



2024:DHC:1544



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

% Judgment reserved on: 24.01.2024
Judgment pronounced on: 28.02.2024

+ RFA 858/2019 & CM APPL. 42954/2019, CM APPL. 60747/2023

RUPALI NATH Appellant

versus

ANUP KUMAR CHAUDHARY Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Ninad Laud, Mr. Sahil Tagotra, Ms. Rashika Narain and Ms. Abhivyakti Banerjee, Advocates

For the Respondent : Mr. Sanjeev Kumar and Mr. Ram Kumar Prasad, Advocates

CORAM:

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

J U D G M E N T

TUSHAR RAO GEDELA, J.

1. The present appeal has been filed by the appellant/defendant against the impugned judgment and decree dated 26.07.2019 passed by the learned Additional District Judge-03, South-East, Saket Courts, New Delhi in a suit bearing no. C.S. No.8264/2016 for declaration, mandatory and permanent injunction, and recovery of damages/mesne profit filed by the respondent/plaintiff.

Signature Not Verified

Digitally Signed
By: VINOD KUMAR
Signing Date: 01.03.2024
15:52:09

RFA 858/2019

Page 1 of 46



2024:DHC:1544



2. The brief facts as culled out from the list of dates as provided in the petition are as follows:-

2.1 The Appellant and the Respondent in the present Regular First Appeal are the son and daughter of Late K.C. Chaudhary, and are presently residing at G-1413, C.R. Park, New Delhi - 110091 ("*suit property*").

2.2 The aforesaid suit property was allotted to Late K.C. Chaudhary by way of Lease by the President of India *vide* a Memorandum of Agreement dated 18.02.1969.

2.3 That the late father of the appellant and the respondent, Sh. K.C. Chaudhary was put in possession of the suit property on 18.02.1969 and was granted a Certificate of Possession to that effect.

2.4 The suit property was granted to Late K.C. Chaudhary by way of Lease dated 11.11.1975 by the President of India.

2.5 On 15.09.2000, the aforesaid suit property was converted from Leasehold to Freehold property during the lifetime of the father of the parties, Late K.C. Chaudhary.

2.6 On 05.06.2001, Sh. K.C. Chaudhary died intestate, and was thereafter survived by his wife Smt. Lakshmi Chaudhary (mother of the parties herein). As per the case of the appellant, ever since the demise of the father, the appellant has been residing on the ground floor of the suit property along with mother (Smt. Lakshmi Chaudhary).



2024:DHC:1544



2.7 The mother, Ms. Lakshmi Chaudhary also died intestate on 30.05.2012. It is the case of the appellant that upon her death, the Appellant and Respondent remained the only legal heirs of the suit property, being Class I legal heirs in accordance with the principles of Dayabhaga School of Hindu Law.

2.8 On 16.05.2016, the appellant received a Legal Notice from the respondent, alleging and mentioning for the first time ever, that Late K.C. Chaudhary had left a Will dated 10.05.2001 with respect to the suit property.

2.9 The appellant herein refuted all claims made in the aforesaid legal notice by way of a letter dated 07.06.2016 sent on her instructions by her advocate. In the said reply, the appellant specifically mentions, *inter alia*, in paragraph 4 that she was shocked by the claim of the respondent regarding the alleged Will executed by her father. Neither the respondent himself, nor the mother of the parties had ever mentioned about any alleged Will executed by the father until the aforesaid Legal Notice dated 16.05.2016, i.e., 15 years after the death of the father, and 4 years after the death of the mother.

2.10 As per the case of the appellant, she also addressed a letter dated 20.07.2016 to the Ministry of Urban Affairs (Department of Urban Development) apprising the Ministry of the apprehension of the appellant that someone may attempt to illegally get the mutation of the suit property done by forging false signatures of the appellant or producing some forged



2024:DHC:1544



undertaking on behalf of the appellant, and that if any such application or attempt is made, the appellant be immediately informed of the same. The appellant also made a similar request by way of online RTI Application on 21.12.2017.

2.11 In fact, in reply dated 15.01.2018 to the aforesaid RTI Application, the Ministry of Urban Development stated that till date, no reference has been received by it to change the ownership of the suit property.

2.12 On 01.07.2016, the Respondent herein instituted a Civil Suit against the Appellant herein, bearing C.S. No. 8264 of 2016 for declaration, mandatory and permanent injunction and recovery of damages / *mesne* profits on the basis of the subject Will dated 10.05.2001.

2.13 It is the case of the appellant that upon receipt of the Legal Notice dated 16.05.2016 as also the aforesaid Suit, the appellant realised that the respondent is seeking to exclude her from the joint family property and from exercising her right to half share in the said property. Accordingly, the appellant herein filed a Suit to enforce her right of share in the said suit schedule property and obtain possession thereof, numbered as CS (OS) No. 447 of 2016.

2.14 On 15.03.2018, the appellant herein filed her Written Statement to the Complaint filed by the Respondent herein, being C.S. No. 8264 of 2016.

2.15 The aforesaid suit *inter alia* for Declaration, filed before the Ld. ADJ, Saket, bearing No. C.S. 8264/2016 came to be decreed *vide* the impugned order dated 26.07.2019 in favour of the respondent herein.



2024:DHC:1544



CONTENTIONS OF THE APPELLANT:-

3. Mr. Ninad Laud, learned counsel for the appellant challenges the judgement and decree passed by the learned Trial Court on basically 3 grounds, which according to him, directly goes to the root of the matter and does not entitle the Respondent/Plaintiff for any relief as sought for, through the suit in question. The grounds/standpoints for challenge are as follows.

4. Firstly, learned counsel challenges the very proving of the said Will in question as mandated under Section 63 of the Indian Succession Act, 1925 and also as per Section 68 of Indian Evidence Act, 1872. He submits that, although as per Section 68 of Indian Evidence Act, only one attesting witness is required to prove the will, however, the same attesting witness must also testify the fact that the other attesting witness had also the signed the same Will before, or with him, at that place and at that instance only. He thus submits that mere knowledge or identification of the second attesting witness by the proving attesting witness called for examination is not sufficient.

5. Learned counsel draws the attention of this Court to page no.213 of the paperbook which is the cross examination dated 25.10.2018 of PW-2 Biplab Mazumdar, one of the attesting witness, called to prove the execution of the Will, wherein it was stated by him that:

“Q. Do you know Abdul Karim S/o Sh. A.P. Alikunj, R/o. 02/117A, DDA Flats, Kalkaji, New Delhi-110019?”



2024:DHC:1544



Ans. No.

Q. Was Abdul Karim S/o Sh. A.P. Alikunj, R/o 02/117A, DDA Flats, Kalkaji, New Delhi-110019 present with you?

Ans. Yes. (Vol. He was present at the said campus of the registrar office INA, Vikas Sadan, New Delhi)."

Thus, on the basis of the disposition made by the attesting witness in his cross examination, learned counsel submits that the same raises a serious question over the genuineness of the attesting witness and their signing and attesting the present Will in question.

