
(2002) 01 DEL CK 0024

In the Delhi High Court

Case No : IAs 1792 and 8818 of 2000 in S. No. 336 of 2000

Meera Dewan

APPELLANT

Vs

Shakuntala Dewan

RESPONDENT

Date of Decision : 18-01-2002

Acts Referred:

Citation : (2002) 2 AD 519 : AIR 2002 Delhi 321 : (2002) 96 DLT 853

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : V.K. Makhija and Akshay Makhija, for the Appellant; Ashok Sapra and Ashwin Sapra, for the Respondent

Judgement

A.K. Sikri, J.—It is not necessary to recapitulate the facts in detail as mentioned in the plaint or averred in the written statement. The issue involved in these two applications is legal issue and only those facts which have bearing on this issue would be stated.

2. The plaintiff has filed the suit for declaration and permanent injunction. The declaration is claimed, inter alia, to the effect that the plaintiff is the owner of the First Floor of property bearing No. 73, Poorvi Marg, Vasant Vihar, New Delhi (hereinafter referred to as the "suit property") by virtue of the Mutual and Companion Wills of the father of the plaintiff and the defendant herein firstly executed on 14th July, 1983 and thereafter on 24th July, 1986 and further that the defendant is not entitled to sell, transfer or alienate the suit property in any manner whatsoever.

3. The father of the plaintiff and the defendant, who is the mother of the plaintiff, executed Wills dated 14th July, 1983. These are two separate Wills which are described by the plaintiff as "Mutual and Companion Wills". These Wills are duly registered by the Sub-Registrar, Asaf Ali Road, New Delhi. In both the Wills it is stated that the defendant and the father of the plaintiff are the joint owners in equal share of the suit property . In the Will of the father of the plaintiff, he

bequeathed his 50 per cent interest in the suit property to the brother of the plaintiff. Sh. Raman Dewan subject to right of residence in the Ground Floor of the said property in favor of the defendant herein and the right to add by construction and the Second Floor to the sister of the plaintiff Mrs. Ritu Dewan alias Ritu Upadhaya. As per the Will of the defendant herein, she bequeathed the First Floor of the suit property to the plaintiff subject to a right of residence in the First Floor including servants quarters on the First Floor of the property in favor of her husband, i.e. the father of the plaintiff, and the second Floor including the servants quarter on the Second Floor to the sister of the plaintiff, Mrs. Ritu Dewan.

4. On 24th July, 1986 both the parents of the plaintiff again executed two separate registered Wills with the Sub-Registrar, Asaf Ali Road, New Delhi. The thrust of these Wills remain the same as that of the earlier two Wills executed on 14th July, 1983. The only difference is that vide Will dated 14th July, 1983 the father of the plaintiff had bequeathed the Ground Floor of the property in favor of Mr. Raman Dewan (brother of the plaintiff) and vide will dated 24th July, 1986 the said Ground Floor was bequeathed in favor of the mother of the plaintiff-defendant herein and she was given a right to receive rent also in respect of that portion in the event of the death of the father of the plaintiff because the suit property was still with the tenant at that time. Thus in the later will executed by the father of the plaintiff more financial security is given to the defendant. In so far as the plaintiff and her sister are concerned, no change was made in respect of their rights in the Wills dated 24th July, 1986.

5. The father of the plaintiff expired on 15th January, 1993 leaving behind his widow-defendant herein as well as two daughters, namely, the plaintiff and Mrs. Ritu Dewan and son Mr. Raman Dewan. There is no dispute that on the death of the plaintiff, the will dated 24th July, 1986 executed by him becomes operative and is to be given effect to. However, the case set up by the plaintiff in the instant suit is that since both the Wills executed by the parents of the plaintiff were Mutual and Companion Wills, the Will dated 24th July, 1986 executed by the defendant also become effective on the death of the defendant's husband as both Wills being Mutual and Companion Wills, the defendant cannot resile from the Will executed by her, and Therefore, cannot deprive of the suit property which falls in the share of the plaintiff by the Will executed by the defendant. In these circumstances, the suit for declaration is filed apprehending sale/disposal of the suit property by the defendant to third parties.

