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

Reserved on: 16th November, 2023
Date of Decision: 12th February, 2024

+ RSA 192/2019

KANWAL NAIN JOHAR Appellant

Through: Mr. Manmeet Singh Maini, Advocate

versus

ASHOK KUMAR JOHAR & ORS Respondents

Through: Ms. Amrit Kaur Oberoi, Adv. for R-3
 None appears for R-1 & R-2

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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:

1. The present second appeal filed under Section 100 of Civil Procedure Code, 1908 ('CPC') impugns the judgement and decree dated 06.05.2019 passed by the Additional District Judge - 03, North District, Rohini Court, Delhi in RCA No. 60/2016, titled as **Sh. Kanwal Nain Johar v. Sh. Ashok Kumar Johar & Ors.** ('First Appellate Court')

1.1. The Appellant herein is the original defendant no. 1, Respondent No. 3 is the original defendant no. 2 and Respondent Nos. 1 and 2 are the original plaintiffs in civil suit bearing no. 965/2006 filed before the SCJ-cum-RC, West District, Tis Hazari Courts, Delhi in ('Trial Court').



1.2. The civil suit was filed for seeking [against the Appellant herein]the relief of recovery of possession of the ground floor (G.F) portion of Shop No. 16, Outram Lines, Opposite T.B. Hospital, Kingsway Camp, Delhi ('suit property') as well as for recovery of arrears of mesne profits of Rs. 70,000/- for the period reckoned from 07.10.2005 to 06.05.2006 and future mesne profits at Rs. 10,000/- per month, until the possession of the same is handed over to the Respondent Nos. 1 and 2 herein.

Brief Facts

2. For the ease of reference, the parties to the present appeal are referred according to their original status before the Trial Court.

2.1. The plaintiffs and the defendants are siblings. The plaintiffs filed the civil suit in their capacity as the lawful owners of the suit property, which they inherited from their late father, Dr. Mangal Sain Johar ('MSJ') through testamentary succession. It was averred in the plaint that the father of the parties, MSJ died on 07.10.2005; and during his lifetime he was the absolute owner and in possession of the properties (i) bearing no. 159, Dr. Mukherjee Nagar (West), Delhi ('Residential Property') and (ii) shop no. 16, Outram Lines, Opposite T.B. Hospital, Kingsway Camp, Delhi ('Commercial Property'). It was stated that with respect to the aforesaid properties MSJ had executed a Will dated 28.05.2003 ('Will dated 28.05.2003') duly registered in the office of the Sub-Registrar- VI, North-West District, Delhi (Exhibit PW-1/2) in favour of plaintiffs and the defendants.

2.2. By virtue of the aforesaid Will dated 28.05.2003, the plaintiffs inherited ownership rights in respect of the suit property (i.e., the ground floor)as well as, separately, joint ownership rights with defendant no. 2 in respect to roof of the second-floor (2nd) portion of the Commercial Property. It was stated that



the basement and first-floor (1st) of the said Commercial Property was bequeathed under the Will exclusively in favour of the defendant no.1.

2.3. It was further, stated in the plaint that the first-floor (1st) portion of the Commercial Property is in actual physical possession of the plaintiffs and they undertake to handover the possession to defendant no. 1 simultaneously upon receipt of possession of the suit property (i.e., the ground floor).

2.4. Defendant No. 2 inherited the second floor (2nd) portion of the said Commercial Property and was in possession of the said floor. It was stated in the plaint that no relief is sought against defendant no. 2 and she has been impleaded as a proforma party.

2.5. In the plaint, it was further stated that a legal notice dated 22.03.2006 was issued to defendant no.1 calling upon him to vacate and hand over the possession of the suit property to the plaintiffs, however, as defendant no.1 failed to accede to their request, the aforesaid civil suit bearing no. 965/2006 was instituted before the Trial Court.