6. Secondly, learned counsel for the appellant further argues that the Will in question on the basis of which the learned Trial Court had rendered the impugned judgement, is a product of circumstances in question and the same is replete with instances of circumstances which posed a great amount of suspicion over the genuineness, validity and execution of the Will in question. In furtherance of that, learned counsel lays out 5 major suspicious circumstances which directly attack the genuineness of the Will in question, which are as under:-

6.1 Will - Prepared/Registered in year 2000/2001, Propounded in Year 2016.

Learned Counsel for the appellant submits that even it is assumed, though without admitting, that there was a Will of the deceased father, it is suspicious as to what refrained or detained



2024:DHC:1544



the Respondent/Plaintiff from propounding the Will immediately after the death of the father. The mere fact that the Will is registered on 10.05.2001, and propounded only in the year 2016 through the Legal Notice dated 16.05.2016 issued by the Respondent/Plaintiff to the Appellant/Defendant, is itself a circumstance which creates doubt over the genuineness of the Will.

Thus, the non-disclosure or keeping the Will under the wraps for a span of more than a decade clearly points to the aspect of the Will being a creation of afterthought and thus, is forged and fabricated one.

6.2 Non-Mentioning of Will in Informal Letter dated 06.07.2015 for Vacating the Suit Premises.

In furtherance of the above, learned counsel submits that the said Will was not even mentioned in the informal letter dated 06.07.2015 by one Mrs. Ruby, wife of the Respondent/Plaintiff, to the Appellant/Defendant. In the said letter, Mrs. Ruby had requested the Appellant/Defendant to vacate the suit premises in question on account of wedding of appellant's son and thus citing a very convoluted cultural cause of societal shaming and thus asked the Appellant to vacate the suit premises instantly.

Learned counsel emphasised that the usage of the language in the last paras of the letter specifically denotes the knowledge



2024:DHC:1544



attributed to the Respondent/Plaintiff that their claim of seeking ejectment and possession from the Appellant/Defendant is clearly time barred on the basis of the adverse possession and limitation. According to learned counsel, there was no plausible reason why the said letter did not disclose the existence of the said Will, which leads to only one conclusion that the Will in question is a creation of an afterthought and is entirely forged and fabricated.

6.3 Undated Will

Learned counsel draws attention of this Court to Will which is annexed at Page 134 to point out that the said Will is undated. According to the learned counsel, when a person of such feeble health had gone to the extent of preparation of Will, it is absurd to believe that the same person deliberately or even unintentionally had left the said Will undated.

Learned counsel further submits that absurdity also stems from the fact that not only was the Will undated, it was also purportedly drafted in the month of November 2000, which is actually 6 months prior to the date of its registration which is 10.05.2001. This absurdity, coupled with the fact that the same was registered merely 25 days prior to the death of the testator/deceased father on 05.06.2001, raises much more suspicion over the validity and genuineness of the said Will in question.

6.4 Active preparation of Will by Respondent/Plaintiff only



2024:DHC:1544



Learned Counsel herein takes the attention of this Court to the cross examination of the Respondent/ Plaintiff to submit that it is a settled law that mere fact of the propounder being actively involved in the preparation of the Will is a sufficient ground to raise a serious doubt over the genuineness of the said Will. Therefore, the said Will cannot be taken into consideration as valid and genuine Will, on its face value itself, without the propounder proving its execution to the utmost satisfaction of the Court.

Learned counsel further specifically points to the statements made by the Respondent/Plaintiff in his cross examination which are reproduced as under:-

“Q. Were you present when, this Will was prepared?

Ans. No, (Vol. I was coordinating the preparation of the Will at the lawyers office. Once it was typed I brought the draft of the Will to show my father for his approval and return to the lawyer's office).

Q. Did you inform your mother about the Will while your father was alive?

Ans. No.

Q. Did you inform your sister/defendant about the Will while your father was alive?

Ans. No.”

Learned counsel submits that the statements made by the Respondent/Plaintiff patently manifest the active involvement of Respondent/Plaintiff in the preparation of the said Will, which was admittedly prepared behind the back of the mother and sister i.e. Appellant/Defendant of the Respondent/Plaintiff. Learned



2024:DHC:1544



counsel further points out that no explanation was attributed by the Respondent/Plaintiff to the fact that the preparation of the said Will was not even disclosed to his own mother, during the lifetime of the deceased father/testator of the said Will. According to learned counsel, the creation and registration of the said Will is shrouded in mystery.

6.5 Unjust Disposition

Learned counsel goes on further to say that the very fact of non-disclosure of the preparation of the said Will to the mother and sister, even when he is actively involved in the preparation of the same, coupled with concealing the same and propounding only after 15 years of the death of the testator/deceased father, creates ample amount of suspicion, doubt and questions the very integrity, validity and genuineness of the said Will in question. The same ought to be rejected outright and there could be no question of granting any relief to the Respondent/Plaintiff based thereon.

The very *bonafide* of the Respondent/Plaintiff is absolutely questionable with all such acts perpetrated by him, and give way to irresistible conclusion of the Will being an afterthought to disentitle the Appellant/Defendant, her own sister, from her legally entitled share in the suit property, which is clearly manifested by the aspect of Unjust Disposition of the suit property/assets of the testator.



Learned counsel draws attention of this Court to the operative paras of the Will dated 10.05.2001, which are reproduced as under:-

“4. I hereby bequeath my property at G-1413, Chittaranjan Park, New Delhi as follows: -

(a) On my death, the ground floor shall devolve upon my wife Mrs. Lakshi Chaudhary alongwith proportionate, undivided and indivisible rights over the land beneath. However shall will have only ri^t to possess and enjoy through out her life time. On her death, my son Mr. Arun Kumar Chaudhary will be the sole and exclusive owner of the said portion of the property.

(b) the first floor, second floor and all other constructions above ground floor, on my death, shall develop upon my son, Mr. Anup Kumar Chaudhary alongwith proportionate, undivided and indivisible rights over the land beneath.

(c) If my son Mr. Anup Kumar Chaudhary predeceases me or my wife, in his place, his wife Dr. Dey Nanda Chaudhary alongwith children Mr. Gaurav Chaudhary (19 years) and Master Gautam Chaudhary (15 years) shall inherit my property in equal shares in the same way mentioned above.”

Learned counsel thus submits that such unjust and unequal bequeathing of the assets could not have been the intention of the testator to the extent of unjustly enriching his own son at the cost of depriving his own daughter completely from his lifetime assets. This instance establishes the greed and ulterior motives of the Respondent/Plaintiff.



Learned Counsel relies upon the judgement of the Hon'ble Supreme Court in ***Smt. Jaswant Kaur vs. Smt. Amrit Kaur and Others*** reported in (1977) 1 SCC 369, wherein it was held that:-

"10. There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in R. Venkatachala Iyengar v. B.N. Thimmajammal. The Court, speaking through Gajendragadkar, J., laid down in that case the following propositions :

"1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, 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.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on



a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.”