6. Along with the suit, the plaintiff has filed is No. 1792/2000 which is an application under Order XXXIX Rules 1 and 2 and Section 151 CPC. Prayer made in this application is that the defendant be restrained from selling, transferring, alienating and parting with possession of the suit property to any third party during the pendency of the suit. On this application ex-parte injunction dated 18th February, 2000 was passed. After the defendant was served with the summons in the suit and notice in the application, the defendant has filed is No.

8818/2000 which is an application under Order XXXIX Rule 4 read with Section 151 CPC for vacation of the ex-parte injunction. The defendant has also filed reply to is No. 1792/2000 as well as written statement. The plaintiff has filed reply to is No. 8818/2000, rejoinder to is No. 1792/2000 and replication in the suit.

7. Since the applications are interlinked, these were heard together and are being disposed of by this common order.

8. The defendant has challenged the stand of the plaintiff primarily on the ground that the two Wills executed by the parents of the plaintiff on two occasions are not the Mutual and Companion Wills, and Therefore, on the death of father of the plaintiff (husband of the defendant), it is that Will which is to be given effect to and not Will dated 24th July, 1986 executed by the defendant who is still alive.

9. In order to appreciate the rival submissions, it is necessary to consider as to what are Mutual and Companion Wills and whether the two Wills dated 24th July, 1986 in question would be covered by the test laid down for deciding whether the particular Wills are Mutual and Companion Wills.

10. A Will is an instrument by which a person makes a disposition of his property to take effect after his death, and which is in its own nature ambulatory and irrevocable during his lifetime. It is a disposition of property which could have no legal effect until the death of the person who executes such disposition. When two or more persons make Will by a single instrument, it may be referred to as joint Will. Thus a joint Will is a single instrument whereby two persons give effect to their testamentary disposition. On the other hand, a mutual Will is one of two testamentary papers made respectively by two persons, each giving the other similar rights in his property and being in fact identical, so far as they can be, for the purpose of carrying out of the intention of the two testators. In a joint Will there is no reciprocity whereas mutual Wills are described as reciprocal Wills. In the case of *V. Sarada and Others Vs. K.V. Narayana Menon and Others*, , the court described the distinction between joint Will and mutual Will in the following words:

"A joint will, though for all apparent purposes, is a simple testamentary instrument, constitutes or unites in the testamentary disposition of two or more persons. The document only evidences that two or more persons have executed their Wills in a single document. A clear and better picture of the distinguish joint wills from mutual Wills. Mutual Wills as distinguished from joint are described as reciprocal Wills. Reciprocity in the matter of bequests under the Wills is the sigil and signet of a mutual Will. The testators should confer upon each other reciprocal benefits."

11. A Joint Will is a Will made by two or more testators contained in a single document, duly executed by each testator, disposing either of their separate properties, or of their joint property. It operates on the death of each testator as his Will disposing of his separate property, and is in effect two or more Wills

depending upon the number of testators. In case of mutual Wills, the testators execute their separate Wills but reading of the two Wills would show reciprocity in the matter of bequest i.e. testators confer, by their respective wills, reciprocal benefits upon each other. It is reciprocal will where one testator is the legatee of the other.

12. In the case of Kochu Govindan Kaimal and Others Vs. Thayankoot Thekkot Lakshmi Amma and Others, the Supreme Court ascribed the following meaning to the mutual Will :

"A will is mutual when two testators confer upon each other reciprocal benefits, as by either of them Constituting the other his legatee; that is to say, when the executants fill the roles of both testator and legatee towards each other. But where the legatees are distinct from the testators, there can be no question of a mutual Will."

