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

Date of decision: 01.12.2023

+ **RSA 153/2023, CM APPL. 42107/2023, CM APPL. 42108/2023,
CM APPL. 45436/2023 & CM APPL. 48519/2023**

AZAD SINGH & ORS. Appellants

Through: Mr. M. L. Kalkal and Mr. M. K. Panchal, Advs.

versus

KRISHNA DEVI & ORS. Respondents

Through: Mr. Bharat Malhotra, Adv. DHCLSC

+ **RSA 154/2023, CM APPL. 42164/2023, CM APPL. 42165/2023,
CM APPL. 45434/2023 & CM APPL. 48701/2023**

AZAD SINGH & ORS. Appellants

Through: Mr. M. L. Kalkal and Mr. M. K. Panchal, Advs.

versus

KRISHNA DEVI & ORS. Respondents

Through: Mr. Bharat Malhotra, Adv. DHCLSC

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CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

**RSA 154/2023, CM APPL. 42164/2023, CM APPL. 42165/2023, CM
APPL. 45434/2023 & CM APPL. 48701/2023**

1. The present second appeal filed under Section 100 of the Code of Civil Procedure, 1908 ('CPC') impugns the judgment dated 28.02.2023 passed by



ASCJ, Patiala House Courts, New Delhi ('First Appellate Court') in RCA No. 5/2017, titled as **Azad Singh & Ors. v. Krishna Devi & Ors.**, whereby the First Appellate Court dismissed the appeal filed against the judgment dated 20.04.2015 passed by Civil Judge, Central (09), Tis Hazari Courts, Delhi ('Trial Court') in CS No. 72/2011 (1st Suit), titled as **Krishna Devi & Ors. v. Azad Singh & Ors.**, whereby the 1st suit filed by the plaintiffs on 17.11.2001 for perpetual and mandatory injunction was decreed in favour of plaintiffs.

1.1 The Appellants herein were defendants and the Respondents herein were plaintiffs before the Trial Court.

1.2 The Civil Suit No. 72/2011 (1st Suit) was filed by the Respondents on 17.11.2001, seeking relief of perpetual and mandatory injunction thereby praying that the Appellants and their agents be directed to vacate one (1) room, verandah on the ground floor and they be restrained from interfering in the possession and occupation of the Respondents over the second floor of the premises bearing no. WZ-134, Naraina Village, New Delhi ('suit property') as shown in red colour in the site plan annexed with the plaint.

1.3 In the said suit it was averred by the Respondents that late Sh. Jagdish Prasad is the rightful owner of the suit property, which devolved upon him through the registered Will dated 15.10.1987; and late Sh. Jagdish Prasad had given one (1) room and verandah on the ground floor of the suit property to the Appellant No.1 herein on leave and license basis, which license was eventually revoked during the lifetime of the late Sh. Jagdish Prasad.

1.4 The said registered Will was executed by Sh. Sisram, the father of late Sh. Jagdish Prasad and Appellant No.1 herein. Sh. Sisram was the owner of the property WZ-134, Naraina Village, New Delhi.



1.5 The Respondents are the surviving Class-I legal heirs of late Shri Jagdish Prasad. Appellant No. 1 and Appellant No. 2 are the real brother and sister-in-law, respectively of late Sh. Jagdish Prasad.

1.6 The Appellants filed joint written statement in the said suit and averred that the Respondents have filed a false and frivolous suit. It was stated that the suit property was given to Appellants by late Sh. Jagdish Prasad as recorded in the unregistered '*Bhai Faisla*' dated 20.12.1987. The Appellants claimed ownership of the suit property on the basis of the said '*Bhai Faisla*'.

1.7 The Trial Court vide judgment dated 20.04.2015 has decreed the suit in favour of the Respondents and held that the Respondents have established that the suit property was owned by late Sh. Jagdish Prasad qua the registered Will dated 15.10.1987; and after his demise on 07.10.2001 the same was owned by the Respondents. The Trial Court further held that the Appellants were permitted to occupy the suit property on leave and license basis, which stood terminated after the demise of late Sh. Jagdish Prasad.

1.8 The judgment dated 20.04.2015 of the Trial Court was challenged before the First Appellate Court in RCA No. 5/2017, wherein the First Appellate Court upheld the findings of the Trial Court and dismissed the appeal vide the impugned judgment dated 28.02.2023.

