

(2009) 10 DEL CK 0302
In the Delhi High Court
Case No : CS (OS) No. 1489 of 1999

Smt. Aruna Chhabra

APPELLANT

Vs

Sri Vinay Sud and Others

RESPONDENT

Date of Decision : 21-10-2009

Acts Referred:

Registration Act, 1908 — Section 17

Citation : (2009) 10 DEL CK 0302

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : K.K. Jha, for the Appellant; Pawan Upadhyay, Prashant Neal and Anish Kumar Maggo, for the Respondent

Judgement

Manmohan Singh, J.—The present suit has been filed by the plaintiff for partition, permanent injunction and mesne profits. The plaintiff is the daughter of late Sri. Maheshraj Sud and defendant No. 1, defendant No. 2 and defendant No. 3 are his son, daughter-in-law and grandson respectively.

plaintiff'S CASE

2. Late Sri. Maheshraj Sud acquired plot No. E-22, Jangpura Extension, New Delhi (hereinafter referred to as the "suit property") vide a perpetual lease deed dated 12 August, 1969 from the President of India. The said property was acquired out of his own funds and a one storey building was constructed thereon also from his own funds. Sometime in 1993, the plaintiff's father entered into an agreement with a builder whereby first and second floor along with three servant quarters on terrace were to be constructed on the ground floor of which the first floor with one servant quarter was to belong to the builder and the rest to Sri. Maheshraj Sud. Out of courtesy, the plaintiff's father allowed the defendants to reside in the second floor of the suit property, while he himself resided in the ground floor thereat.

3. While staying with the plaintiff at her matrimonial residence at Coonoor,

Tamilnadu Sri. Maheshraj Sud, who was suffering from tuberculosis, passed away on 18 September, 1996.

4. During his lifetime, late Sri. Maheshraj Sud made a Will dated 22 February, 1993 which was duly registered with the Sub- Registrar, Asaf Ali Road, Delhi vide Registration No. 954, Additional Book No. III, Vol. 717 at pages 55 to 58. The attesting witnesses were the plaintiff's husband and the builder of the suit property. As per the said Will, half of the ground floor was to go to defendant No. 3, grandson of the testator. The other half of the ground floor along with the second floor, terrace and two servant quarters were bequeathed to the plaintiff.

5. When the plaintiff visited the suit premises in Delhi on or about 7 December, 1998 she saw that the portion bequeathed to her had been taken over by the defendants. On apprising the defendants of the Will, the defendants became hostile. Since then, the plaintiff sent many letters and phone calls etc. to the defendants to vacate her share of the property, but to no avail. The plaintiff then sent a legal notice dated 29 February, 1999 calling upon the defendants to restrict their occupation of the suit property. The defendants continued to stay in possession thereof. Thus the present suit has been filed.

DEFENDANTS' CASE

6. The defendants. case is that the alleged Will produced by the plaintiff, was signed by late Sri. Maheshraj Sud when he was unwell and not in complete control of his faculties. It has been alleged that the said Will was signed by him by coercion and under the influence of the plaintiff. Further, the defendants have alleged that the suit property was not self acquired and was the joint hindu family property of the family and as such, defendant No. 1 being the only son is a coparcener and entitled to his share of the same.

7. The defendants. have also brought to light the family settlement arrived at by the parties dated 14 March, 1993. The said family settlement is admittedly signed by the defendant No. 1, the plaintiff and late Sri. Maheshraj Sud and written in the handwriting of the builder. As per the said settlement, defendant No. 1 was to be owner of the entire second floor. The Will is stated to be fabricated and the family settlement to be binding. Further, it is stated that the plaintiff got her share in the form of jewellery, money and a plot of land in Agra.

8. In the replication, the plaintiff has pointed out certain places where the defendants have contradicted their statements. By placing on record the family settlement, the defendants have falsified their stand that the suit property was not self acquired as if it had not been self acquired, late Sri. Maheshraj Sud would have no right of dividing and/or giving the same to his family only. Further, the Will was not forcefully executed by the plaintiff or her husband but by late Sri. Maheshraj Sud of his own free will, in fact he personally appeared before the Sub- Registrar and got the Will registered.