Learned Counsel relies upon the judgement of the Hon’ble Supreme Court in ***Ram Piari vs. Bhagwant and Others*** reported in (1990) 3 SCC 364, wherein it was held that:-

“Disinherited daughter, under a will alleged to have been executed by her father one day before his death bequeathing all his property in favour of sons of her only sister, has assailed validity of orders of three courts below for failure to apply the rule that presumption of due execution of a pious and solemn document like will stood rebutted due to existence of suspicious circumstances which the propounder could not rule out specially when he had taken active part in its execution.

Happy marriage or financially well-settlement of appellant could not add to genuineness of will. The High Court in recording this finding, completely misdirected itself. More so,



2024:DHC:1544



when no finding of dire circumstances of respondent to help out of which testator disinherited the other daughter, was recorded by any courts. ”

7. Lastly, learned counsel for the Appellant/Defendant raised a vehement objection to the maintainability of the suit in question before the learned Trial Court, in that, he submits that Respondent/Plaintiff, on the basis of Will, while claiming the sole ownership of the entire suit property had thus, only sought for the ejectment of the alleged tenant, *i.e.*, Appellant /Defendant alongwith *mesne* profits, but had neither sought the declaration of his ownership title to the entire suit property nor had sought for any relief of possession consequent upon injunction.

8. Learned counsel had thus argued that the suit which was filed in the present form is absolutely not maintainable at all as per the settled law of the country which specifically bars the maintainability of a suit simpliciter for injunction without the necessary prayers for declaration when the defendant squarely raises a cloud over the title of the plaintiff to the suit property in question, which was successfully established by the Appellant/Defendant by questioning the main assertions of the Respondent/Plaintiff, solely on the basis of the Will in question.

9. In that, learned counsel for the Appellant relies upon the judgment of the learned Single Judge of Bombay High Court in ***Anil Digamber Dhumal vs. Sunil S/o Digamber Dhumal & Ors.*** reported in 2018 SCC OnLine Bom 951, wherein while relying upon the landmark judgement of



Hon'ble Supreme Court in *Anathula Sudhakar vs. P. Buchi Reddy (Dead)* by L.Rs. and Ors. reported in AIR 2008 SC 2033, it was observed that:-

“32. It has been contended on behalf of respondent No. 1 that the suit filed simpliciter for possession by the original plaintiff was not maintainable as the Will Deed on which the plaintiff relied, was denied and challenged by respondent No. 1 and title claimed by the plaintiff on the basis of the Will Deed was also challenged. It was submitted that when cloud was created on the title on the basis of pleadings by respondent No. 1, it was incumbent for the plaintiff to have sought a declaration in respect thereof and that the suit filed simpliciter for possession, was not maintainable. Reliance was placed on judgment of the Hon'ble Supreme Court in the case of *Anathula Sudhakar v. P. Buchi Reddy (Dead)* by L.Rs. and or s. (supra). In response, it was contended on behalf of the appellant that only the aforesaid Will Deed dated 25-7-1993 was the subject-matter of dispute and that the contesting parties were well aware about the same, having led evidence in that regard. It was submitted that there was no question of any cloud being created on the title of the appellant and that, therefore, the suit for possession was maintainable.

33. The Hon'ble Supreme Court in the aforesaid judgment of *Anathula Sudhakar v. P. Buchi Reddy (Dead)* by L.Rs. (supra) has held as follows:—

“17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and



substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the Court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the Court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the Court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The Court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

34. *Applying the aforesaid position of law to the facts of the present case, it becomes clear that respondent No. 1 had indeed not only denied the aforesaid Will Deed dated 25-7-1993, but in his written statement, he*



had also denied that Digamber Dhumal was the owner of the suit property. It was also denied that the suit property was self acquired property of Digamber Dhumal and it was contended that the suit property was coparcenary property. There was evidence led on behalf of respondent No. 1 to show that the Will Deed dated 25-7-1993 was not valid and that it could not be the basis for the original plaintiff to claim title in the suit property. The tenor of the pleadings in the written statement filed on behalf of respondent No. 1 and evidence led on his behalf demonstrated that the very basis of the plaintiff seeking possession of the suit property was denied and there was certainly cloud created on the claims of the plaintiff in respect of title and ownership in the suit property. Applying the aforesaid principle laid down by the Hon'ble Supreme Court to the facts of the present case, it becomes evident that the original plaintiff and the appellant ought to have prayed for declaration and that suit filed simpliciter for possession was not maintainable. Hence, the said question is answered in favour of respondent No. 1 and against the appellant."

On that basis, learned counsel for the Appellant/Defendant thus summarises all his arguments, that regardless of the questions/suspicious circumstances being lined against the validity and genuineness of the Will in question, the learned Trial Court had actually erred in construing the suit as maintainable and run a full blown trial, when the suit itself is not maintainable and had thus caused severe prejudice to the Appellant.

10. Learned Counsel further argued that in view of the submissions made, the Respondent/Plaintiff is not entitled to the relief at all in the form of the present suit and the suit filed by the Respondent/Plaintiff should have been dismissed outrightly by the learned Trial Court.

CONTENTIONS OF THE RESPONDENT:-



2024:DHC:1544



11. Mr. Sanjeev Kumar, learned counsel appearing on behalf of the Respondent contends that the whole premise of the appellant's case herein is that the Will dated 10.05.2001, being executed under suspicious circumstances, is a forged document, based upon which the learned Trial Court had decreed the suit in favor of the respondent herein. Whereas, this ground is an afterthought, taken for the first time by the appellant in the present appeal, having no factual foundation and finds no mention either in the Written Statement or during the evidence filed before the learned Trial Court.

12. Learned counsel invites the attention of this Court to the impugned judgment and decree dated 26.07.2019, specifically to the issues framed, to submit that no question was raised before the learned Trial Court for it to frame and decide the issue of authenticity of the said Will.

13. It is further submitted that no application was filed by the appellant for recasting of issues already framed or framing of an additional issue. Learned counsel submits that despite the issue not being framed on this aspect, when the appellant/defendant had placed oral arguments before the learned Trial Court that the Will was forged and executed under suspicious circumstances, the learned Trial Court had gone into the evidences led by both the parties and decided that there is no irregularity or illegality in the making and registration of the Will. Learned counsel relied upon Paras 9 to 11 of the impugned judgment, which dealt with the same, and are as follows:



“9. From the aforesaid rival contention of the parties, the crucial question which requires determination of this court is whether the Will in question is a genuine or forged document. From the perusal of the said Will, it is seen that it was registered with the Sub-Registrar and the plaintiff duly proved the said Will as Ex.PW1/2 by examining the official witness from the office of concerned Sub-Registrar. The plaintiff also examined one of the attesting witnesses of the will, namely, Shri Biplab Mazumdar who gave very consistent and natural testimony. Nothing contrary came out in his cross-examination to disbelieve the said witness. He also informed that the testator came to their house and asked the father of the witness to become a witness but because he was not well, Biplab Mazumdar was sent to witness the will. He deposed that he signed the will at the Campus of Sub Registrar at INA, Vikas Sadan, New Delhi.