1.9 Both, the Trial Court and First Appellate Court concluded that the photocopy of unregistered '*Bhai Faisla*' dated 20.12.1987 has not been proved by the Appellants and is inadmissible in evidence.

Arguments of Appellants

2. The learned counsel for the Appellants states that both the Courts below have erred in returning a finding that the registered Will dated 15.10.1987, made by late Sh. Sisram was valid and proved in accordance with law.



2.1 He states that the Appellants have filed on record a photocopy of the unregistered '*Bhai Faisla*' dated 20.12.1987 which was signed by all the four (4) sons of late Sh. Sisram including late Sh. Jagdish Prasad. He states that the Courts below wrongly held that the said '*Bhai Faisla*' was not proved in accordance with law even though the plaintiff's witness PW-2, Sh. Jeet Singh, in his cross-examination on 08.10.2008 admitted his knowledge with respect to the execution of said '*Bhai Faisla*'. He states that non-confrontation of the said '*Bhai Faisla*' to the said PW-2, Sh. Jeet Singh in his cross examination is of no consequence.

2.2 He states that he also relies upon the testimony of Ms. Radha i.e. Respondent No.2 herein, daughter of late Sh. Jagdish Prasad, who was examined as a witness in the 2nd suit. He states that Respondent No.2 in her testimony admitted her knowledge of the execution and existence of the '*Bhai Faisla*' dated 15.10.1987.

2.3 He states that on a conjoint reading of the testimony of Respondent No.2, i.e., Ms. Radha and PW-2 Sh. Jeet Singh, the Courts should have concluded that the '*Bhai Faisla*' stands proved.

2.4 He states that the Appellant No. 1 and late Sh. Jagdish Prasad acted upon the '*Bhai Faisla*' and it was in furtherance thereof that the Appellant No.1 herein was put in possession of the suit property in 2001. He states that it is only after death of late Sh. Jagdish Prasad on 07.10.2001 that the 1st Suit was filed alleging that the Appellant No.1 was a licensee in the suit property.

2.5 He states that the Trial Court wrongly held that the '*Bhai Faisla*' is not admissible in evidence due to its non-registration under Section 17 of the Registration Act, 1908 ('Registration Act'). He states that as per the judgment of the Co-ordinate bench of this Court in ***Himani Walia v. Hemant Walia***



and Ors., 2022 SSC OnLine Del 893, an unregistered family settlement can be admitted in evidence and the same is not required to be compulsorily registered.

2.6 He states that the photocopy of '*Bhai Faisla*' dated 20.12.1987 was duly tendered in chief by the Appellant No.1 herein who examined himself as defendant witness-1 ('DW-1') and the said '*Bhai Faisla*' was given 'Mark A'. He states that documents were not given an exhibit Mark as the original was not produced.

2.7 He states that the original of the said '*Bhai Faisla*' could not be produced during trial as the custody of the original is with the Respondent No.1 (Mrs. Krishna Devi). He states a notice for production of original was issued to the Respondent No.1 under Order XII Rule 18 read with Section 151 CPC.

2.8 He states, without prejudice, if the registered Will dated 15.10.1987 of late Sh. Sisram is given effect to, the Respondents will receive a larger share in the suit property than the Appellants herein; which would be inequitable.

2.9 He states that the substantial questions of law which arise for consideration in this matter is 'Whether the '*Bhai Faisla*' dated 20.12.1987 supersedes the registered Will dated 15.10.1987?', and, consequently, 'Whether the Trial Court was competent to examine and return a finding on the validity of the registered Will dated 15.10.1987?'.

Arguments of Respondents

3. In reply, learned Counsel for the Respondents states that the registered Will dated 15.10.1987 has been duly proved in accordance with provisions of Indian Succession Act, 1985. He states that the attesting witness to the Will i.e., Sh. Jeet Singh was examined as PW-2 and his testimony has stood the



test of cross-examination and has been rightly appreciated by the Trial Court to return the finding that the Will dated 15.10.1987 stands proved.

3.1 He states that late Sh. Sisram was the owner of the property bearing No. WZ-134, Naraina Village, New Delhi-110028 ('entire property') which includes the suit property.

3.2 He states that the late Sh. Sisram bequeathed separate and distinct portions of the entire property to his four (4) children in the manner set out in detail in the registered Will dated 15.10.1987. He states that the suit property fell in the exclusive share of the Respondents.

