vide letter dated 17.01.2006, had informed the DDA that papers of the plot have been misplaced and also submitted an affidavit and indemnity bond in this regard. Information of death of the allottee was given to DDA by Respondent No.1, Sh. Ashish Yadav, claiming himself to be the son of the deceased allottee. The Respondent No.1 applied for mutation of the Suit Property in his name and submitted the copy of registered Will dated 03.12.2007 executed by deceased allottee in favour of the Respondent No.1.



15. On the basis of the pleadings, the learned Trial Court framed the following issues, which are as under:-

- “i) Whether the suit is maintainable in the absence of statutory notice required under Section 53(B) of the DDA Act, 1957? (OPD)*
- ii) Whether the suit has been properly valued for purpose of court fees? (OPD)*
- iii) Whether Smt. Shanti Devi was the legally wedded wife of Late Shri Bachchu Ram? (OPP)*
- iv) Whether Smt. Kalawati was the legally wedded wife of Late Shri Bachchu Ram? (OPD)*
- v) Whether the plaintiff is son of Late Shri Bachchu Ram Yadav? (OPP)*
- vi) Whether the suit is liable to be dismissed under order 7 Rule 11 CPC? (OPD)*
- vii) Whether the Will dated 3rd December, 2007 is a forged and fabricated Will thus voidable? (OPP)*
- viii) Whether plaintiff is entitled for declaration as prayed in Clause (a) of prayer clause? (OPP)*
- ix) Whether the plaintiff is entitled to preliminary decree of partition as prayed for in clause (b) and (c)? (OPP)*
- x) Whether the plaintiff is entitled to decree of possession as prayed in clause (c) of payer clause? (OPP)*
- xi) Whether the plaintiff is entitled for permanent injunction as prayed in clause (e) of prayer clause? (OPP)”*

16. During the course of the trial, Smt. Kalawati, mother of the Respondent No.1 and 2 expired. The Appellant and Respondents examined 5 Witnesses each to prove their case. Based on the evidence on record, the learned Trial Court was pleased to decide Issue No.1 to 6 in favour of the Appellant/plaintiff and against the Respondents/defendants. However, the Issue No.7 was decided in favour of the Respondent No.1 and 2 and against the Appellant. Based on the findings of Issue No.7, the learned Trial Court, decided the Issue No. 8 to 11 in favour of the Respondent



No.1 & 2 and against the Appellant/plaintiff and dismissed the present Suit.

17. The appellant preferred the present Appeal challenging the Impugned Judgment dated 05.05.2022.

Submissions on behalf of the Appellant

18. The learned Counsel appearing for the Appellant submitted that the learned Trial Court failed to appreciate that the Respondent No.1 failed to prove the Will dated 03.12.2007 in accordance with law. The signature appearing in the Will dated 03.12.2007 is not that of Late Sh. Bachchu Ram Yadav. The photograph appearing in the said Will is not clear and hence the identity of the testator is not clear. The learned Counsel for the Appellant further submitted that the execution of the Will is surrounded by suspicious circumstances and hence the Respondent No.1 ought to have proved the same in accordance with law. The learned Trial Court failed to appreciate the law laid down by the Hon'ble Supreme Court in *Lalitaben Jayantilal Popat Vs Pragnaben Jamnadas Kataria*, (2008) 15 SCC 365, *Anil Rishi Vs Gurbaksh Singh*, (2006) 5 SCC 558, *Jarnail Singh Vs Bhagwanti*, (2019) 17 SCC 704. With these submissions, the learned Counsel for the Appellant prayed for setting aside the Impugned Judgment dated 05.05.2022.

Legal Analysis based on the facts of the present case

19. Heard the arguments advanced by the learned Counsel for the Appellant and perused the documents placed on record by the Appellant

20. The learned Trial Court decided Issue No.1 to 6 in favour of the Appellant and against the Respondent No.1 and 2. There is no challenge to



the said findings. It is proved on record that the Late Smt. Shanti Devi was the legally wedded wife of Late Sh. Bachchu Ram Yadav and the Appellant was the legitimate son of Late Sh. Bachchu Ram Yadav. The learned Trial Court also held that there was no legal marriage between Late Sh. Bachchu Ram Yadav and original defendant No.1, Late Smt. Kalawati. However, the Appellant admitted the fact that the Respondent No.1 and 2 are also children of Late Sh. Bachchu Ram Yadav. Hence the main question to be decided in the present Appeal is Issue No.7, i.e., “Whether the Will dated 03.12.2007 is a forged and fabricated Will and thus voidable”? The learned Trial Court fixed the onus to prove this issue on the plaintiff. The appellant never challenged the said position.

21. In order to decide this issue, it is essential to examine the law relating to Will. It is important to first understand the law relating to the execution and proof of Wills under the Indian Succession Act and the Evidence Act.

(i) Section 63 of the Indian Succession Act reads as follows:

“63. Execution of unprivileged wills. Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules—

- (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.*
- (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.*
- (c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in*



the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

As per Section 63 of the Indian Succession Act, besides the signatures or mark of the testator, a Will is required to be attested by two or more witnesses, each of whom should have seen the testator sign or put his mark on the Will.