3. The defendant no.1 filed his written statement and set up a defence that the Will dated 28.05.2003 is forged and fabricated since their late father, MSJ had during its lifetime executed only one Will dated 20.09.1982 ('Will dated 20.09.1982') registered at the office of Sub-Registrar – 1, Kashmere Gate, Delhi dated 20.09.1982 (Exhibit DW-4/A). It was stated that as per Will dated 20.09.1982 the testator i.e., MSJ has bequeathed all the movable and immovable properties and amounts standing in his accounts amongst his three sons i.e., (plaintiffs and defendant no.1) in equal proportion. It was stated therefore, as per the Will dated 20.09.1982, he is the rightful and lawful owner of the suit property. It was also stated that defendant no. 1 has incurred costs in the re-construction of the super structure standing on the Commercial Property



and therefore, he is in rightful possession of the suit property.

Findings of the Trial Court and First Appellate Court

4. The Trial Court after perusing the evidence partly decreed the suit and directed the recovery of possession of the suit property in favour of the plaintiffs. The Trial Court returned a very categorical finding after examining the testimonies of five witnesses (which included not only attesting witnesses to the will [PW-3 and PW-5] but witness [PW-2] from the office of the Sub-Registrar as well) that the execution of the Will dated 28.05.2003, propounded by the plaintiffs, and its registration in the office of the Sub-Registrar stands duly proved; and, on the other hand defendant no.1 has failed to adduce any evidence to prove that the Will dated 28.05.2003 is forged and fabricated. In view of the said finding, the Trial Court held that the reliance placed by defendant no.1 on the Will dated 20.09.1982, was of no consequence.

4.1. However, the prayer for a decree of recovery of damages and future mesne profits was declined by the Trial Court on the ground that since the plaintiffs are admittedly in possession of the first-floor (1st) of Commercial Property which fell into the share of defendant no.1 as per the Will dated 28.05.2003, and they as well are not paying any damages to defendant no.1 for the said possession, the Trial Court, therefore, held that the plaintiffs are not entitled to any decree of damages or future mesne profits in respect of the suit property.

5. Thereafter, before the First Appellate Court, defendant no 1 had challenged the decree of possession of the suit property passed by the Trial Court in favour of the plaintiffs by filing RCA No. 60/2016. On the other hand, plaintiffs also preferred a cross-appeal bearing no. RCA No. 70/2016 being aggrieved by the rejection of prayer for a decree of recovery of damages and



future mesne profits by the Trial Court.

6. By a common judgment dated 06.05.2019, the First Appellate Court upheld the decree of possession and concurred with the finding that the Will dated 28.05.2003, propounded by the plaintiffs, has been proved in accordance with law.

6.1. The defendant no. 1 had also filed an application under Order 41 Rule 27 of CPC for leading additional evidence. The application mainly sought the relief for comparison of the signatures of their late father, MSJ on Will dated 28.05.2003 with the signatures on (i) Will dated 20.09.1982 and (ii) documents submitted with the Delhi Development Authority ('DDA') in 2002. The said application was rejected by the First Appellate Court after perusing the orders dated 07.07.2011 and 31.03.2012 passed by the Trial Court dismissing similar applications seeking same reliefs. Accordingly, defendant no. 1's appeal RCA No. 60/2016 was dismissed.

6.2. In the cross-appeal preferred by the plaintiffs i.e., RCA No. 70/2016, the First Appellate Court set aside the order of the Trial Court rejecting the prayer for decree of damages and future mesne profits in respect of the suit property to the plaintiffs. The First Appellate Court held that plaintiffs were held entitled to the arrears of damages at Rs 70,000/- from 07.10.2005 to 06.05.2006 and future mesne profits at Rs. 10,000/- per month in respect of the suit property until the possession of the same is handed over by defendant no.1 to plaintiffs.

7. Aggrieved by the said orders of the Trial Court and the First Appellate Court defendant no.1 has filed the present appeal.

Arguments on behalf of the Appellant i.e., defendant no. 1

8. Learned counsel for the Appellant i.e., defendant no. 1 states that the



Courts below fell in error in decreeing the suit for possession and awarding mesne profits by relying upon the Will dated 28.05.2003. He states that the said Will has not been proved in accordance with law. He states that the age of the testator, MSJ in the year 2003 was above 90 years and he did not visit the office of the concerned Sub-Registrar for its registration. He states that the signatures and thumb impression was not affixed on the said Will in the presence of the Sub-Registrar. He states that the testator, MSJ was bed-ridden in May, 2003 and could not have visited the office of the Sub-Registrar. He states that there are contradictions in the testimony of PW-1 and PW-4, which are material and have not been appreciated by the Courts below.