13. In this case three testators executed one common Will. On the death of two testators, the third testator claimed that he had become entitled, by survivorship, to all the properties disposed off by the Will. After reproducing the Will in para 2 of the judgment, the court formulated the question and answered which was to be determined in the said case in para 6, in the following manner:

"The sole point for determination in these appeals is whether under the will all the three testators became joint owners of all the properties on which it operated. After hearing the question fully argued, we have come to the conclusion that is not the effect of the will, and that the judgment of the High Court contra cannot be supported. There were three executants of the will. Each of them possessed properties, which were his or her self-acquisitions. They also owned some properties which they had jointly acquired, but their title to such properties was as tenants-in-common and not as joint tenants. Each of them would have been entitled to executed a will of his or her properties, and if that had been done, by the legatees named therein would undoubtedly have been entitled to those properties. In the present case, the legatees who were intended to take were the same persons, and it was for that reason that the three testators instead of each executing a separate will jointly executed it. It is, nevertheless, a will by which each testator bequeathed properties belonging to him or to her, and Therefore on the death of each testator, the legatees mentioned in the will would be entitled to the properties of the testator, who dies."

14. It may be mentioned that the Will executed by the three executants related to the properties acquired by them jointly and separately. After reading the recital of the said Will, the court found that there were no words by which the executants thereof divested themselves of their own ownership and vested in themselves jointly. The court further found that Clause 3 of the Will provided that the testators could alienate the properties jointly or severally, and Therefore, there was no intention of the testator to impress the said properties with the

character of joint property. The court held that the Will was joint Will but not mutual Will as no reciprocal benefits were conferred by one on the other Constituting the other his legatee. What is important is, it was held, that the executants should fill the roles of both testator and legatee towards each other, where the legatees are distinct from the testators there can be no question of a mutual Will.

15. The same question about the nature and effect of the Will i.e. whether it was joint Will or mutual Will, came up for consideration before the Supreme Court in the case of *Dilharshankar C. Bhachech Vs. Controller of Estate Duty*, Ahmedabad, . The court stated the distinction between the joint Wills and mutual Wills by observing as under :

"Para 28: Theobald on "Wills", 12th Edn., pages 28 and 29 at paras 79 and 80 describes the difference thus:

Joint Wills-Persons may make joint Wills, which are, however, recoverable at any time by either of them or by the survivor. A joint Will is looked upon as the Will of each testator, and may be proved on the death of one. But the survivor will be treated in equity as a trustee of the joint property if there is a contract not to revoke the Will; but the mere fact of the execution of a joint Will is not sufficient to establish a contract not to revoke. So a legacy to a legatee who survived the first testator, but pre-deceased the second, did not lapse. Where a joint Will is followed by a separate Will which is conditional on a condition that fails, the joint will is not revoked even though the subsequent separate Will contains a revocation clause.

Mutual Wills- The term "mutual Wills" is used to describe separate documents of a testamentary character made as the result of an agreement between the parties to create irrevocable interests in favor of ascertainable beneficiaries. The revocable nature of the Wills under which the interests are created is fully recognised by the court of Probate; but in certain circumstances the Court of Equity will protect and enforce the interests created by the agreement despite the revocation of the Will by one party after the death of the other without having revoked his Wills.

The Court of Equity will not protect the beneficiary under mutual Wills merely because they have been made in almost identical terms. There must be evidence of an agreement to create interests under the mutual Wills which are intended to be irrevocable after the death of the first to die. Where there is no such evidence the fact that the survivor takes an absolute interest is a factor against the implication of such agreement. Where, however, the evidence is clear, as, for example, where it is contained in recitals in the Wills themselves, the fact that each testator gave the other an absolute interest with a substitutional gift in the event of the other's prior death does not prevent the Court of Equity from affording its protection to the beneficiary under the mutual Wills. The agreement must also be sufficiently precise to be enforced by the Court.