(ii) Sections 68 of the Evidence Act, which relates to proof of documents required by law to be attested, reads as under:

“68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”

Therefore, as per Section 68 of the Indian Evidence Act, at least one of the attesting witnesses needs to be examined to prove the execution of a Will.

22. The Division Bench of this Hon’ble Court in ***Desh Raj Gupta Vs State & Ors reported as*** 2010 (119) DRJ 138 analysed the law relating to



the Wills and culled out the principles to be kept in mind while examining a Will. The relevant portions from the aforementioned judgment, *inter alia*, reads as follows:

“I. The legal burden to prove due execution always lies upon the person propounding a will. The propounder must satisfy the judicial conscience of the court that the instrument so propounded is last will of a free and capable testator.

II. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by the law. The contestant opposing the will may bring material on record meeting such prima facie in which event the onus would shift back on the propounder to satisfy the Court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. (see the decision of the Supreme Court in Madhukar D. Shende v Tarabai Aba Shedge AIR 2002 SC 637).

III. No specific standard of proof can be enunciated which must be applicable to all the cases. Every case depends upon its circumstances. Apart from other proof, conduct of parties is very material and has considerable bearing on evidence as to the genuineness of will which is propounded. Courts have to be vigilant and zealous in examining evidence. Rules relating to proof of wills are not rules of laws but are rules of prudence.

IV. Expanding on the care and caution to be adopted by the courts, and presumptions to be raised, in the decision reported as (1864) 3 Sw& Tr. 431 In The Goods of Geale, it was opined that where a person is illiterate or semi literate or the will is in a language not spoken or understood by the executor, the court



would require evidence to affirmatively establish that the testator understood and approved all the contents of the will.

V. One form of affirmative proof is to establish that the will was read over by, or to, the testator when he executed it. If a testator merely casts his eye over the will, this may not be sufficient.

VI. Courts have to evaluate evidence pertaining to the circumstances under which the will was prepared. If a will is prepared and executed under circumstances which raise a well grounded suspicion that the executor did not express his mind under the will, probate would not be granted unless that suspicion is removed.

VII. A word of caution. Circumstances can only raise a suspicion if they are circumstance attending, or at least relevant to the preparation and execution of the will itself.

VIII. Another point that has to be considered is about the improbability in the manner in which the instrument is scripted. Instance of suspicious circumstances would be alleged signatures of testator being shaky and doubtful, condition of the testator's mind being feeble and debilitated, bequest being unnatural, improbable and unfair.

IX. Suspicious circumstances are a presumption to hold against the will. Greater is the suspicion more heavy would be the onus to be discharged by he who propounds the will.

X. A will is normally executed by a person where he intends to alter the rule of succession or where he desires a particular form of inheritance and to that extent, nature of bequest is not of much substance to invalidate a will, but consistent view taken by the



courts is that this could be treated as a suspicious circumstance. What weightage has to be attached to this suspicion would depend upon case to case.

XI. Suspicion being a presumptive evidence, is a weak evidence and can be dispelled."

23. In view of the legal provisions and the settled position of law, the burden of proof is on the propounder of the Will to prove the execution thereof and 4 basic facts need to be proved:

- (i) the Will was signed by the testator in the presence of two attesting witnesses;
- (ii) the testator was of sound and disposing state of mind at the time of execution of the Will;
- (iii) the testator understood the nature and effect i.e., the content of the disposition so made; and
- (iv) the testator had put signatures or mark on the Will out of his own free will.

24. Coming back to the facts of the present case, it is the case of the original defendant No.1-3 that Late Sh. Bachchu Ram Yadav executed a registered Will dated 03.12.2007 and bequeathed the Suit Property in favour of the Respondent No.1. The burden is on the original defendant No.1 to 3 to prove that the Will dated 03.12.2007 was executed and registered in accordance with law. In order to discharge the said burden, the original defendant No.1 to 3 led evidence and examined the following witnesses:



(i) DW-2, Sh. Shalabh Kumar Aggarwal, one of the attesting witnesses to the Will dated 03.12.2007 categorically stated that Late Sh. Bachchu Ram Yadav called him one day before the execution of the Will and asked him to come to Sub-Registrar's office at around 10-10.30 am. When he reached, Late Sh. Bachchu Ram was present there with Ms. Simmi Uttam, the other witness. In front of DW-2, Late Sh. Bachchu Ram Yadav narrated the matter to the typist who typed the Will. He also deposed that the Will was signed by Late Sh. Bachchu Ram Yadav in front of the officer of the Sub Registrar. After that DW-2 signed and thereafter Ms. Simmi Uttam signed the Will.

DW-2 withstood the cross examination and his evidence is uncontroverted.

(ii) DW-3, Dheeraj Kumar, the record keeper from the office of Sub Registrar-V, Mehrauli, New Delhi proved the registration of the Will dated 03.12.2007 as per Section 71 of the Evidence Act.