3.3 He states that all the other four (4) sons of late Sh. Sisram including the Appellant No. 1 herein are also in occupation and possession of the rest of the portions of the suit property in accordance with the registered Will dated 15.10.1987.

3.4 He states that it is the Appellants alone, who are in wrongful possession of the suit property, in contravention of the bequest made under the registered Will dated 15.10.1987.

3.5 He states that the reliance placed upon the photocopy of unregistered '*Bhai Faisla*' dated 20.12.1987 by the Appellants is untenable. He states the said document is a photocopy, the same has not been assigned an exhibit mark during trial and it has not been admitted into evidence; and therefore, the same cannot be referred to or relied upon in these proceedings.

3.6 He states that the said '*Bhai Faisla*' was not shown to the PW-2 i.e. Sh. Jeet Singh, and, therefore, the reliance placed on his testimony has been rightly rejected by the Courts below. He states the said documents cannot create ownership right in favour of Appellant No.1 with respect to the suit property.



Analysis and Conclusion

4. This Court has considered the submissions of the counsel for the parties and perused the record.

5. The Courts below have returned concurrent findings of fact holding that:

- i. That late Sh. Sisram was the owner of the entire property bearing No. WZ-134, Naraina Village, New Delhi ('entire property').
- ii. That the genuineness of the registered Will dated 15.10.1987 (Exhibit PW-1/1) executed by late Sh. Sisram has been duly proved by producing the original and leading evidence of the attesting witness, Sh. Jeet Singh (PW-2).
- iii. That late Sh. Sisram bequeathed separate and distinct portions of the entire property in favour of his four (4) sons. The said portions were duly marked and identified in the coloured site plan annexed to the registered Will dated 15.10.1987.
- iv. That the four (4) sons of late Sh. Sisram have acted upon the registered Will dated 15.10.1987 and are in occupation of the different portions of the entire property in accordance with the bequest made under the said Will.
- v. The dispute has arisen limited to the suit property. The suit property was bequeathed to late Sh. Jagdish Prasad under the registered Will dated 15.10.1987 and he became the exclusive owner of the suit property by operation of the said Will.
- vi. The Respondents herein are the Class-I legal heirs of late Sh. Jagdish Prasad and therefore are owners of the suit property.
- vii. The photocopy of the unregistered '*Bhai Faisla*' dated 20.12.1987



has not been proved by Appellants in accordance with law and therefore it has not been admitted in evidence. The defendants failed to lead evidence of the attesting witness and lead secondary evidence in accordance with law. The said document requires to be compulsorily registered as per Section 17 of the Registration Act and on account of its non-registration and non-stamping it is even otherwise inadmissible in law.

Unregistered 'Bhai Faisla' dated 20.12.1987

6. The substratum of the arguments of the Appellants before this Court has been that the photocopy of unregistered 'Bhai Faisla' dated 20.12.1987 ('Mark A') is a binding document and the Courts below wrongly failed to consider the said document.

6.1. This Court has perused the judgment of the Trial Court wherein the Trial Court has rejected the said defence of the Appellants and after considering the testimony of the Appellants and PW-2, Jeet Singh held that the said 'Bhai Faisla' dated 20.12.1987 has not been proved by the Appellants. The relevant findings are as under:

"The defendants have denied the aforesaid Will and instead have placed reliance on the photocopied document 'Mark A' recorded as Bhai Faisla on 20/12/1987. They stated that as per the said settlement/ agreement which was entered into by all the four brothers and their wives in presence of entire witnesses, the suit property was given to the defendant no. 1 by Sh. Jagdish Prasad. The original of this document was stated to be in possession of the plaintiffs to produce which a notice under Order 12 Rule 8 read with Section 151 of the CPC was also served upon the plaintiffs.

Vide order dated 27/03/2020, the then Ld. Civil Judge permitted the defendants to place the photocopy of the said document on record with a rider that it shall be proved according to the rules of evidence i.e. by testimony of parties executing the same as well as of the attesting witnesses.....