10. From the testimony of the aforesaid two witnesses and their cross-examination, this court does not find any inconsistency or contradiction. However, counsel for defendant argued that the said Will does not stipulate the date in the last paragraph of the Will and the said Will was made only one month before expiry of the testator and even no probate was sought.

11. In my considered opinion, the non-mentioning of the date is not fatal as the date was mentioned by the Sub-Registrar as well as other witnesses in various official stamps on the front side as well as reverse side of the Will on 10.05.2001. The defendant did not challenge the said Will by filing a counter-claim and no evidence has been led to raise a suspicious circumstance for execution of the said Will. The signature of the testator is there on every page of the Will. Accordingly, this court does not find any irregularity or illegality in making and registration of the said Will.”

14. Learned counsel for the respondent strenuously argued that no evidence was led by the appellant before the learned Trial Court to prove that the subject Will was forged or fabricated. In fact, the defence witness i.e. the appellant/defendant herself had nowhere specifically stated in her evidence affidavit that the subject Will is a forged or fabricated document.



2024:DHC:1544



It is submitted that having not challenged the Will before the learned Trial Court, the appellant cannot be allowed to raise a fresh ground at the stage of appeal before this Court.

15. Mr. Kumar next contends that the appellant in her evidence, heavily relied upon the letter dated 06.07.2015 written by the wife of the respondent to the appellant before filing of the suit, on the ground that it does not mention the said Will. Learned counsel submits that even assuming that respondent had not informed the appellant about the Will, but by this letter, the respondent and his wife had claimed their right in the ground floor of the suit property, demanding that the appellant vacates the floor at the earliest. Learned counsel argued that no steps were taken by the appellant, from the date of the letter till filing of the suit by the respondent, either in the form of a reply to the letter or filing of a suit for permanent injunction, to claim her right as a shareholder over the suit property.

16. Learned counsel submits that the appellant was residing at the suit property only on the condition that she and her family would reside there only till her son's marriage. However, when the appellant failed to vacate the suit property, the respondent herein served her with a legal notice dated 16.05.2016, which is placed at Page 74 of the paperbook. Placing reliance on the same, learned counsel submits that the existence of the Will bequeathing the suit property in favor of the respondent as well as the fact that the suit property was mutated in favor of the respondent on 16.08.2013, were clearly mentioned in the legal notice sent to the appellant.



2024:DHC:1544



17. Learned counsel next placed reliance on the reply of the appellant to the legal notice, placed at Page 79 of the paperbook, to submit that the only objection taken by the appellant against the said Will is at Para 4, alleging therein that the Will was a forged document which the respondent had kept as a secret till then. On this, Mr. Kumar submits that apart from making a bald allegation in the reply and despite knowing that the appellant was at the verge of eviction by virtue of the subject suit filed by the respondent, no legal action was taken by the appellant to challenge the said Will or the mutation in favor of the respondent, to claim her right over the suit property and instead, a suit for partition was filed by the appellant.

18. Learned counsel invites attention of this Court to the suit for partition filed by the appellant, placed at Annexure A-12, specifically to the prayer clause to submit that it only seeks partition of the suit property and no prayer for declaration of the said Will as illegal and void is made by the appellant.

19. Next, Mr. Kumar refers to the evidence, at page 225, which is the cross-examination of the appellant/defendant wherein it is admitted by the appellant that she was called to reside at the suit property by her mother, to look after her. It is also admitted that the appellant has not sent any legal notice or letter to the respondent demanding her share in the suit property. It is further admitted that the appellant was residing in the suit property with the consent of their mother and the respondent. On this, learned counsel submits that thus, it is clear that the appellant was not residing in



2024:DHC:1544



the ground floor of the suit property by virtue of any vested shareholder right, but only at the behest of their mother and mercy of the respondent.

20. Learned counsel submits that not only this, but the appellant had also admitted during her cross-examination that even after receiving a response on the RTI filed by her to the Ministry of Urban Affairs, she did not take any legal action against the respondent, despite having the information that suit property stood mutated in favor of the respondent.

21. Mr. Kumar further contends that the facts that the house tax of the suit property was being paid by the respondent, the electricity meter was installed in the name of the respondent, and that the appellant never approached any authority for the change of name in the house tax, electricity and water connections have been clearly admitted by the appellant during her cross-examination. Learned counsel also submits that an official from House Tax Department and an official from Electricity Department (PW4) were also called as witnesses to testify the same.

22. Learned counsel for the respondent submits that it is not the case of the appellant that their father was not of a sound mind at the time of execution of the Will, as there is a clear admission by the appellant in her cross-examination that the father was communicating well with the appellant before his death, despite serious health problems.

23. Learned counsel next argues that the Will in question is a registered document, which has been proven in accordance with law by the respondent before the learned Trial Court. In this regard, he refers to the



2024:DHC:1544



evidence i.e. chief examination and cross-examination of the respondent/PW-1 to submit that not even a single question or suggestion was put to the respondent with regard to the authenticity of the Will. Mr. Kumar contends that infact, the question of the Will being forged and fraudulently signed was put to the attesting witness to the Will i.e. PW2/Sh. Biplab Mazumdar, who clearly refuted the said allegation during his cross-examination, which is placed at page 213 of the paperbook.

24. Learned counsel refers to the evidence of PW2/Sh. Biplab Mazumdar at Page 206, wherein he clearly deposes that the subject Will was executed by Late Sh. Kailash Chandra Chaudhary in his presence as well as in the presence of the other witness to the Will, namely Sh. Abdul Karim.

25. Mr. Kumar refers to the cross examination of PW2/Sh. Biplab Mazumdar, wherein to the question that whether Sh. Abdul Karim was present with him, he clearly answers in affirmative and deposes voluntarily that the other witness to the Will namely Sh. Abdul Karim was present at the said campus of Registrar's office, INA. No specific question was asked from PW2, during cross examination, to the effect whether Sh. Abdul Karim signed the Will before him or in his presence. Thus, learned counsel for the respondent submits that the objection of the appellant to the extent that PW2 never stated that Sh. Abdul Karim was present before the Registrar at the time of execution of the Will cannot be sustained.



2024:DHC:1544



26. Learned counsel submits that the subject Will was proved in accordance with law before the learned Trial Court. The PW-5 i.e. the official from the Sub-Registrar's Office, Mehrauli was called as a witness who testified the subject Will from the official records brought by him. Mr. Kumar submits that even during his cross examination, no specific question with regard to the Will being forged or fabricated was put by the appellant/defendant.

27. Learned counsel also refers to the written statement filed by the appellant/defendant, that too after 3 years of filing of the suit, and submits that no preliminary objection was taken by the appellant regarding the Will being allegedly forged. He refers to para 9 of the written statement which is extracted hereunder:

“9) That with respect to Paragraph No. 9, it is denied that the late K.C. Chaudhary, father of the defendant herein has executed a Will as the father of the defendant herein died intestate. That the defendant herein had received a Legal Notice dated 16.05.2016 from the Plaintiff, alleging that the Late Mr. K.C. Choudhury had left a will, with respect to the suit schedule property, in favour of the Plaintiff, and, vide the said legal notice, has asked the Defendant in the instant case to vacate the said suit schedule property. Further, The said Will has never been probated or given effect to, in any Hon'ble Court.”

