



2024:DHC:443



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ RSA 227/2023 & CM APPL. 62146/2023, CM APPL. 62147/2023

ANGOORI DEVI Appellant
Through: Mr. Sandeep Khatri and Ms. Shivani Negi, Advs.

versus

JAGDISH Respondent
Through: None

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)
19.01.2024

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1. This is a second appeal under Section 100 of the Code of Civil Procedure 1908 (CPC).
2. The present appellant was the plaintiff before the learned trial court in CS SCJ 704/2021 and the appellant in the first appeal, being RCA DJ 01/2023.
3. In the plaint instituted by her, the appellant claimed to be the owner and in possession of the property No. 44/XII (New) and 73 & 75 (Old) admeasuring about 45 ½ sq. yards out of the total property admeasuring 214 sq. yds., SP Zone, Malkaganj, Delhi-110007.

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4. The said property was stated to have been purchased by the appellant's father-in-law Karan Singh under a registered Sale Deed. Karan Singh was stated to have executed a Will in the appellant's favour. Admittedly, the appellant was claiming titular rights in respect of the suit property under the said Will.

5. The case of the appellant was that, on the request of Bhagwati Devi, the mother of the respondent and a distant relative of the appellant, Karan Singh, he had allowed Bhagwati Devi to use a portion admeasuring 7 sq. yards (hereinafter "the suit property") in the aforementioned Malkaganj property as a licensee. The appellant contended that, consequent on the demise of Bhagwati Devi, the suit property was in the occupation and was being used by the respondent, Jagdish. The appellant claimed to be in requirement of the suit property as her children had grown up.

6. Accordingly, the plaint averred that, in July 2020, the appellant requested the respondent to vacate the suit property and, on his failing to do so, issued a notice to the respondent on 23 October 2020, reiterating the request and cancelling the license whereby Bhagwati Devi had been permitted to stay in the suit property by Karan Singh.

7. On the respondent continuing to occupy the suit property, the appellant instituted CS SCJ 704/2021 against the respondent, seeking ejectment of the respondent from the suit property as well as seeking recovery of the suit property.



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8. The suit was dismissed by the learned Senior Civil Judge (learned SCJ) by judgment dated 25 November 2022. The learned SCJ observed that the appellant had failed to establish any titular right in respect of the suit property as the appellant was claiming title on the basis of a Will by Karan Singh, which the appellant was unable to prove in accordance with Section 68¹ of the Indian Evidence Act as the appellant had not been able to produce any of the attesting witnesses to the Will.

9. Once the Will was not proved, the learned SCJ held that, as the appellant's husband was alive, she could not claim any rights by way of succession to the suit property. Additionally, on the ground that the suit property could not be identified from the site plan which had been filed by the appellant, the learned SCJ dismissed the suit.

10. The appellant appealed against the aforementioned decision of the learned SCJ to the learned Additional District Judge (the learned ADJ) by way of RCA DJ 01/2023.

11. By the impugned judgment dated 8 May 2023, the learned ADJ has essentially reiterated the findings of the learned SCJ to the effect that the suit property could not be identified from the site plan and that, even otherwise, the Will had not been proved in accordance with

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

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



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the Section 68 of The Evidence Act and Section 63² of the Indian Succession Act.

12. Insofar as the GPA on the basis of which the appellant was additionally claiming rights over the suit property was concerned, the learned ADJ has held that, consequent on the death of the executor of the GPA, the GPA did not continue to have any effect.

13. Before me, Mr. Sandeep Khatri, learned Counsel for the appellant, has essentially urged the contention that the learned ADJ failed to take note of application filed by the appellant under Order XLI Rule 27 of the CPC, seeking to place on record additional evidence.

14. Had the learned ADJ permitted the appellant to do so, it is submitted that the appellant would have possibly been able to prove the Will.

15. The suit instituted by the appellant was one based on title. The appellant has, all along, been asserting titular rights in the suit

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

- (a) The testator shall sign or shall affix his marks to the will, or it shall be signed by some other person in his presence and by his direction.
- (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.
- (c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.



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property on the basis of the Will of Karan Singh. The Will was unprivileged, within the meaning of Section 63 of the Indian Succession Act. Clause (c) of Section 63, therefore, required it to be attested by at least two attesting witnesses. In **Janki Narayan Bhoir v. Narayan Namdeo Kadam**³, this requirement has been held to be mandatory. Section 68 of the Evidence Act, therefore, required at least one attesting witness to be called in the witness box before the Will could be used in evidence.⁴

16. The concurrent finding of the learned SCJ and the learned ADJ that the appellant had not succeeded in proving the Will on the basis of which he was claiming title in the suit property is, therefore, factually and legally correct, and does not call for any interference.

17. Though the impugned orders of the learned SCJ and the learned ADJ as they stand do not, therefore, give rise to any substantial question of law which could merit interference in second appeal, I have, for the purposes of satisfying myself regarding the contention of Mr. Khatri, also gone through the application filed by the appellant before the learned ADJ under Order XLI Rule 27 of the CPC.

18. The application may be reproduced, *in extenso*, thus:

(IN THE COURT OF DISTRICT JUDGE: (CENTRAL) THC:
DELHI
RCA NO. /2023

IN RE:

³ (2003) 2 SCC 91

⁴ Ref. **Kashibai v. Parwatibai**, (1995) 6 SCC 213, **Murthy v. C. Saradambal**, (2022) 3 SCC 209



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Smt. Angoori Devi

...Appellant

Versus

Sh. Jagdish.