8.1. He states that the Courts below erred in admitting the Will dated 28.05.2003 in evidence even though the plaintiffs have not obtained any probate of the said Will.

8.2. He states that defendant no. 1 relies upon the Will dated 20.09.1982 stating the same to be their father's, MSJ last and the final will. He states that defendant no. 1 is rightfully in possession of the suit property in furtherance of the said Will. He states that in the past, the house tax payable to the municipal body for the suit property has been paid by the said defendant no.1. He states that the Commercial Property was re-constructed in 2002-2003 after demolishing the old structure and at this stage, the defendant no. 1 contributed towards the cost of construction.

8.3. He states that though the testator, MSJ had three (3) sons and two (2) daughters, however, as per the Will dated 20.09.1982, there was no bequest made in favour of either of the daughters. He states in the purported Will dated 28.05.2003 bequest has been made in favour of three (3) sons and one (1) daughter. He states that no bequest has been made in favour of other daughter



of MSJ i.e., Mrs. Kamla Kapoor. He states that the extent of construction existing in the Commercial Property has been wrongly described in the said Will. He states that these suspicious circumstances have not been considered by the Courts below.

8.4. He states that the signatures of the testator, MSJ on the Will dated 28.05.2003 are forged. He states that he is relying upon a voice recording of the plaintiffs admitting to the manipulation of the said Will. He states that the voice recording could not be placed on record before the Trial Court due to the negligence of the erstwhile counsel and an application under Order 41 Rule 27 CPC (CM Application No. 6831/2020) has been filed before this Court for taking the same on record.

Arguments on behalf of the Respondent No. 3 i.e., defendant no. 2

9. In reply, learned counsel for Respondent No. 3 i.e., defendant no. 2 states that in the written statement filed by defendant no. 1, there was no allegation as regards to the alleged forgery of the signatures of the testator, MSJ on the Will dated 28.05.2003. She states that the defendant no. 1 pleaded a bare denial on the validity of the said Will. She also relies upon the examination-in-chief dated 28.05.2010 of defendant no. 1 (who examined himself as DW-1) to contend that no specific dispute on the signatures on the Will was raised by defendant no. 1.

9.1. She states that the Will dated 28.05.2003 has been duly proved by leading the evidence of the attesting witnesses to the Will i.e., PW-3 and PW-5. She states that the defendant's witnesses i.e., DW-2 and DW-3 admitted that the testator, MSJ was in sound disposing mind until his death. She states that the testator, MSJ expired on 07.10.2005 and the defendant no. 1 was a government employee until March, 2007. She states that as per his terms of



employment, defendant no. 1 could not carry on any business during his employment. She states that defendant no.1's contention that he is not a government employee and was carrying on medical practice in the suit property to carry on with the legacy of his father, MSJ, on part time basis, from the suit property is incorrect.

9.2. She states that the alleged audio recording sought to be brought on record for which CM Application No. 6831/2020 is filed, has never been placed on record in these proceedings. She states that a criminal complaint on the same allegations (of the Will being forged) filed under Section 156 of the Code of Criminal Procedure, 1973 against the plaintiffs already stands dismissed by the concerned Criminal Court. She states that these allegations are, therefore, without any basis.

9.3. She states that under the Will dated 20.09.1982, no bequest was made to the daughters. She states that under the Will dated 28.05.2003, defendant no. 2 has been bequeathed second floor (2nd) of the Commercial Property along with separate roof rights jointly with the plaintiffs. She states that defendant no. 2 is in exclusive possession of the second floor (2nd) of the Commercial Property in terms of the Will dated 28.05.2003.

9.4. She states that the Courts below have returned concurrent findings of the fact holding that the execution of the Will dated 28.05.2003 has been duly proved by the attesting witnesses to the said Will.