On this, learned counsel submits that no allegation as to the Will being forged or fabricated has been made by the appellant/defendant even in the written statement filed before the learned Trial Court in the subject suit.

28. Mr. Kumar submits that the subject Will, being registered and duly proven in accordance with law through evidence before the learned Trial



2024:DHC:1544



Court, cannot now be challenged by the appellant at this stage of appeal, that too by merely making a bald allegation. He relies upon the judgment of the Supreme Court in ***Pentakota Satyanarayana v. Pentakota Seetharatnam***, reported in (2005) 8 SCC 67, specifically para nos. 21 and 25, which are extracted hereunder:

“21. ...In the instant case, the Will has been duly proved and the High Court and the lower court in their discussion have even held so. It has also been held that the testator was hale and hearty and in a sound state of mind. The Will is a registered Will. DW 5 the attester and DW 6 the scribe have been examined to prove the Will. As already noticed, the Will gives property to Respondent 1 Seetharatnam, the first wife of the testator and the remaining properties to the appellants, who according to the testator, were his children and the children through his second wife A. Kantamma. We have already referred to the written statement filed by Srirammurthy in the suit. The statement made by him in the written statement is one of the most important factors which authenticates the genuineness of the Will. No evidence has been led in by the respondents to show the exercise of any fraud or undue influence at the time of execution of the Will. No evidence was adduced to show that the testator was not in sound state of mind and in fact, the finding is that he was of sound mind. In our opinion, the evidence adduced by the appellant propounders is sufficient to satisfy the conscience of the court of law that the Will was duly executed by the testator. The trial court has reached certain findings with regard to the suspicious circumstances...”

*25. It is settled by a catena of decisions that any and every circumstance is not a suspicious circumstance. Even in a case where active participation and execution of the Will by the propounders/beneficiaries was there, it has been held that that by itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will. It has been held that the mere presence of the beneficiary at the time of execution would not prove that the beneficiary had taken prominent part in the execution of the Will. This is the view taken by this Court in *Sridevi v. Jayaraja Shetty* [(2005) 2 SCC 784] ...”*



29. Mr. Kumar next relies upon the judgment of this Court passed in the case of **Jiwan Dass v. Bhola Nath**, reported in **2011 SCC OnLine Del 92**, to submit that one attesting witness to the Will is sufficient for proving the same. The relevant paras of the aforesaid judgement are extracted hereunder:

“10. It is this testimony which has to be appreciated to hold as to whether the essential requirements of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act have been fulfilled. Over a co-joint reading of these two provisions of law establishes that one attesting witness to the document, i.e. to a will is sufficient for the proof of a will. The essential requirements culled out time and again for the due execution of the will necessarily include : -

- (1) the testator should sign or affix his mark to the will;*
- (2) the signature or the mark of the testator should be so placed that it should appear that it was intended thereby to give effect to the writing as a will;*
- (3) the will should be attested by two or more witnesses, and*
- (4) each of the said witnesses must have seen the testator signing or affixing his mark to the will and each of them should sign the will in the presence of the testator.*

11. These essentials are no doubt not an empty formality. The attesting witness signs the document for testifying to the signatures of the executant; it is not necessary that more than one witness should be present at the same time; no particular form of attestation is necessary. The requirement is that each of the attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the attesting witnesses had signed the will in the presence of the testator.

12. This requirement has been adhered to. DW-4 was sole attesting witness who had been examined; his testimony as afore-noted has fulfilled the requirements of the proof of a valid will. It is not necessary that each of the attesting witnesses should be known to one another and both should be present simultaneously...”



2024:DHC:1544



REBUTTAL BY THE APPELLANT:

30. In rebuttal, Mr. Laud, learned counsel for the appellant had reiterated his submissions earlier made concerning the suspicious circumstances jeopardizing the legality and validity of the Will in question.

31. While referring to the Written Statement filed on behalf of the Appellant/Defendant in the civil suit, learned counsel contended and re-emphasized that the necessary objections and contentions challenging the veracity of the Will in question are very much present in the written statement and the cross examination of the respondent/plaintiff.

32. Learned counsel, in the same breath, argued that inspite of the fact that it was incumbent upon the appellant to raise serious question against the Will, arguendo, the onus to prove the credibility and veracity of the Will is actually upon the propounder itself in the first place. He further contended that though arguably, the questions raised in the cross-examination are not of such attacking character, but the same, alongwith the averments in the written statement coupled with the reply dated 07.06.2016 to legal notice dated 16.05.2016, are sufficient enough to raise serious disputes which tantamount to raising the cloud over the title of the respondent/plaintiff, as asserted by virtue of Will, over the suit property.

33. In continuation thereto, learned counsel emphasized that the vehemence of such assertions by the Appellant had lead the learned Trial Court to decide the suit on the basis of the Will in question. Learned counsel further submits that the sheer failure of the respondent/plaintiff to



2024:DHC:1544



discharge his onus of proving the Will, free from suspicious circumstances by not raising relevant question to his own witness/attesting witness regarding the signing of the Will by the other attesting in his presence, can be read in favour of the appellant, and thus, it can safely be inferred that the Will is not free from suspicious circumstances as argued above.

34. In view of such glaring discrepancies, learned counsel prays that the present appeal be decided in favour of the appellant and the impugned judgement and decree be set aside.

ANALYSIS AND CONCLUSION:

35. This Court has heard the arguments addressed by Mr. Ninad Laud, learned counsel for the appellant as well as Mr. Sanjeev Kumar, learned counsel for the respondent, carefully perused the pleadings and evidence led by the parties before the learned Trial Court and also considered the judgments relied upon by them.

36. In order to appreciate the grounds of appeal as also the arguments addressed by the parties, it would be apposite to extract the prayers sought by the respondent/ plaintiff before the learned Trial Court:

“A. DECREE OF DECLARATION THEREBY DECLARING THE POSSESSION OF THE DEFENDANT UNAUTHORIZED AND ILLEGAL IN THE PORTION AS SHOWN IN THE SITE PLAN.

B. DECREE OF MANDATORY INJUNCTION DIRECTING THE DEFENDANT OR HER LEGAL REPRESENTATIVE OR ANY PERSON CLAIMING THROUGH HER TO VACATE THE SUIT PROPERTY GROUND FLOOR OF THE PROPERTY HOUSE NO. G-1413 CHITRANJAN PARK NEW DELHI AS MARKED IN BLUE IN THE SITE PLAN.