. . Respondent

APPLICATION ON BEHALF OF APPELLANT UNDER
ORDER XLI RULE 27 CPC READ WITH SECTION 151 CPC
FOR ALLOWING THE APPLICANT TO LEAD ADDITIONAL
EVIDENCE

MOST RESPECTFULLY SHWOETH:

1. That the applicant/ appellant filed the above appeal before this Hon'ble Court. The contents of the said appeal may kindly be read as a part and parcel of this application as the same has not been repeated here for the sake of brevity.

2. That the case of the applicant is that the plaintiff was actively working in respect of the suit property as GPA during the life time of the registered owner Shri Karan Singh and after the death of Shri Karan Singh as beneficiary of the will duly executed by the deceased Karan Singh in favour of the appellant, without any objection from any corner as well the appellant was paying the house tax of the property in suit and her name was assessed in the assessment record of the MCD and the appellant was declared as owner in the said assessment record of the MCD and she was treated as owner in respect of the property in suit and have also filed documents Exbt. PW-1/3 property tax receipt dt.21.01.2019 and Exbt. PW-1/8 tax assessment by MCD and Exbt. PW-1/9 the GPA by Karan Singh in favour of Karan Singh and Exbt. PW-1/10 the will dt.11.02.1998 in favour of appellant.

3. That the keeping in view all the documents above mentioned the ownership of the appellant is not disputed but the objection of the Ld. Lower court is that the will was not proved as per law and hence the suit of the plaintiff was dismissed. The Hon'ble trial court was also confused with regard to the site plan as to how the portion of a property is separated from the main portion of the property by a lane.

4. That this is a fit case in which this Hon'ble court may allow the application of the applicant in respect of leading of additional evidence, if required and this Hon'ble court may deem fit in the present circumstances, may be allowed.

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5. That if the present application is not allowed, the applicant/appellant shall suffer irreparable losses and injury which can never be compensated in terms of money.

Under the above mentioned facts and circumstances it is therefore most respectfully prayed that this Hon'ble Court may kindly be pleased to allow the application of the appellant/applicant in the interest of justice and the applicant shall be allowed to lead additional evidence with regard to the proving of will as per law and the clarification of site plan, if required.

Applicant/appellant

Delhi

Through

Dt.30.12.2022

Counsel

19. In the entire application, there is no averment that the appellant was in a position to produce the attesting witnesses to the Will as witnesses so as to be able to prove the Will.

20. In fact, in para 2 of the application, the appellant has reiterated that she was claiming right over the suit property as she had been working in the suit property as the GPA of Karan Singh during his lifetime and as the beneficiary of Karan Singh's Will, which was in her favour, without any objection from anyone.

21. Thereafter, the appellant has placed reliance on house tax receipts, property tax receipts and MCD documents in order to claim ownership over the suit property.

22. Inasmuch as the appellant's husband was alive, the only ground on which the appellant could have obtained any titular right over the



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suit property was under the Will executed by Karan Singh.

23. Though the prayer in the application filed by the appellant under Order XLI Rule 27 of the CPC was that she be permitted to lead additional evidence with regard to proving the Will as per law, there is no reference, in the application, to any evidence that the appellant was in a position to lead. In fact, Ground (F) in the first appeal filed by the appellant before the learned ADJ specifically stated thus:

“Because the Ld. Lower Court failed to consider the fact that the plaintiff failed to prove the will as per law by producing the witness of the will before the Hon'ble court but keeping in view the circumstances of facts, as mentioned above in preceding grounds, the ownership of the plaintiff is un-disputed and without any objection from any corner for that the plaintiff reserve her right to prove the will as per law by means of additional evidence, if required.”

(Emphasis supplied)

24. There was, therefore, a clear admission, by the appellant, before the learned ADJ, that she was not in a position to prove the Will.

25. The case that the appellant urged before the learned ADJ was that, though she was not in a position to prove the Will by producing attesting witnesses, the circumstances of the case and the fact that the ownership of the appellant was undisputed made out a case for interference.

26. The averment that the ownership of the appellant was undisputed only stems from the fact the respondent was proceed *ex parte* before the learned SCJ. That does not do away with the



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requirement of the appellant having to prove the case set out in the plaint in the first instance. The plaint was one based on title. The appellant was seeking to eject the respondent from the suit property by claiming titular right in respect thereof.

27. There are concurrent findings of fact that the appellant had been unable to prove her title over the suit property. Even before me, Mr. Khatri's argument on the aspect of title is predicated on the Will of Karan Singh. Apart from the fact that there was an admission in Ground (F) in the first appeal before the learned ADJ that the appellant was not in a position to prove the Will, there is no material on record, on the basis of which the Will could be said to be duly proved. Section 63 of the Indian Succession Act and Section 68 of the Evidence Act categorically require the attesting witness to a Will to be produced for a Will to be duly proved.

28. An appeal under Section 100 of the CPC lies only on substantial questions of law. Para 24(ii) of the judgment in *Hero Vinoth v. Seshammal*⁵ holds that a "substantial question of law" can be said to arise in the following two circumstances:

"A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to



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such legal principle.”

29. No substantial question of law, within the meaning of either circumstance, arises in the present case. No debatable question of law exists. The impugned decisions cannot be said to be contrary to any settled legal principle.

30. Accordingly, this appeal is dismissed.

C. HARI SHANKAR, J.

JANUARY 19, 2024

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Click here to check corrigendum, if any