9. Further, as per the defendants. own admission and reliance on the family

settlement, the plaintiff is the rightful owner of the entire ground floor of the suit property as the said settlement relied upon by the defendants provides that the plaintiff is the rightful owner of the entire ground floor. The plaintiff has denied receiving any money, jewellery or property in Agra.

10. I have perused the submissions of both parties as well as other relevant documents. On 8 July, 1999 this Court restrained the defendants from transferring, parting with or creating any third party interest on the suit property.

ISSUES

11. Issues in this case were framed on 4 September, 2002 and the same are reproduced hereinbelow:

1. Whether the Will dated 22 February, 1993 executed by Late Sri. Maheshraj Suda is valid and the plaintiff is entitled for possession of the portion of the premises No. E-22, Jangpura Extension, New Delhi in terms thereof?

2. If issue No. 1 is decided in the affirmative, what is the amount the plaintiff is entitled to receive from the defendants towards Mesne Profits in respect of the said portion which is in their wrongful occupation and enjoyment and consequent to their refusal to hand over possession of the same?

3. If issue No. 1 is decided in the negative, what is the share and portion of the premises E- 22 Jangpura Extension, New Delhi to which the plaintiff is entitled to inherit as one of the legal heir of her father Late Shri Maheshraj Suda and what is the amount of mesne profits which the defendants are liable to pay to the plaintiff for denying the right of use and occupation of the said premises to the plaintiff and for their exclusive occupation and enjoyment of the entire of the said premises in exclusion of the plaintiff?

4. Relief

12. The plaintiff has examined four witnesses i.e. plaintiff herself as PW-1, Lt. Col. (Retd.) T.S. Chhabra as PW-2 (husband of the plaintiff), Sh. Sarabjeet Singh as PW-3 and Sh. Surender Kumar, LDC, the Officer of Sub-Registrar III, Asaf Ali Road, New Delhi. The affidavits of PW-1 to PW-3 were filed on 3rd January, 2003.

13. PW-1 Smt. Aruna Chhabra in her affidavit has almost reiterated the statements made in the plaint. The following documents were exhibited in her affidavit:

(a) Certified copy of the Lease Deed dated 12th August, 1969 of the suit property as Exhibit PW1/1;

(b) Certified copy of the Will dated 22nd February, 1993 as Exhibit PW1/2;

(c) Death certificate of the father of plaintiff as Exhibit P1;

(d) Acknowledgment Card of the Registered post letter sent to defendant No. 1 along with Will as Exhibit PW1/3;

(e) The legal notice as well as postal receipts of acknowledgment card which are exhibited as PW1/4 to Exhibit PW1/8

14. In support of the relief for mesne profits, a statement has been made by the plaintiff that the built up area of the property which falls in her share is over 3000 sq. ft. and before filing of the suit she enquired about the rental income of the said area from a property dealer, as per whom the same would be about Rs. 35,000/- per month. She has also denied in her affidavit that the property is a joint family property/co- parcenary property and that the same was purchased by her father from ancestral funds. In her cross examination she made a statement that she brought her father to Coonoor in the month of April, 1991. She has admitted that her father was suffering from tuberculosis at that time and was of quite weak and feeble health. It has also been stated that at the time of execution of the Will dated 22nd February, 1993 she, her father and her husband were residing in the premises in question at Jangpura, Delhi. She has also specifically answered the question that the plaintiff, her husband and the builder had accompanied her father to the office of Sub-Registrar for getting the Will registered.

15. PW-2 Lt. Col. Dr. T.S. Chhabra (Retd.) in his affidavit has identified the certified copy of the Will exhibited as PW1/2. He has also reiterated in his statement that he and Mr. Sarabjeet Singh were the witnesses to the Will which was signed by Shri Maheshraj Suda in their presence. He also identified his signatures marked as "C", the signatures of Maheshraj Suda marked as "D" and signatures of Mr. Sarabjeet Singh marked as "E". He has also confirmed the statements given by his wife as PW1. In his cross examination he has denied that he never visited his ailing mother-in-law and in fact in the beginning of 1990 he came to see his ailing mother-in-law during her lifetime for the last time. He admitted in his statement that he and his wife did not attend the funeral ceremony of his mother-in-law as they were stationed at a long distance.