C. PASS DECREE OF PERMANENT INJUNCTION IN FAVOUR OF THE PLAINTIFF AND AGAINST THE DEFENDANT THEREBY RESTRAINING THE DEFENDANT THEIR LEGAL REPRESENTATIVE, AGENTS THEIR SERVANTS OR ANY OTHER PERSON PERMANENTLY FROM TO PART AWAY THE PORTION OR CREATE ANY THIRD PARTY INTEREST IN THE SUIT PROPERTY GROUND FLOOR OF THE PROPERTY HOUSE NO G-1413 CHITRANJAN PARK NEW DELHI AS MARKED IN BLUE IN THE SITE PLAN.

D. PASS A DECREE OF RECOVERY OF RS 6,72,000/- DAMAGES/MENS PROFIT/RENT ON THE BASIS OF AGREED RENT FOR A PERIOD 01/06/2012 TO 30/05/2016 AND FROM 01/06/2016 AS PER THE MARKET VALUE IN FAVOUR OF THE PLAINTIFF AND, AGAINST THE DEFENDANT FOR ILLEGALLY OCCUPYING AND USING THE SUIT PROPERTY.

E. AWARD COST OF THE SUIT TO THE PLAINTIFF."

37. Equally relevant would be the issues which were framed by the learned Trial Court on 29.08.2019 upon the pleadings before it, which are as under :-

- "1. Whether the plaintiff is not entitled for the reliefs claimed in this case as the defendant and the plaintiff are siblings and have joint right/share over the property in question? OPD*
- 2. Whether the plaintiff is entitled for a decree of declaration as prayed for? OPP*
- 3. Whether the plaintiff is entitled for a decree of mandatory injunction? OPP*
- 4. Whether the plaintiff is entitled for a decree of permanent injunction as prayed for? OPP*
- 5. Whether the plaintiff is entitled for recovery of amount of Rs.6,72,000 as prayed for? OPP"*

38. The learned Trial Court took upon itself to deal with issue Nos. 1, 2 and 3 in the beginning of its impugned judgment. The learned Trial Court



2024:DHC:1544



held all the three issues in favour of the respondent/ plaintiff and as a consequence thereto, the issue No.4 regarding decree of permanent injunction and issue No. 5 regarding recovery of Rs. 6,72,000/- was allowed.

39. The arguments of learned counsel for the appellant/ respondent were only on three issues, namely:-

39.1 That the registered Will dated 10.05.2001 executed by the late father of the parties- Sh. Kailash Chandra Chaudhary was executed under suspicious circumstances, which have not been satisfactorily explained by the propounder of the Will, i.e., the respondent/ plaintiff and as such, the Will has to eschewed from consideration.

39.2 That the propounder of the Will, i.e., the respondent/ plaintiff has failed to prove the execution of the Will in accordance with the provisions of the Indian Evidence Act.

39.3 That the suit is hit by the provisions of Section 34 of the Specific Relief Act, 1963.

40. After having gone through the records of the case and the evidence on record, it appears to this Court that the issue as to whether the Will was a genuinely executed document and proved in accordance with the provisions of Section 63 of the Indian Succession Act read with Section 68 of the Indian Evidence Act, ought to be considered in the first instance.



2024:DHC:1544



41. It is trite that the pleadings in a suit under the Code of Civil Procedure, 1908 need to contain precise and concise averments regarding the material facts upon which alone, the evidence, both oral and documentary, is to be adduced. It is also trite and that too by a catena of judgments of the Supreme Court as well as various High Courts that no evidence in the absence of precise pleadings can or should be considered by Civil Courts during trial and if so brought on record, has to be eschewed from consideration while passing the judgment. It is also no more *res integra* that any objection as to the admissibility, the mode of proof as also the relevancy of a document which is otherwise admissible in evidence, ought to be taken at the very first instance i.e., during trial. Such objections are precluded from being raised in the Appellate or the subsequent stages, unless of course, the evidence itself is inherently inadmissible.

42. With the aforesaid legal backdrop, this Court now proceeds to consider the arguments addressed on behalf of the appellant. In order to appreciate the grounds raised in the appeal, this Court had meticulously scrutinized the written statement by the appellant before the learned Trial Court. It would be relevant also to consider that the said written statement was filed after more than two years of the suit i.e., on 15.03.2018. In the written statement, except to contend that the respondent/ plaintiff had falsely claimed that the late father Sh. Kailash Chandra Chaudhary had executed a Will registered on 10.05.2001, no substantive pleading in regard to either the Will being forged or fabricated or that the Will was executed



2024:DHC:1544



under suspicious circumstances or was shrouded in mystery was ever taken by the appellant.

43. This Court has also minutely perused the examination-in-chief of the evidence by way of an affidavit Ex.DW-1/A, wherein, except to depose that the late father had died interstate on 05.06.2001 and that the respondent had falsely claimed that the late father had executed a Will which was registered on 10.05.2001, no substantive deposition in regard to either the Will being forged or fabricated or that the Will was executed under suspicious circumstances or was shrouded in mystery was ever deposed by the appellant.

44. In order to satisfy the conscious of this Court, the statement of the respondent/plaintiff-PW-1 was also perused. This Court observes that even when the said Will was being marked and exhibited as Ex.PW-1/2, no objection regarding the mode of proof, relevancy or admissibility of the said Will was ever registered by the appellant. The cross-examination of PW-1 was also perused by this Court. Even during such cross-examination, except to only suggest that the respondent/plaintiff was trying to unlawfully dispossess the appellant/defendant from her rightful share through inheritance in the suit property by way of a fraudulent Will exhibited as PW-1/2, no question regarding the Will itself being either a forged or a fabricated document, apart from the entire cross-examination being conspicuous of any question raising the issue of suspicious circumstances, as argued now, was put to the respondent PW-1. It is intriguing to note that there is not even a single suggestion of the Will being executed under



2024:DHC:1544



suspicious circumstances or shrouded in mystery put to the witness respondent PW-1.

45. On the issue raised by learned counsel regarding the non-compliance of the mandatory stipulation of Section 63 of the Indian Succession Act read with Section 68 of the Evidence Act by the attesting witness PW-2, this Court has also perused the cross-examination of PW-2. It would be relevant to note that the PW-2 reiterated that he had signed the Will at the campus at the Office of the Registrar, INA, Vikas Sadan, New Delhi. It is also relevant to note that the PW-2 had asserted that he had signed as witness after the Will was signed. Thus, so far as the attesting witness himself was concerned, he was able to prove his presence as also the attestation by him. In regard to the contentions of the learned counsel for the appellant regarding PW-2 not deposing that the other attesting witness namely Sh. Abdul Karim had simultaneously appended his signatures on the Will, no direct question in that regard was asked. In fact, what was asked was whether Mr. Abdul Karim was present with the PW-2, to which the witness answered in the affirmative. He further volunteered to state that the said Mr. Abdul Karim was present at the said campus of the Registrar's office. Other than that, no question discrediting the witness, much less demolishing the evidence of PW-2 was ever put by the appellant/defendant. It would also be relevant to note that the Record Keeper (PW-5) from the office of the Sub-Registrar was summoned with the record of original Will dated 10.05.2001 and had proved the same in accordance with law. As



2024:DHC:1544



already noted above, the appellant/ defendant had not raised any objection in her examination-in-chief of her evidence by way of affidavit.