In the present case, the defendants did not make any averments about the circumstances under which the aforesaid original of the alleged



Bhai Faisla went to the possession of the plaintiffs. No evidence has been led as to the circumstances of the said documents going to the possession of the plaintiffs and **hence, in the opinion of this Court, the defendants have failed to make out the case for placing reliance on the photocopy of the said document.** Even otherwise as per the order dated 27.03.2010 of the then Ld. Civil Judge, it was made clear to the defendants that the documents shall be proved by testimonies of the parties executing the same as well as of the attesting witnesses. **Despite that, apart from themselves, the defendants have not examined any other independent witness who could be said to have proved the execution of the said documents.** During the course of arguments, a great emphasis was laid by the Ld. Counsel for the defendants on the testimony of PW2 dated 08.10.2008 submitting that as is evident from the said cross-examination, the witness had admitted that an agreement dated 20.12.1987 was arrived at and its terms were reduced into writing **however he did not admit or deny his signatures on the said agreement and had stated that he might have signed the same.** It was argued that the witness further did not deny the suggestion that 8 witnesses have signed the said agreement. **It is contended that the said PW2 who was also a witness to the said Bhai Faisla had admitted its execution before the Court and hence the said document stands proved. This Court finds it difficult to accept the said argument for the reason that when the said question was put to the witness, the said agreement was not shown to him. Moreover, the alleged signatures of the said witness on the agreement were also not shown to him and in these circumstance, it cannot be inferred that the witnesses had admitted himself attesting the aforesaid agreement or signing the same.**

(Emphasis supplied)

6.2. Similarly, the First Appellate Court as well after examining the testimony of the PW-2 i.e., Sh. Jeet Singh has rejected the reliance placed by the Appellants on the said 'Bhai Faisla' dated 20.12.1987. The relevant portion of the judgment of the First Appellate Court reads as under:

"On the other hand, the appellants failed to bring on record any contradictions in the deposition of PW2 and also failed to lead any secondary evidence with respect to the "bhai faisla", It has been argued that the PW2 admitted his signature on the " bhai faisla " and the Ld. Trial Court erred in not treating the " bhai faisla " as proved. The said argument does not inspire confidence of the Court as it is clear from the cross-examination and also as observed by the Ld. Trial Court in the judgment at page no.27 that the said agreement i.e. the " bhai faisla " was never shown to the witness and therefore it cannot be inferred that the witness had admitted himself attesting the " bhai faisla ", The appellants



did not examine any other attesting witness of the " bhai faisla " and also did not make efforts to get the same registered .”

(Emphasis supplied)

6.3. Thus, the Courts below have returned a concurrent finding of fact that the alleged ‘*Bhai Faisla*’ dated 20.12.1987 has not been proved as no attesting or independent witness to the said agreement has been examined by the Appellants.

6.4. The Courts below have also held that the said ‘*Bhai Faisla*’ dated 20.12.1987 cannot be admitted in evidence as it is a mere photocopy and the Appellants could not satisfy the Court with respect to the custody of original document. Consequently, the ‘*Bhai Faisla*’ was not given an exhibit mark and has not been admitted in evidence. The said document was tendered by defendant witness-1 (‘DW-1’) and was assigned ‘Mark A’. In the opinion of this Court, the Courts below were correct in their approach in not reading the photocopy of unregistered ‘*Bhai Faisla*’ into evidence. In this regards it would be imperative to refer to the judgment of Supreme Court in the case of ***Life Insurance Corporation of India & Anr. v. Ram Pal Singh Bisen, (2010) 4 SCC 491***, wherein the Supreme Court at para 31 held as under:

*“31. Under the law of evidence also, it is necessary that contents of documents are required to be proved either by primary or secondary evidence. At the most, admission of documents may amount to admission of contents but not its truth. **Documents having not been produced and marked as required under the Evidence Act cannot be relied upon by the Court. Content of the document cannot be proved by merely filing in a Court.**”*

(Emphasis supplied)

6.5. This Court finds no infirmity in the concurrent findings of the Court below that the Appellants failed to lead evidence to prove the photocopy of the ‘*Bhai Faisla*’ dated 20.12.1987; as admittedly no witness of the said document was produced. And, Appellants failed to explain the circumstances



in which the custody of the original is allegedly with Respondent No.1. Even before this Court, the counsel for the Appellants failed to address arguments on the issue of custody of the original.

6.6. Therefore, the reliance placed by the Appellants on the photocopy of an unregistered '*Bhai Faisla*' dated 20.12.1987 which has not been proved, to claim ownership right in the suit property and to further deny the rights of the Respondents arising from a registered Will dated 15.10.1987 in the suit property, has been rightly rejected by the Courts below.