16. PW-3 Mr. Sarabjeet Singh has filed the affidavit confirming that he was one of the attesting witnesses of the Will of Shri Maheshraj Suda. He has also made the statement that Shri Maheshraj Suda signed the Will in his presence as well as in the presence of other persons. He was also shown the certified copy of the Will and confirmed his signatures at Mark "E" on the Will as well as the signatures of PW-2 at Mark "C" and that of Sh. Maheshraj Suda at Mark "D". In his cross examination he has stated that Mr. Suda was his client and he is in construction business. The statement has also been made that Mr. Suda approached him for the purpose of a collaboration agreement which was signed sometime between 1992-93. He has also made a statement that the family agreement dated 14th March, 1993 is in his handwriting and it bears the signatures of Dr. T.S. Chhabra (PW2), husband of plaintiff and that of Mrs. Aruna Chhabra (PW1) daughter of deceased besides the signatures of deceased himself and signatures of Mr.

Jagdish Sood.

17. PW4 Shri Surender Kumar has brought the relevant record. In his statement he has stated that Will was registered against Registration No. 954 on 22nd February, 1993 and book No. 3 Vol. 717 pages 55 to 58. He has also proved the certified copy of the Will shown to him and he confirmed that the same was issued from the Office of Sub-Registrar at Asaf Ali Road which is Marked as Exhibit PW4/1. In his cross examination he has made the statement that he had no role to play as an LDC during the registration of the Will. It has been stated by him that he has not seen the original Will, therefore, he was not in a position to make any comment about the Will as well as the seal of Sub- Registrar. He has deposed that copy of the Will retained by the office of Sub-Registrar bears the seal and signatures of the Sub-Registrar.

18. The defendants have produced the evidence by way of affidavits of Mr. Vinay Sood (DW1), Mrs. Neeta Sood (DW2) w/o Mr. Vinay Sood, Mr. Lalit Sood and Mr. Jagdish Khullar as DW3 and DW4 respectively.

19. In his affidavit Mr. Vinay Sood (DW1) has almost reiterated the statement made in the written statement, however, in para 11 of the affidavit he has stated that after the alleged Will a family settlement had taken place in the family on 14th March, 1993 and the said family agreement duly bears the signatures of plaintiff and that of father of the plaintiff. He has admitted in this para itself that as per the family agreement the he shall be the owner of the entire second floor of the property. It has also been mentioned in the affidavit that the Will is a fabricated one. In his cross examination he has deposed that he did not contribute any fund to the acquisition of the property in question and also cannot produce any other evidence except the evidence on record to show that the property in question is a Joint Hindu Property. He mentioned that he cannot be say if on the death of his father he became "Karta" of the Joint Hindu Family and in fact he does not understand the meaning of "Karta" nor he has filed any income tax return as a member or "Karta" of Hindu Undivided Family. He has admitted that the letter exhibited as PW1/D1 i.e. mutual family agreement of the property was written by the builder Mr. Sarabjeet Singh PW3 and he did not recollect if the builder had written the same in his presence or not. He has also denied that the contents of the said agreement were dictated by him and he was unable to make a statement as to whose signatures the document PW1/D1 bore when it came to his hands for the first time. He has specifically mentioned that he agreed to the terms and conditions contained in the said document but not to the full extent. However, voluntarily he has admitted his signatures and the justification given for the same is that due to respect of his father he has signed the document. He has also stated that the said document has not been challenged in any Court of Law or before any Authority till date. He has specifically admitted that as per the said document a portion of the property was to go to his sister, i.e. to the plaintiff and he never offered any share to his sister in terms of the said document in spite of the fact that plaintiff contacted him

before filing of the suit. The receipt of the legal notice was also admitted by him.