46. That apart from the aforesaid, the appellant had also filed a suit for partition bearing CS (OS) No. 447/2016 in this Court, seeking a decree of possession of one-half share in the joint family property and partition by metes and bounds. It is intriguing to note that in the entire partition suit, which was filed after the suit filed by the present respondent, the appellant, in her pleadings thereto, neither questioned the genuineness of the Will nor pleaded that it was forged and fabricated or that there was any suspicious circumstance in its execution or the Will itself was shrouded in mystery. In fact, it is interesting to note that in the said suit, neither did she seek a decree of declaration to the effect that the said Will executed by the late father be declared as null and void, nor did she seek the cancellation of mutation carried out in the name of the respondent on the basis of the said Will. Nothing stopped or prevented the appellant from filing an independent suit before a Civil Court seeking aforesaid prayers.

47. The appellant has failed to show that there was any pleading to the effect that the Will was either forged or fabricated or any pleading with regard to any suspicious circumstances were averred in the written statement. In view of the above, as also in the absence of any such deposition in the examination-in-chief of evidence of appellant, this Court is of the considered opinion that no such argument in the absence of pleadings or even a shred of evidence, can be entertained by this Court at this stage, to reverse the finding of facts reached by the learned Trial Court



2024:DHC:1544



in the impugned judgment. This Court is fortified in its view on the strength of the judgment of the Supreme Court in *Biraji @ Brijraji & Another v. Surya Pratap & Others*, reported in (2020) 10 SCC 729, wherein it was categorically held that evidence in the absence of pleadings in support thereof, particularly in a suit, has to be necessarily eschewed from consideration by the learned Trial Court. In the present case, it is far worse. In that, there is a clear absence of the pleadings coupled with no evidence having been brought on record during cross-examination of the witnesses of the respondent/plaintiff or independent evidence of the appellant.

48. Mr. Laud, learned counsel had relied upon a number of judgments of the Supreme Court to submit that the attesting witness whose evidence is brought on record must necessarily also establish that the other attesting witness also appended his signatures upon the said Will. In view of the fact that no question worth its name or even a suggestion was put to the attesting witness PW-2, the argument raised at this stage without the necessary pleadings or evidence would be a mere speculation and cannot be countenanced. A party which does not question the evidence during trial at the stage of cross examining the witness of the other side would be precluded at a subsequent stage to question such evidence, which has been proved in accordance with law during the trial.

49. The judgments of the Supreme Court that Mr. Laud relied upon have, in detail, considered the cross-examination of the attesting witnesses by the opposite party to conclude that a solitary attesting witness was



enough to prove the Will, subject to such evidence of the witness containing the elements of sub-section (c) of Section 63 of the Indian Succession Act. The sub-Section (c) of Section 63 is reproduced hereunder for clarity :-

“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) xxx

(b) xxx

(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.”

The element which appears to be necessary is the fact that the Will ought to be attested by two or more witnesses which is an undisputed issue in the present case, as also the attesting witness also must assert that the testator has signed or affixed his mark to the Will. In the present case, the witness has stated that the testator had executed a Will dated 10.05.2001 in his presence as well as in the presence of other witness, namely Mr. Abdul Karim. In the opinion of this Court, more particularly, when there was no effective cross-examination on these issues, the ingredients of sub-section (c) of the Section 63 of the Indian Succession Act stood fulfilled. This coupled with the fact that PW-2 volunteered to state that the other witness was also present in the campus of the Registrar's Office. In fact, PW-2 had



asserted that he had signed the Will at the Registrar's Office. No further question, admittedly in respect of any other deficiency of Section 63 of the Indian Succession Act was ever put to the witness. As such, the evidence and the statement of the attesting witness, in the opinion of this Court, are within the confines of the judgments of the Supreme Court relied upon by the appellant.

50. This Court is fortified in its view by the judgement of the Supreme Court in **Ramesh Verma vs. Lajesh Saxena**, reported in (2017) 1 SCC 257, specifically Para 13 which is extracted hereunder:-

“13. A will like any other document is to be proved in terms of the provisions of Section 68 of the Evidence Act and the Succession Act, 1925. The propounder of the will is called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document on his own free will and the document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. This is the mandate of Section 68 of the Evidence Act and the position remains the same even in a case where the opposite party does not specifically deny the execution of the document in the written statement.”

51. Though this Court has concluded that no pleading or evidence, much less an effective cross-examination in respect of any alleged suspicious circumstances surrounding the execution of the Will or the same being shrouded in mystery was ever taken by the appellant, however, the same are being considered herein, only for the completion of consideration of the case of the appellant.



2024:DHC:1544



51.1 That so far as the circumstance of the Will being registered in the year 2001 but propounded in the year 2016, that is, after a passage of 15 years is concerned, the said circumstance on its own may not be a circumstance which will create a doubt in the execution of the Will inasmuch as the said Will has been held to be a validly executed Will of the late father of the parties. That coupled with the fact that the appellant never questioned even the genuineness of the signatures of the late father. Thus, mere delay, howsoever long, in the facts of the present case, does not shroud the Will in mystery.

51.2 Regarding the submission of non-mentioning of the said Will in the informal letter dated 06.07.2015 is concerned, it is relevant to note that no evidence worth its name was led by the appellant to show that the wife of the respondent was aware of the said Will before she wrote the letter dated 06.07.2015. As such, on facts, the said circumstance is not a suspicious circumstance.

51.3 In respect of the contention that the Will itself is undated, this Court is of the considered opinion that the relevance is not the date of the Will but the registration of the said Will, duly signed and executed by the late father of the parties. Moreover, an undated Will by itself would not be a suspicious circumstance unless the same was not followed by a proper registration before the competent authority. Thus, even if the Will did not contain a date, it would not lose its authenticity except when put in trial in accordance with law.



2024:DHC:1544



51.4 The other submission of the appellant was in regard to the active participation in the preparation of the Will by the respondent who was the main benefactor of the said Will being a highly suspicious circumstance. Learned counsel had referred to the cross-examination of the respondent to contend that the respondent had not only actively participated in the preparation of the Will but also had concealed the same from the mother of the parties as also the appellant, who is his own sister. Learned counsel wanted this Court to infer from the above that the active participation of the respondent in such circumstances would amount to grave suspicious circumstance. This Court had also perused the cross-examination of the respondent and from the answers elicited, is unable to agree with the contentions of the appellant. Keeping in view the fact that there was neither any pleading nor any effective cross-examination of the respondent regarding this issue, this Court is of the opinion that the said circumstance, in the facts of the case, cannot be held as a suspicious circumstance.

51.5 Lastly, the appellant cited unjust disposition as a suspicious circumstance. It is observed that the appellant in her written statement or even in the evidence has not disputed or raised suspicion over the genuineness of the signatures of the father. Even during the cross-examination of the attesting witness-PW-2, the appellant was unable to dislodge or seriously dispute either the signatures of the late father of the attesting witnesses. In fact, PW2 asserted that the testator had executed the Will in their presence. Keeping in view the fact that there



2024:DHC:1544



was neither any pleading nor any effective cross-examination of the respondent regarding this issue, this Court is of the opinion that the said circumstance is not a suspicious circumstance.