Before the death of the first to die, the agreement is a contractual one made in consideration of mutual promises. It can, Therefore, at this stage be revoked by mutual agreement and even by unilateral breach, giving rise to an action for damages, at least where the revoking party gives such notice to the other as may enable him to alter his Will also. But on general principles only the parties to the agreement can sue for damages for unilateral breach."

31. Halsbury's Laws of England, fourth edn., vol. 50 at pages 95 and 96, paras 207 and 208 deals more or less in the same manner about joint Will and mutual Will. But at page 108, para 221 it states the law thus:-

221. Restrictions by taking a benefit under a mutual Will.- Mutual Wills may be made, either by a joint Will or by separate Wills, in pursuance of an agreement that they are not to be revoked. Such an agreement may appear from the Wills, or may be proved outside the Wills, but it is not established by the mere fact that the Wills are in identical terms. If no such agreement is shown, each party remains free to revoke his will. If there are separate Wills, or to revoke the joint Will, so far as it disposes of his property, and the fact that one party has died without revoking property, and the fact that one party has died without revoking the disposition of his property does not prevent the survivor from revoking the disposition which he has made notwithstanding that he has received benefits out of the estate of the deceased party. Even when there is such an agreement and one party has died after departing from it by revoking or altering the Will, the survivor having notice of the breach cannot claim to have the later Will set aside, since the notice gives him the chance of altering the Will as regards his own property; and the death of the deceased party is itself sufficient notice for this purpose. If, however, the deceased has stood by the agreement and not revoked or altered his Will, the survivor is bound by it, and although probate will be granted of a later Will made by him in breach of the agreement, since a Court of probate is only concerned with the last Will, the personal representatives of the survivor nevertheless hold his estate in trust to give effect to the provisions of the joint Will or mutual Wills."

32. Jarman on wills in Eighth ed., at page 42 states the position of mutual Wills thus:

The fact that a husband and wife have simultaneously made mutual Wills, giving each to the other a life interest with similar provision in remainder, is not in itself evidence of an agreement not to revoke the Wills; in the absence of a definite agreement to that effect there is no implied trust precluding the wife from making a fresh Will inconsistent with her former Will, even though her husband has died and she has taken the benefits conferred by his Will. Although by the mutual Wills the wife expressly has refrained from exercising a power of appointment, which her husband had only in default of her exercising it, and he has appointed, the wife can both take the benefit of her husband's Will and exercise her power to appointment, unless the language of his Will either puts her to her election, or places her in the position of seeking at the same time to

approve and reprobate its provisions."

16. That was a case where "K" and his wife "M" jointly possessed certain properties in respect of which they executed a joint Will. The appellant-accountable person, who was one of the three grandsons of "K" and "M" was made the executor of the will. The Will stipulated that after the death of "K" or "M" the survivor shall become the owner of the properties in question. The Will further stated that after the death of the survivor, the testators "devised and bequeathed" the properties which were delineated into three parts to their three grandsons, in species i.e. in specific demarcated areas.

17. "M" predeceased "K". Thereupon estate duty on the share of the property which passed on to "K" had been duty paid. On the death of "K", the appellant-cum-accountable person-cum-sole executor and trustee paid estate duty to the remaining extent of 50% on the said properties. The appellant's case was that since the properties were settled by the joint Will in favor of the grandsons and since duty had been paid on the death of one of the joint executants to the Will, after the death of the survivor-executant "K", the duty was not payable on the whole estate by virtue of Section 29 of the Estates Act. It was further contended that the deceased "K" was neither at the time of his death nor at any time during the continuance of the settlement, the full owner of the share of the property of "M" because he had only a life interest therein to receive rents and profits from that share and, Therefore, exemption contemplated by Section 29 came into force and the Revenue was not entitled to levy any estate duty with regard to the share of "M" on the death of the deceased "K". Allowing the appeal of the accountable person with costs Supreme Court held:

(1) Section 29 would apply even if the "settlement" and the "liability to pay estate duty" both came into existence simultaneously on the death of one of the parties to a marriage. The expression "if the estate duty has already been paid... since the date of the settlement" in Section 29 means "if the estate duty has become payable or has been paid either simultaneously with the creation of the settlement or any time thereafter". It is not necessary that the settlement in question should first come into existence and duty should become payable subsequent thereto. Section 29 comes into operation only on the death of the surviving spouse. The intention of the Legislature in framing the section was to avoid double duty.