7. Nonetheless, this Court has examined the contents of the alleged unregistered '*Bhai Faisla*' dated 20.12.1987. In the opinion of this Court, the said document cannot be construed as a family settlement as in this agreement there was no part (or portion) of the entire property, which was being received by late Sh. Jagdish Prasad, on the contrary, it records permission being granted by late Sh. Jagdish Prasad to defendant no.1 i.e., Appellant No.1 to occupy the suit property. The contents of the document even if read in evidence supports the contention of the Respondents that the Appellant no.1 was a mere licensee in the suit property. The said document cannot be construed to record any transfer of rights in the immovable property from late Sh. Jagdish Prasad in favour of Appellant No. 1. The said document also acknowledges that the ownership of the suit property vests in late Sh. Jagdish Prasad.

7.1 The Trial Court and the First Appellate Court rejected the reliance placed by the Appellants on the said '*Bhai Faisla*' dated 20.12.1987 on the ground that in view of Section 17 of the Registration Act, a document which seeks to transfer title in an immovable property from one person to another requires to be compulsorily registered. This Court finds no infirmity in the



said findings of the Court as the same are correct in law.

7.2 In this regard, the reliance placed by the Appellants upon the judgement of the Co-ordinate Bench of this Court in **Himani Walia** (Supra) to contend that ‘*Bhai Faisla*’ dated 20.12.1987 need not be registered, is not applicable to the facts of this case. In the judgement of **Himani Walia** (Supra) the learned Single Judge has held that the registration of a family settlement is not required when the document records an oral partition, which had already been arrived at between the parties. The relevant portion of the judgement read as under:-

“10. Thus it is clear that family settlements are not required to be compulsorily registered, and stamp duty is not required to be compulsorily paid in respect of the same, when the settlement has been arrived at initially as an oral partition and is thereafter put into writing for the purpose of information. Considering the said position, it is clarified that there is no requirements of valuation of the suit properties in the present case...”

(Emphasis supplied)

However, in the facts of the present case the unregistered ‘*Bhai Faisla*’ dated 20.12.1987 does not record any oral partition between the parties but records an arrangement in *praesenti* for the use of the suit property.

7.3 This Court therefore, finds no infirmity in the finding of the First Appellate Court and the Trial Court rejecting the defence of the Appellants based on the photocopy of the unregistered ‘*Bhai Faisla*’ dated 20.12.1987.

Registered Will dated 15.10.1987

8. In the facts of this case, the Trial Court by its judgment has returned a detailed finding with respect to the genuineness of registered Will dated 15.10.1987 based on the testimony of the attesting witness ‘PW-2’ i.e., Sh. Jeet Singh. The relevant portion of the judgment reads as under:

“The proof of execution of the will in law is stipulated under Section 66 of the Indian Evidence Act which provides that 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, arid subject to the process of the Court and capable of giving evidence.

In the entire cross-examination of PW2 carried out by the counsel for the defendants, the defendants did not give any suggestion to the witness that the said will is not a validly executed document or that the same is a forged and fabricated document. Considering the unimpeached testimony of PW2 who is an attesting witness to the said will, this Court is of a view that the plaintiffs have been able to prove the aforesaid will of Sh. Sis Ram before this Court.

(Emphasis supplied)

The said finding of the Trial Court has been duly upheld by the First Appellate Court.

8.1 The learned Counsel for the Appellants has not been able to show any infirmity in the evidence of the attesting witness PW-2 i.e., Sh. Jeet Singh with respect to the registered Will dated 15.10.1987 before this Court.

8.2 There is no dispute before this Court with respect to the fact that the property WZ-134, Naraina Village, New Delhi ('entire property') was owned by late Sh. Sisram. The devolution of interest upon late Sh. Jagdish Prasad, the father of the Respondents who was a beneficiary of the registered Will dated 15.10.1987, therefore, clearly establishes Respondent's ownership rights in the suit property.

8.3 The Appellant No.1 has not disputed before this Court the finding of the Trial Court based on the testimony of DW-2/1, that all the sons of late Sh. Sisram are in occupation of property No. WZ-134, Naraina Village, New Delhi in accordance with the bequest made under the Will dated 15.10.1987 and as per the said site plan enclosed therewith.

8.4 This Court, therefore, finds that in the facts of this case, there arises no question of law as proposed by the Appellants that 'whether the unregistered 'Bhai Faisla' dated 20.12.1987 supersedes the registered Will dated 15.10.1987?'.



9. The second submission of the counsel for the Appellants that the validity of the Will could not have been gone into by the Trial Court also does not give rise to any substantial question of law.