51.6 In view of the aforesaid, the arguments regarding suspicious circumstances surrounding the execution of the Will or the same being shrouded in mystery is untenable on facts and stand rejected.

52. Thus, from the overall examination of the pleadings, evidence, both oral and documentary and the law on the subject, this Court is of the firm opinion that the Will of Late K. C. Chaudhary was validly proved.

53. However, having observed as above, this Court now proceeds to evaluate the conclusion reached by the learned trial Court with respect to issue nos. (i), (ii), and (iii). In para 9 of the impugned judgement, the learned Trial Court after considering the facts before it, thought it fit and necessary to determine as to whether the Will in question is a genuine or forged document. While concluding that the Respondent/Plaintiff had duly proved the making, execution and registration of the Will dated 10.05.2001, the learned Trial Court in para 15 of the impugned judgement concluded that after the expiry of the respondent's father "*he became the absolute owner of the suit property*". In the considered opinion of this Court, though the learned Trial Court was having the necessary and competent jurisdiction to decide the genuineness and authenticity of the Will as a collateral document, however, could not have come to a definite conclusion or finding of fact that the respondent/plaintiff had indeed



2024:DHC:1544



become an absolute owner of the subject suit property, merely on the basis of proving the Will. It is trite that proof of a Will is not proof of the title of the beneficiary. It is also trite that the beneficiary, once is able to prove the execution of the Will in accordance with law, would necessarily have to establish his title in accordance with law.

54. That not having been done, the learned Trial Court recording the aforesaid finding and holding the respondent/plaintiff as an absolute owner is not only erroneous but also contrary to law inasmuch as the present suit was not one seeking declaration of title. In that view of the matter, the respondent/plaintiff either ought to have sought declaration of his title by necessary amendment or filed a separate comprehensive declaratory suit. Having failed to do that, the Trial Court could not have given finding that the Respondent/plaintiff had become 100% owner of the entire suit premises.

55. The aforesaid conclusion reached by this Court is fortified by the judgement of the Supreme Court in *Anathula Sudhakar's Case*, though on a different point, as well as reiterating judgement in *T.V. Ramakrishna Reddy vs. M. Mallappa and Another* reported in (2021) 13 SCC 135. The relevant paras of the *T.V. Ramakrishna* are extracted hereunder:-

“14. The issue is no more res integra. The position has been crystallised by this Court in Anathula Sudhakar v. P. Buchi Reddy [Anathula Sudhakar v. P. Buchi Reddy, (2008) 4 SCC 594] in para 21, which read thus : (SCC pp. 607-608)



“21. To summarise, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

(a) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in Annaimuthu Thevar). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for



injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.

15. It could thus be seen that this Court in unequivocal terms has held that where the plaintiff's title is not in dispute or under a cloud, a suit for injunction could be decided with reference to the finding on possession. It has been clearly held that if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

16. No doubt, this Court has held that where there are necessary pleadings regarding title and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. However, it has been held that such cases are the exception to the normal rule that question of title will not be decided in suits for injunction."

According to the ratio laid down in aforesaid judgements, even if the necessary averments regarding title form part of plaint and the plaintiff has not sought the relief of declaration & possession, the learned Trial Court may not pass a decree of declaration of title particularly if the matter involves complicated question of facts and law relating to the title. In such case, the Supreme Court held that the parties should be relegated to the comprehensive suit for declaration of title instead of suit for mere injunction.



56. In the present case, it is undisputed, rather admitted by both the parties that they are siblings. From a holistic reading of the Written Statement, it appears to this Court that the appellant had asserted that the late father had died intestate and on that basis, asserted her share over the entire property. She has seriously not disputed the title of the respondent/plaintiff over the property at least to the extent of his share and as such, it cannot be said with assertion that the appellant/defendant has raised any serious cloud over the title of the respondent/plaintiff. Thus, the case of the respondent/plaintiff may not fall fully within the purview of **Anathula Sudhakar** (supra), except to para (d) of the Para 21 of the said judgement as clarified hereinabove. This view gets reiterated by the fact that the appellant has filed a suit seeking partition of the very same property on the basis of alleged intestate death of her father. Thus, the respondent/plaintiff should have sought appropriate reliefs in the suit.

57. In the present case, the learned Trial Court merely on the basis of proof of Will, has declared the Respondent/Plaintiff as “Owner” without any such prayer or an issue framed. The perversity of the learned Trial Court’s decree is apparent from the terms of decree as drawn, extracted hereunder:-

(A) A decree of declaration is passed in favour of the plaintiff and against the defendant to the effect that the defendant is unauthorized and illegal possession of the suit property as shown in site plan.

(B) A decree of mandatory injunction is passed in favour of the plaintiff and the defendant is directed to vacate the suit property i.e. G-1413, Ground floor, C.R. Park, New Delhi as shown in site plan in blue



2024:DHC:1544



*colour (Ex.PW1/1) **and hand over its vacant possession to the plaintiff within 30 days.***

(c) A decree of permanent injunction is also passed and the defendant, her agents, LRs etc. are restrained to create any third party interest in the suit property i.e. G-1413, Ground floor, C.R. Park, New Delhi as shown in site plan.

*(D) A decree is also passed awarding the mesne profit/damages @Rs.5,000 per month from the date of filing of the suit **till the date of delivery of possession of the suit property to the plaintiff** against the defendant.*

(Emphasis Supplied)

A perusal of the decree brings to fore the perversity that without seeking declaration of title or possession, the learned Trial Court, had erroneously granted both. Neither the decree for title nor possession of the suit premises could at all have been granted, in view of absence of the prayer, requisite Court Fees etc., and as such, cannot withstand the scrutiny of law.

Moreover, despite holding the fact that the respondent/plaintiff failed to prove any agreement for tenancy, yet on the basis of finding of 100% ownership based on the Will of the late father, the learned Trial Court proceeded to grant the *mesne* profit at the rate of Rs.5,000/- without there being any evidence led for such purpose.

In view of the aforesaid findings, issue no. (iv) & (v) also are held against the respondent/plaintiff.

58. In view of the above, while holding that the respondent/plaintiff was able to prove due execution of the Will dated 10.05.2001 of Late Sh. K.C.



2024:DHC:1544



Chaudhary, the impugned judgement and decree in respect of the remaining issues cannot be sustained and are set aside accordingly.

59. Consequentially, the deposit made with the Registrar General of this Court by the appellant in compliance of order dated 24.09.2019, is directed to be released forthwith to the appellant alongwith interests accrued thereupon, after completion of necessary formalities thereto.

60. With the aforesaid direction, the appeal is partly allowed to the extent of the observations made hereinabove.

61. The pending applications also stand disposed of.

TUSHAR RAO GEDELA, J.

FEBRUARY 28, 2024/nd