9.5. She states that defendant no. 1 has failed to raise any question of law in the memorandum of appeal. She states that the arguments raised assail the finding of facts returned by the Courts below.

Analysis and findings

10. This Court has considered the submissions of the learned counsel for the



parties and perused the record.

11. The sole argument raised by the defendant no. 1 is that the Will dated 28.05.2003 has been wrongly admitted in evidence by the Courts below on two (2) grounds – (i) as the plaintiffs have not obtained a probate of the said Will and; (ii) the signatures of the testator, MSJ on the said Will are forged and fabricated.

12. As per the Will dated 28.05.2003, the testator, MSJ bequeathed the Residential Property to his three (3) sons i.e., plaintiff nos. 1 and 2 as well as defendant no. 1; to the exclusion of his two (2) daughters. In the said Will, the Commercial Property was bequeathed to his three (3) sons and one (1) of his daughters (i.e., defendant no. 2).

13. The plaintiffs in order to prove the genuineness of the Will dated 28.05.2003 led the evidence of the two (2) attesting witnesses to the Will i.e., Shri. R. S. Beniwal as PW-3 and Sh. Joginder Singh Sethi as PW-5. The plaintiffs also summoned the concerned official from the office of the Sub-Registrar VI-A as PW-2 for production of the copy of the original Will registered with the said office. PW-5 was the morning walk partner of the testator, MSJ and PW-3 is an advocate. The said attesting witnesses and the official witness were cross-examined by defendant no. 1.

14. The Trial Court after reviewing the evidence of the attesting witnesses and the official witness returned a finding that the execution of the Will and its registration has been duly proved on record. The finding of the Trial Court reads as under:-

“10.....PW-2 also proved that the Will dated 28.05.2003 was executed by Sh. Mangal Sain Johar and the same' was registered in the office of Sub- Registrar bearing registration No. 21025, Book No. Ill, Volume No. 2148 at pages- 35 & 36 dated 28.05.2003.



PW-3 is also one of the attesting witness on the Will. This witness stated that he has signed the Will and the same was executed and presented before the Office of Sub-Registrar for registration. This witness also stated that the said Will bears the signatures of Dr. Mangal Sain Johar on both pages at Point- A and it also bears the thumb impressions of Dr. Johar. This witness stated that after Dr. Johar had signed the said Will, Sh. Joginder Kumar Sethi signed the said Will at Point-B, thereafter, he signed the said Will at point- C. Nothing fruitful was extracted during the cross examination of PWs- 1, 2&3. PW-4 also deposed on the lines of affidavit.

PW-5 is another witness to the Will, who has stated that the deceased testator had told him before executing the will about it, as he was his morning walk partner. PW-5 has stated that he has affixed his signatures on Ex- PW-1/2 outside the office of lawyer and at the place where it was typed. This witness also stated that Dr. Mangal Sain Johar was the first person to sign the Will and thereafter, he affixed his signatures as well as thumb impression thereupon. Thus, the execution of Will is duly proved and the same was signed by both the witnesses and it was registered with the office of Sub-Registrar.

11. Ld. counsel for the defendants has vehemently contended that the Will dated 28.05.2003 is forged and fabricated. As I observed earlier that the defendant is not able to show any ground to prove that the Will dated 28.05.2003 is forged and fabricated. Both the witnesses in the Will dated 28.05.2003 has clearly stated in the court that Will was executed in their presence and they have signed as witness. Moreover, the defendant no. 1 has not adduced any evidence to show that the Will dated 28.05.2003 is forged and fabricated. The Will is registered with the Office of Sub-Registrar, thus, the Will dated 28.05.2003 is duly proved by the plaintiffs.....

15.....I am of the view that the defendant no. 1 is not able to challenge the testimony of PWs and to raise any suspicion about the execution of Will dated 28.05.2003. Thus, this issue is decided in favour of the plaintiffs and against the defendants."