9.1 Firstly, the Appellant No. 1 himself has acquired right, title and interest in a portion of the entire property in pursuance to the registered Will dated 15.10.1987. The Appellant No. 1 has no independent ownership right in the entire property de-hors the Will. Therefore, the challenge to the Will only qua to the suit property is without any basis. The admission of the existence of the Will is also evident from the first proposed question of law which has been rejected hereinbefore.

9.2 Be that as it may, the First Appellate Court has rightly held that in the State of Delhi in view of Section 57(a) read with Section 213 of the Indian Succession Act, 1925, Wills do not mandatorily require a probate in Delhi¹. Consequently, a valid Will can be acted upon by the beneficiaries, if there is no dispute with respect to its genuineness. The transmission of title in the estate of the deceased testator takes effect in favour of the beneficiaries, immediately upon the death of the testator.

9.3 The requirement for proof of the genuineness of the Will arises only when a dispute is raised by one of the legal heirs. In the facts of this case, the Respondents herein have led evidence and proved the genuineness of the Will to the satisfaction of the Court, by producing the original Will and attesting witness PW-2 i.e., Sh. Jeet Singh. It would be relevant to refer to a judgment of Co-ordinate Bench of this Court in the **Rajesh v. Munni Devi, 2011 SCC OnLine Del 1257**, the relevant portion of the said judgment reads as under:

¹ Behari Lal Ram v. Karan Chand Sahani, AIR 1968 P&H 108; Clarence Pais v. UOI, (2001) 4 SCC 325; Om Prakash Yadav & Ors v. Kanta Yadav, 2017 SCC OnLine Del 6961; Kanta Yadav v. Om Prakash Yadav & Ors., (2020) 14 SCC 102.



“7. This is a second appeal. It is yet at the stage of admission. On behalf of the appellant, it has been urged that the question about the genuineness of the will could only be decided by the probate court and civil court has no jurisdiction to go into the matter. Reliance has been placed upon 154 (2008) DLT 354 Priyanka Vivek Batra v. Neeru Malik to support the submission that under Section 34 of the Specific Relief Act, declaration can be granted only of any legal character or right to any property. It is pointed out that in this case, the Bench of the Delhi High Court had held that no declaration can be made during the pendency of probate proceedings. Reliance upon this judgment is totally misplaced. Admittedly, in this case, there are no probate proceedings pending. It is also an admitted case that in Union Territory of Delhi, probate of a will is not mandatory. The judgment of 2002 VAD (Delhi) 733 Manmohan Singh v. Smt. Joginder Kaur also does not help the case of the appellant. In this case, it had, in fact, been held that a suit for declaration is maintainable where either a party has been evicted from possession, secondly, a person must possess a letter of administration before filing the suit and, thirdly, where there is a contention of the fact that proceedings shall take as nearly as may be a form of a regular suit. Condition no. 1 has been fulfilled; plaintiff has categorically averred that she had been evicted from her possession; suit was maintainable. Reliance upon the judgment of the Madras Bench reported in AIR 1992 Madras 136 Alagammai v. Rakkammal is also unwarranted. In this case, court has held that where a decision is rendered by an ordinary civil court and a decision is rendered by a probate court on question of truth, validity, genuineness and due execution of a will, the decision of the probate court is a judgment in rem, which will bind not only the parties before it, but the whole world. There is no dispute to this proposition. It is wholly inapplicable to the present case as admittedly there are no probate proceedings filed or pending.

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9. No substantial question of law has arisen. Both the fact finding courts have delved into the evidence-both oral and documentary-to arrive at the finding that the will of the deceased father-in-law was a valid and binding will. The plaintiff was rightly entitled to her share in the suit property pursuant to this document. No interference is called for in the impugned judgment as no substantial question of law has arisen. Appeal as also the pending applications are dismissed in limine.”

(Emphasis supplied)

A civil court cannot examine the validity of a Will for the purpose of granting a probate of the Will; however, where a Will is relied upon by a party in support of its claim/defence, the civil court is well within its jurisdiction to examine the genuineness of the Will for deciding the said claim/defence.

9.4 Therefore, the proposed second question of law as raised by Appellants



also does not arise for consideration.

10. To conclude, the arguments raised by the Appellants do not raise any question of law much less a substantial question of law and the grounds merely challenge the finding of facts.