20. DW2 Mrs. Neeta Sood has confirmed the statement of DW1. She has stated in her affidavit that the plaintiff has already received her share by way of jewellery and cash amount of Rs. 10 lac besides a plot of land measuring 1000 sq. yd. situated at Agra. In her cross examination she has admitted that the family settlement had taken place in her presence and she never objected to the said settlement nor was she aware about the contents of the said settlement. She has deposed that at the time of execution of the Will her father-in-law had been suffering from various ailments. She has also given the interpretation about the word "fabricated" mentioned in the pleading that the word "fabricated" means that the Will is signed by her father-in-law under some pressure.

21. DW3 Mr. Lalit Sood has filed the affidavit dated 9th July, 2004 and in his affidavit he has confirmed the statement of defendant No. 1 and 2 by stating that the suit property was purchased by the deceased from the ancestral funds and partly from the borrowings from the relations and friends and his father has also contributed some amount. In his cross examination he deposed that he did not know the exact date and the year when the suit property was purchased. He has admitted that he is married to the sister of defendant No. 2. He has specifically admitted in his cross examination that he does not have any document to establish his statement that the property was purchased from ancestral funds and from money borrowed from relations and friends.

22. DW4 Mr. Jagdish Khullar, neighbor of deceased filed his affidavit dated 9th July, 2004 by stating that the deceased was closely attached to the defendants. He has stated that he has never seen the plaintiff visiting the house of the deceased during her mother's sickness and till her death. In his cross examination he states that he is a transporter by profession and he was not aware about the fact that defendants No. 1 and 2 had made police complaints against the deceased.

23. A certified copy of the Will dated 22 February, 2002 has been filed with the documents and is exhibited as PW 1/2. The same is duly signed by the testator and attested by two witnesses. One of the attesting witnesses of the Will is the plaintiff's husband, Lt. Col. Dr. T.S. Chhabra (Retd.) and the other is Mr. Sarabjeet Singh, the builder of the first and second floor of the suit property. By their affidavits, both have admitted accompanying late Sri. Maheshraj Sud to the office of the Sub-Registrar and attesting the Will in his presence. Both have also identified their signatures on the said Will. Further, PW4 Shri Surender Kumar, LDC, Officer of the Sub-Registrar III, Asaf Ali Road, New Delhi has mentioned in his statement that though he was not present on the day that the Will in question was presented for registration, the copy of the Will retained by the office of the Sub-Registrar bears the seal and signatures of the Sub-Registrar.

24. The burden of proof in Issue No. 1 is upon the plaintiff. The defendants have led no evidence to prove that the suit property is a joint family property. Further,

not even an iota of evidence has been submitted by the defendants. supporting their contention that the plaintiff received jewellery, money and a plot in Agra etc. In so far as the validity of the Will is concerned, a perusal of the evidence on record shows that the Will dated 22 February, 1993 seems to be in order.

Therefore Issue No. 1 is decided in favour of the plaintiff. The family settlement dated 14 March, 1993 has also been placed on record. The said family settlement has been signed by the plaintiff, defendant No. 1, Mr. Jagdish Sood and late Sri. Maheshraj Sud and it changes the portions appropriated to the parties by the Will. Further, in her examination on 10 September, 2003 the plaintiff has admitted that the said settlement has been signed by her. The said family settlement is a later document than the Will and is annexed as Ex. PW1/ D1.

25. The defendants have not produced any evidence to prove that the plaintiff had taken any jewellery, Rs. 10 lac or that she was given the plot measuring 1000 sq. yd. in Agra. The said statements given by the defendants No. 1 and 2 have not been proved in accordance with law, therefore, the contention of the defendants cannot be accepted.

26. As regards the family settlement, it is an admitted position that the said document is unstamped and is not registered under the law. No issue in this regard has been framed. Both the defendants i.e. DW1 and DW2 have made contradictory statements about the validity and execution of the said family agreement. Defendant No. 1 in his statement has specifically mentioned that in case the family settlement is valid the plaintiff was to get the share of the property.

27. To decide the present dispute, the real question for determination is whether the family settlement will prevail or the Will?