(Emphasis Supplied)

15. The defendant no. 1 has contended before this Court that the testator, MSJ did not appear before the concerned Sub-Registrar on 28.05.2003 for its registration as the testator, MSJ was bed ridden. This Court has perused the cross-examination of the attesting witnesses PW-3 and PW-5; it is observed that no such suggestion was given to the said attesting witnesses by defendant no. 1. This Court has also perused the testimony of defendant no. 1, who



examined himself as DW-1. No such stand has been taken by DW-1 in his testimony given to the Court. It is, therefore, evident that this contention of defendant no. 1 is a plea, which has no basis in the pleadings and evidence. In fact, no such ground has been raised in the memorandum of appeal filed before this Court. A factual plea cannot be permitted to be raised for the first time during oral arguments in the second appeal as held by the Supreme Court in the case ***Bachhaj Nahar v. Nilima Mandal and another*, (2008) 17 SCC 491** at paragraph 10 which reads as under:

“10. The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are:

(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject-matter of an issue, cannot be decided by the court.

(ii) A court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint

(iii) A factual issue cannot be raised or considered for the first time in a second appeal.”

(‘Emphasis Supplied’)

16. The counsel for defendant no. 2 has rightly relied upon the evidence of defendant no. 1’s witnesses i.e., DW-2 and DW-3, who are the owners in possession of the adjoining shops. The said witnesses have categorically stated that the testator, MSJ was mentally fit right until his demise (on 07.10.2005). Therefore, the contention of defendant no. 1 that the testator, MSJ being above 90 years of age at the time of the execution of the Will dated 28.05.2003 is of no consequence. In fact, as per the deposition of defendant no. 1 himself in his cross-examination, the testator, MSJ took active interest in the re-construction



of the Commercial Property in the year 2002-03 and purchased additional area from DDA; for which the testator, MSJ personally attended the office of DDA for execution of the supplementary lease deed on 27.11.2002. The submissions of defendant no. 1 itself evidences that the testator, MSJ despite his advance age of 90 years was agile, able and taking independent decisions with respect to his personal properties in 2002-2003. This Court therefore, finds no merit in the submission of the defendant no.1 that the testator, MSJ was incapable of attending the office of the Sub-Registrar for registration.

17. The testator, MSJ by his earlier Will dated 20.09.1982 had bequeathed his Residential Property and Commercial Property equally to his three (3) sons without specifying the floors to which each one of them would be specifically entitled. He excluded his two (2) daughters from the said Will dated 20.09.1982. However, in the subsequent Will dated 28.05.2003, the testator, MSJ while maintaining the bequest of the Residential Property upon his three (3) sons, however, specified the portions which each one of them would inherit.

With respect to the Commercial Property as well, he specified each of the floor which his sons would inherit. In addition, he made a bequest in the Commercial Property in favour one of his daughters i.e., defendant no. 2. Thus, the material change in the bequests between the two (2) Wills is the specification of the floor-wise ownership of each of the legatee. In 2002-2003, a significant development took place in as much as the Commercial Property (which earlier consisted of only one (1) room and a courtyard) was re-developed by the testator, MSJ and a super structure comprising of basement, ground-floor (G.F), first-floor (1st), second-floor (2nd) and terrace came into existence. The desire of the testator, MSJ to make a bequest of a portion of the property in favour of one (1) of his daughters due to this changed



circumstance appears to be natural. This Court therefore finds no suspicious circumstances surrounding the execution of the Will dated 28.05.2003 as alleged by the defendant no. 1.

18. The submission of defendant no. 1 that Will dated 28.05.2003 could not have been admitted in evidence as it was not probated is without any merit. The Trial Court has rightly held that no probate of the Will is required in the State of Delhi. In this regard it would also be appropriate to refer to the case of ***Azad Singh & Ors. v. Krishna Devi & Ors.*** and a connected matter passed by this Court decided on 01.12.2023 in **RSA 153/2023, 2023:DHC:8756** wherein on a more detailed analysis of this issue with regards to probate of the Will required in the State of Delhi, it was observed as under:

“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 Delhi [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]. 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:*

“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 V AD (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.”