(2) The Will in question was a mutual Will. The husband "K" received the benefit under the Will after the death "M". It became irrevocable by him after her death. Therefore he had no disposing power over the share of "M" in the property. In the premises, being a "settled property", estate duty having been paid on the death of one of the parties, the accountable person was entitled to exemption u/s 29 of the Act.

Section 29 requires that the deceased whose death attracts the duty must have had disposing power at the time of his death. Therefore, whether estate duty

was payable to the whole of the property or not would depend upon whether the deceased "K" had disposing power over the share of "M" inherited by him on her death or not? Whether a person is competent to dispose of would depend on the terms and conditions under which the property is either acquired or inherited. The expression "competent to dispose of" must bear the ordinary meaning in the English language. A person shall be deemed to be competent to dispose of the property if he has every power or authority enabling the donee or other holder thereof to appoint or dispose of the property as he thinks fit.

(3) The question regarding competence to dispose of the property would depend upon the construction of the Will. The Will must be construed in such a manner as to find out the true intention of the executants or the testator and testatrix. For that it must be read as a whole. Secondly, the expression must be read consistently.

(4) Before the death of the first of the executants, the agreement remained contractual one in consideration of mutual promises. It could have been at that stage revoked by mutual agreement or even by unilateral breach, giving rise at the most to an action for damages. But after the death of the first one without revoking his or her own Will, the joint Will would become irrevocable by the survivor. There must however, be definite agreement found from the tenor of the Will or aliunde that the Will would not be revoked after the death of one of the executants or disposition will not be made contrary to the Will after the death of one of the executants. Such an agreement may appear from the will or may be proved outside the Will but that is not established by the mere fact that the Wills are in identical terms, if such an agreement is shown, each party remains bound.

(5) A different and separate agreement must be spelled out not to revoke the Will after the death of one of the executants. That agreement must be clear though need not be by a separate writing but must follow as a necessary implication which would tantamount to an express agreement. The predominant intention of the executants at the time of the execution, after the acceptance of the benefit of the execution makes the Will in this case irrevocable by the survivor of the executants.

(6) Because of the specific clause that it was intended that the grandsons would receive the benefit in species and there being no provision for making up the deficiency or diminution if any, it must follow that there was mutuality and "K" was not competent to dispose of the property in any manner contrary to the ultimate disposition. The dominant intention of the testators was evidenced from the language used. This must be judged in the facts and circumstances of each case. It was not only that on certain basis the Will was made but it was intended to remain intact to be enjoyed by the grandchildren. The fact that both the executants have described themselves "joint owners" is not by itself conclusive on this point nor the use of the expression "that the survivor shall become the owner" is conclusive. There is a definite agreement not to revoke the Will by one of the executants after he or she has received the benefit under the Will on the

death of either of them.