25. The evidence of the DW-2 categorically shows that Late Sh. Bachchu Ram Yadav was of sound mind and was clearly aware about the contents of the Will as he himself narrated the contents of the said Will to the typist. Further, from the narration of events, it is clear that the testator signed the Will out of his free will. In view of the deposition of DW-2 and DW-3, there is a strong presumption in favour of the fact that the Will dated 03.12.2007 was validly executed and registered. As held by the Hon'ble Supreme Court in ***Rabindra Nath Mukherjee and Another Vs Panchanan Banerjee (Dead) by LRs and Others reported as 1995(4) SCC 459***, the doubt would be less significant if the Will is registered. This



Court is of the considered view that the mandate and requirements of Section 63 of the Indian Succession Act are fulfilled in the present case.

26. The Appellant has challenged the Will mainly on the following grounds:

(i) The Appellant alleges that the signatures of the testator that appear on the Will are not matching with the signatures appearing on the Perpetual Lease deed dated 30.11.1976 and Mortgage deed dated 26.10.1978. In this regard, it is to be noted that the Will is executed on 03.12.2007 whereas the aforesaid documents relied upon by the Appellant were executed almost three (3) decades before execution of the Will in question. Moreover, the Appellant has not taken any steps to verify the signatures of Late Sh. Bachchu Ram Yadav on the Will dated 03.12.2007. Therefore, the non-matching of the signatures cannot be taken as a valid ground for such suspicion.

(ii) The Appellant further contended that the photographs appearing on the back side of the Will dated 03.12.2007 is not clearly visible. There is no signature of the testator across the photographs. In this regard, at the outset, it has to be seen that the Will dated 03.12.2007 is a validly registered document. The registration of the said document has been proved by DW-3. The photographs of all the signatories are taken by the registering authority after the registration of a document in normal course. There is a presumption under Section 117 of the Evidence Act in favour of the said Will. In the instant case, no evidence has been led by the Appellant to show that Late Sh. Bachchu Ram Yadav



was not present at the office of the concerned Sub Registrar on the day of registration of the Will in question. In the absence of any contrary evidence, the objection of the Appellant is not sustainable in law.

(iii) It has further been alleged by the Appellant that Late Sh. Bachchu Ram Yadav was not having cordial relationship with the Respondent No.1 and 2 and hence he could not have executed the Will dated 03.12.2007. It is an admitted position that the Respondent No.1 and 2 are also children of Late Sh. Bachchu Ram Yadav, who was working in Delhi and hence he stayed for major part of his life in Delhi. The Appellant admitted that Late Sh. Bachchu Ram Yadav used to stay in the Suit Property with the original defendant No.1 to 3 during his stay in Delhi. Late Sh. Bachchu Ram Yadav was under regular treatment from Max Hospital, Saket. The Appellant was in Allahabad, so it appears that the Respondent No.1 and 2 were taking care of Late Sh. Bachchu Ram Yadav, while he was in Delhi. Additionally, the Respondents have proved that Late Smt. Kalawati repaid the loan taken by Late Sh. Bachchu Ram Yadav for purchasing the Suit Property. Therefore, this Court does not find any merit in the contention of the Appellant that Late Sh. Bachchu Ram Yadav could not have bequeathed the Suit Property in favour of the Respondent No.1.

(iv) The Appellant has further alleged that DW-2 is a friend of the Respondent No.1 and thus his evidence is at the instance of the Respondent No.1. As held by the Hon'ble Supreme Court in **Rabindra Nath Mukherjee** (Supra) '*..... it may be said that*



*somebody has to take necessary steps in such matters; but if he happens to be one close to the executor, some eye-brow is bound to arise. Even so, if there be other circumstances on record to show the voluntary character of the document, the eye-brows should get dropped down.....'*In the present case, DW-2 is a person known to the family of the Respondent No.1 and 2. It has been stated that he is not a close friend but meets Respondent No.1 occasionally. Further, it has been stated that he acted as a witness as per the request of Late Sh. Bachchu Ram Yadav and not as per the request of the Respondent No.1. It is nowhere come in evidence that the Will was executed at the instance of Respondent No.1. Therefore, merely the acquaintance of DW-2 with the Respondent No.1 cannot cast doubt on the testimony of DW-2.

(v) As evident from the records of the present case, it is not the case of the Appellant that Late Sh. Bachchu Ram Yadav was not in sound mind or incapacitated in any manner at the time of the execution of the Will dated 03.12.2007. It is also not the case of the Appellant that the Will was executed by fraud, coercion or undue influence.

27. In view of the aforesaid and the evidence available on record, it stands proved that the Will was executed by Late Bachchu Ram Yadav in favour of the Respondent No.1 and suspicion with respect to signatures of Late Bachchu Ram Yadav is not tenable. Accordingly, this issue has been rightly decided against the Appellant/plaintiff.

28. From the totality of the facts and circumstances of the present case, this Court is of the considered view that the Appellant failed to raise any



reasonable suspicion regarding the execution of the Will dated 03.12.2007. There is no infirmity or perversity in the Impugned Judgment passed by the learned Trial Court.

29. Accordingly, the present Appeal is dismissed. No order as to costs.

GAURANG KANTH, J

JULY 25, 2022