(Emphasis supplied)

19. The defendant no. 1 himself is relying upon the Will dated 20.09.1982 to resist the plaint and has admittedly not obtained any probate for the said Will; and therefore, the said objection of probate has been raised without any basis. In any event, the plaintiff nos. 1 and 2 have duly proved the genuineness of the Will dated 28.05.2003 by leading the evidence of the attesting witnesses i.e., PW-3 and PW-5 to the Will.

20. The defendant no. 1 has contended that the signatures and thumb impression of the testator, MSJ as they appear on the Will dated 28.05.2003 are forged and fabricated. The Trial Court has held that no evidence has been adduced by defendant no. 1 to show that the Will does not bear the signatures and thumb impression of the testator, MSJ and on this ground after due consideration rejected the said contention of defendant no. 1. The First Appellate Court as well after perusal of the record rejected the said argument on the ground of absence of any evidence. The First Appellate Court as well opined that in view of the testimony of the two (2) attesting witnesses to the Will, the said plea had no basis. Before this Court, in second appeal the said plea is sought to be substantiated by now bringing on record an alleged audio recording by way of CM Application No. 6831/2020. This Court is of the considered opinion that in the facts of this case, the alleged audio recording cannot be permitted to be brought on record at the stage of second appeal. The



details of the alleged audio recording are not mentioned in this application and the audio recording itself is not filed on record. The suit before the Trial Court was instituted on 22.05.2006 and the attempt to place on record the alleged audio recording 13 years later by way of this application cannot be permitted. The defendant no. 1 has contended that this audio recording could not be placed on record before the Trial Court due to the inadvertence of the earlier counsel; in the opinion of this Court this is not a valid or a legal ground for permitting leading of additional evidence at the stage of a second appeal. The remaining documents pertaining to criminal proceedings initiated between the parties in 2019 are not relevant for deciding the issues arising in the suit. The First Appellate Court is the final Court of facts and for this reason additionally, the present application seeking to adduce facts is not maintainable. Accordingly, CM Application No. 6831/2020 seeking permission to place on record additional documents is dismissed.

21. The defendant no.1 has lastly challenged the award of damages passed by the First Appellate Court at Rs. 10,000/- per month w.e.f. 07.10.2005 until the date of handing over the possession of the suit property. The defendant no. 1 has challenged the same on the ground since he is the owner in possession of the suit property as per Will dated 20.09.1982, and therefore, he is not liable to pay any damages to the plaintiffs. In view of the concurrent findings of the Courts below that the suit property has devolved upon plaintiff nos. 1 and 2 exclusively as per Will dated 28.05.2003, which stands duly proved as the last and final Will of their father, MSJ; and therefore, the contention of defendant no. 1 is without any merits. There is no challenge to the rate of damages at Rs.10,000/- per month.

22. The defendant no. 1 has also contended that plaintiff nos. 1 and 2 are in



possession of the first floor (1st), which has been let out on rent and therefore, there was no occasion to award damages at Rs. 10,000/- per month against the defendant no. 1. This Court has perused the ground of memorandum of appeal in RCA No. 70/2016 filed by plaintiff nos. 1 and 2. It is stated in the said appeal that the first-floor(1st) of the Commercial Property fetches rent which is much lesser than the rent to which they would have been entitled if the suit property i.e. ground-floor of Commercial Property was made available to them. The First Appellate Court after duly considering the grounds of appeal reversed the order of the Trial Court on the issue of damages and future mesne profits. This Court finds no infirmity in the order passed by the First Appellate Court with regards to awarding damages at Rs. 10,000/- per month. Accordingly, the challenge to the award of damages is also without any merit and requires no interference.

23. In the considered opinion of this Court, the First Appellate Court has duly analysed the evidence and the Appellant/defendant no.1 has been unable to show that any wrong inference has been drawn by the said Court from proved facts by applying the law erroneously. It is not open to this Court to review the fact findings of the Courts below. The arguments raised by the Appellant do not raise any question of law much less a substantial question of law and the grounds merely challenge the finding of facts.

24. 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 Cr.

.....

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)

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

26. Pending applications, if any, stands disposed of.

MANMEET PRITAM SINGH ARORA, J

FEBRUARY 12, 2024/rhc/ms