18. Coming to the question of construction of Will in para 50 of the judgment, the court observed as under:

"Therefore the Will must be construed in its proper light and there must be definite agreement found from the tenor of the Will or aliunde that either of the joint executants would not revoke the Will after receiving the benefit under the Will. Such definite agreement need not be express; it can be implied. The terms of the Will have been set out exhaustively. It was undoubtedly a joint Will. The property in question has been described as "our property". The expression "owner" has also been used in the manner indicated in the sentence "During our lifetime we shall continue to be the joint owners of land bungalow and blocks with their common bathroom and two privies...and shall be joint entitled to the rents and income of the said land and blocks and the user and rent of the bungalow". The Will goes on further to say that on the death of one of them, the survivor shall become the "owner of... and shall become entitled to the rents and income and user of the said land bungalow and blocks including garage...". Therefore, it is clear that the ownership which the joint executants contemplated was the user during the lifetime and entitlement to the rents and income of the same. It is this ownership which was to pass on the death of either of them to the survivor and the Will thereafter goes on to say that "the provisions hereinafter contained shall become effective after the death of the survivor of us." And thereafter after the death it is provided "we hereby devise and bequeath our said furnished bungalow..." The gift of the property to the three grandchildren as owners in full sense is to take effect on the death of the survivor of both the executants. It is clear that the property was intended to be kept intact for the enjoyment of the ultimate legatees and during the lifetime of either of them the property would not in any way be parted with or diminished. This intention, expressed in the implied terms in the bargain in the Will, in our opinion, would be fortified by devising the property to three grandchildren in species i.e. in specific form and not providing for any money or compensation for diminution or any part thereof before coming into effect of the Will in question. If that is the position then, in our opinion, there is a definite agreement not to revoke the Will by one of the executants after he or she has received the benefit under the Will on the death of either of them."

19. Thereafter the position was summed up in para 55 laying down the propositions. This para reads as under:

"In view of the above discussion, the following propositions follows:

(1) Whether estate duty was payable on the whole of the property or not would depend on whether the deceased Gopalshankar had "disposing power" over the share of Mahendraba inherited by him on her death or not?

(2) The above question would depend on the construction of the joint Will-did it create any mutuality among the executants of the joint Will? Whether

Kamalashankar Gopalshankar having accepted the benefit and after his wife's death, was competent to do anything contrary to the ultimate bequest? Before the death of the first of the executants, the agreement remained contractual one in consideration of mutual promises. It could have been at that stage revoked by mutual agreement or even by unilateral breach, giving rise at the most to an action for damages. But after the death of the first one without revoking his or her own Will makes the joint Will irremovable by the survivor {(see Theobald (supra))}. But there must be an agreement that the Wills could not be revoked after the death of one of the executants or disposition will not be made contrary to the Will after the death of one of the executants. Such an agreement may appear from the Will or may be proved outside the Will but that is not established by the mere fact that the Wills are in identical terms. If such an agreement is shown, each party remains bound.

(3) A different and separate agreement must be spelled out not to revoke the Will after the death of one of the executants. That agreement must be clear though need not be by a separate writing but must follow as a necessary implication which would tantamount to an express agreement.

(4) The predominant intention of the executants at the time of the execution, after the acceptance of the benefit of the execution makes the Will in this case irrevocable by the survivor of the executants.

(5) Judged by the principles indicated above, in the facts and circumstances of this case, we are of the opinion because of the specific clause that it was intended that the grandsons would receive the benefit in species and there being no provision for making up the deficiency or diminution if any, it must follow that there was mutuality and Kamalashankar Gopalshankar was not competent to dispose of the property in any manner contrary to the ultimate disposition.

(6) The fact that estate duty was paid is non sequitur.

(7) The payment of wealth tax by Kamalashankar Gopalshankar on the whole estate after the death of Mahendraba is not relevant.

(8) The question of strict construction of the taxing statute and the principle that one who claims exemption must strictly come within the preview is not relevant in this case because the exemption follows on the interpretation of the Will."

20. Keeping in view the aforesaid principles in mind, we have to give proper construction to the set of Wills executed by the parents of the plaintiff in the instant case.