11. In this regard, it would be appropriate to refer to the case of *Nazir Mohamed v. J. Kamal and others (2020) 19 SCC 57* wherein the Supreme Court observed that second appeal only lies on a substantial question of law and the party cannot agitate facts or call upon the High Court to re- appreciate the evidence in a second appeal. The operative portion to this aspect reads as under:

*“22. A second appeal, or for that matter, any appeal is not a matter of right. the right of appeal is conferred by statute. A second appeal only lies on a substantial question of law. If statute confers a limited right of appeal, the court cannot expand the scope of the appeal. **It was not open to the respondent-plaintiff to reagitate facts or to call upon the High Court to reanalyse or reappreciate evidence in a second appeal.**”*

23. Section 100 CPC, as amended, restricts the right of second appeal, to Only those cases, where a substantial question of law is involved. The existence of a "substantial question of law" is the sine qua non for the exercise of jurisdiction under Section 100 CPC..

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28. To be “substantial”, a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way.

*29. **To be a question of law "involved in the case, there must be first, a foundation for it laid in the pleadings, and the question should emerge from the sustainable findings of fact, arrived at by courts of facts, and it must be necessary to decide that question of law for a just and proper decision of the case."***

(Emphasis supplied)

12. This second appeal is accordingly dismissed and the order of the First Appellate Court is upheld.

13. In this case, the Respondents have not been awarded any mesne profits for the continuing unauthorized occupation of the Appellants and therefore,



the Appellants have no deterrent for failing to vacate the suit property. Therefore, the costs in the appeal are awarded in favour of the Respondents.

14. Pending application(s) stands disposed of.

RSA 153/2023, CM APPL. 42107/2023, CM APPL. 42108/2023, CM APPL. 45436/2023 & CM APPL. 48519/2023

15. The present second appeal filed under Section 100 of the Code of Civil Procedure, 1908 ('CPC') impugns the judgment dated 28.02.2023 passed by ASCJ, Patiala House Courts, New Delhi ('First Appellate Court') in RCA No. 4/2017, titled as **Azad Singh & Ors. v. Krishna Devi & Ors.**, whereby the First Appellate Court dismissed the appeal filed against the judgment dated 20.04.2015 passed by Civil Judge, Central (09), Tis Hazari Courts, Delhi ('Trial Court') in CS No. 70/2011, titled as **Krishna Devi & Ors. v. Azad Singh & Ors.**, whereby the suit filed by the plaintiff for perpetual and mandatory injunction was decreed in favour of plaintiffs.

15.1 The Appellants herein were defendants and the Respondents herein were the plaintiffs before the Trial Court.

15.2 The Civil Suit No. 70/2011 ('2nd Suit') was filed during the pendency of the Civil Suit No. 72/2011 ('1st suit') on a fresh cause of action which arose during the subsistence of the 1st Suit. The Respondents in 2nd suit sought relief of mandatory and permanent injunction and direction to the Appellants to remove the articles lying on the roof of the first floor of the property bearing WZ-134, Naraina Village, New Delhi ('suit property').

15.3 The District Judge vide order dated 13.12.2010 ordered that both the suits were to be consolidated for the purpose of disposal and that the evidence recorded in the 1st Suit shall also be read in the 2nd Suit.

15.4 The Trial Court has held that the Respondents are entitled to a decree



of a mandatory injunction and the Appellants have been directed to remove the cooler, water pots, staircase or any other items lying on the roof of the Respondent's room, forming the subject matter of the 1st suit, forming portion of the entire property (as defined above). The Trial Court also issued a permanent injunction restraining the Appellants from using the said roof in any manner. The First Appellate Court has upheld the decree.

15.5 The judgment of the Trial Court and the First Appellate Court in this second appeal relies upon the proof of the genuineness registered Will dated 15.10.1987 by which the Respondents similarly derived their ownership rights in the suit property and made out a case for grant of relief as prayed for.

15.6 The Trial Court and the First Appellate Court as well have relied upon the reasons which weighed with them while passing a decree with respect to the ground floor and second floor property in the 1st Suit.

16. The learned Counsel for the Appellants herein has not addressed any separate arguments in this second appeal.

17. No arguments have been urged in this second appeal which would give rise to any substantial question of law.

18. Accordingly, this second appeal also stands dismissed. The costs in the appeal are awarded in favour of the Respondents. Pending application(s) stands disposed of.

MANMEET PRITAM SINGH ARORA
(JUDGE)

DECEMBER 1, 2023

Aks/sk