21. If the two Wills executed by the executants are mutual, before the death of one of them, the agreement remains a contractual one in consideration of mutual promises and can be revoked by mutual agreement or even by unilateral breach giving rise to, at the most, an action to damages. Further after the death of any one of the executants, both the Wills become operative and the other is not entitled to revoke the Will thereafter. One of the executants in the instant case

had died. Therefore, what is to be examined in the instant case is as to whether there was an agreement that the Wills could not be revoked after the death of one of the executants or deposition will not be made contrary to the Will after the death of one of the executants. In *Dilharshankar's* case (supra) it has been held that such an agreement may appear from the Will or may be proved outside the Will. For this purpose pre-dominant intention of the executants at the time of execution is to be seen. In the present case, the executants of the two Wills were husband and wife. They were joint owner of the property in equal shares. They have one son and two daughters. It appears that the intention of both the parents, namely, Sh. N.N. Dewan and his wife i.e. the defendant No. 1 herein, was to bequeath their property in favor of all the three children. In the Will of Sh. N.N. Dewan he bequeathed his 50 per cent interest to his son, Sh. Raman Dewan and Second Floor to his daughter, Mrs. Ritu Dewan alias Ritu Upadhaya. The defendant No. 1 by separate Will executed on the same day bequeathed First Floor of the suit property to the third child, namely, the plaintiff herein and Second Floor including servant quarter on the Second Floor to Mrs. Ritu Dewan alias Ritu Upadhaya, another daughter. The reading of the two Wills would make it clear that the intention of both the executors was to give Ground Floor to their son, Sh. Raman Dewan, First Floor to the plaintiff herein and Second Floor along with servant quarter to another daughter, Mrs. Ritu Dewan. It would also be significant to mention that while bequeathing the property in the aforesaid manner, both the executants gave the right of residence in the said property to the surviving spouse. The manner in which different portions were bequeathed by the two executants in their respective Wills in favor of their children would be clear from paras 1 and 2 of the both the Wills (which are in identical terms) and read as under:

"1. I am owner of the 50% of property No. 73, Poorvi Marg, situated at Vasant the said property belongs to my wife, Smt. Shakuntala Dewan. My share of the property has been built from my own earning and savings.

2. At present I and my wife Smt. Shakuntala Dewan, who is a joint owner of the said property are sharing the rental income floor-wise for the ground floor including the garage for me and the first and the second floors, including the servants quarters on these floors for my wife, Smt. Shakuntala Dewan. We both wish and want the same arrangements to continue with regards to the ownership and the rights of the property and these arrangements are made in consultation and with concurrence of my wife Smt. Shakuntala Dewan."

22. From this one cannot rule out the possibility of there being an agreement between the parents of the plaintiff as to how the respective shares in the suit property would be given to three children. Prima facie, when such an agreement can be discerned from the Will, it can be stated, again, prima facie, that the Wills in question were the mutual Wills. The plaintiff has the right to prove such an agreement even outside the Will. That occasion would come when the evidence is recorded in the suit after framing of the issues. At this stage, it cannot be held

that there is no possibility of the two Wills being mutual Wills. Therefore, I am satisfied that the plaintiff has been able to prove, prima facie, case for grant of injunction.

23. Even the balance of convenience is in favor of the plaintiff. As per the two Wills, the father of the plaintiff had given his share in favor of his son and other daughter and mother's share has gone to the plaintiff herein. If the injunction is refused now and the defendant No. 1 parts with or sells the First Floor of the property in question, the plaintiff shall suffer irreparable injury in the event she succeeds ultimately. On the other hand, the defendant No. 1 does not suffer any injury. After all, we have to keep in mind that it is a family dispute. If ultimately the plaintiff is able to prove the mutuality of the Wills and the arrangement agreed upon between the husband and the wife whereby both the parties agreed that all three children should inherit the suit property, the defendant No. 1 at this stage should not be given a chance to create the conditions by which the plaintiff is totally excluded from inheriting any portion of the property. All the three conditions for grant of injunction under Order XXXIX Rules 1 & 2 CPC stand established in the present case.

24. The result of the foregoing discussion is that is No. 1792/2000 filed by the plaintiff is allowed. Ex-parte injunction order dated 18th February, 2002 is made absolute. is No. 8818/2000 filed by the defendant under Order XXXIX Rule 4 CPC is hereby dismissed. It goes without saying that any expression of opinion is only a tentative expression and no final opinion is expressed in the matter.