28. As regards this question, counsel for the plaintiff has submitted that the family agreement does not satisfy the requirements of law as it is not a recording of a partition that has already taken place, but that it seeks to create new rights over the suit property. The said agreement has never been acted upon by the parties and is inadmissible in evidence as it is unstamped and unregistered and does not in law create or extinguish any rights in the concerned property of the nature sought to be claimed by the defendants. No Issue in this regard has been framed. Further, the defendants have taken a contradictory stand in the said family settlement. Counsel for the plaintiff referred to Tek Bahadur Bhujil Vs. Debi Singh Bhujil and Others, wherein the question of when a family arrangement ought to be registered was discussed. In this context, it was observed as under:

12. Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what had been agreed upon so that there be no hazy

notions about it in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess. The document Exhibit 3 does not appear to be of such a nature...

...The document would serve the purpose of proof or evidence of what had been decided between the brothers. It was not the basis of their rights in any form over the property which each brother had agreed to enjoy to the exclusion of the others. In substance it records what had already been decided by the parties. We may mention that the appellant and respondent No. 1, even under this arrangement, were to enjoy the property in suit jointly and it is this agreement of theirs at the time which has later given rise to the present litigation between the two. The document, to our mind, is nothing but a memorandum of what had taken place and, therefore, is not a document which would require compulsory registration u/s 17 of the Registration Act.

29. Counsel for the defendants has, in retaliation, contended that the family settlement has been admitted by the plaintiff and not denied even once. Further, though the settlement is unregistered, it can be relied upon for collateral purposes to show the conduct of the parties.

30. I agree with the learned Counsel for the plaintiff that the defendant has not been able to prove the family settlement pleaded in the written statement as neither is the said agreement registered nor is it duly stamped. The defendant has failed to prove the said family settlement in accordance with law. The said document, therefore, is not admissible in law in view of the judgment reported in Avinash Kumar Chauhan Vs. Vijay Krishna Mishra,

31. It is pertinent to mention that when the matter was taken up for final hearing on 10 September, 2009 the learned Counsel for both the parties had shown their interest to settle the matter and the same was adjourned to 8 October, 2009 for appearance of the parties. On 8 October, 2009 when both the parties appeared before the court in person the plaintiff without prejudice to her rights was agreeable to settle the matter in view of the family settlement as alleged by the defendants by accepting her share of ground floor. However, the defendants were not agreeable to part with any portion of the property even on the basis of family settlement pleaded by them as defence in the written statement.

The judgment was reserved thereafter.

32. From the evidence stated above it is clear that the plaintiff has failed to produce any evidence on record in order to show that the property in question could get the rent of Rs. 35,000/- at the time of filing of the suit. The plaintiff did not produce the property dealer with whom she has discussed about the quantum of her share in the suit property. PW1 and PW2 have merely made the

statement in this regard, without any evidence, therefore, the relief of mesne profit is rejected.

33. Since the plaintiff has discharged her burden on issue No. 1 by proving the Will dated 22 February, 1999 and on the other hand the defendant has failed to prove the family settlement in view thereof the plaintiff is entitled for the relief of partition, possession and permanent injunction as claimed. The suit of the plaintiff is accordingly decreed in terms of Para 15 of the plaint and a preliminary decree is passed declaring the share of the parties in the suit property bearing No. E-22, Jangpura Extension, New Delhi as per the Will of late Sh. Mahesh Raj Suda dated 22 February, 1999.

34. In view of the fact that a preliminary decree is passed in respect of the suit property Mr. Vivekananda, Adv. (Mobile No. 9810149231) is appointed as a Local Commissioner to hold an enquiry for partition of the suit property by metes and bounds. The Local Commissioner shall inspect the suit property and submit a report as to whether the suit property can be partitioned by metes and bounds (except the First Floor and one servant quarter) as per the Will and suggest the mode of partition, if the same is possible. In case the property cannot be partitioned it shall be reported accordingly.

35. The Local commissioner shall be paid a sum of Rs. 50,000/- to be shared by the parties in proportion of their respective share in the suit property apart from administrative charges, if any, incurred by the Local commissioner.

36. The fee shall be paid on the date fixed before the Local commissioner. The parties shall give access to the Local commissioner of the suit property for the purposes of execution of the commission. The parties are directed to appear before the Local commissioner on 23rd November 2009 at 5.30 PM.

37. List the matter on 12 January, 2010 for directions to await the report of the Local commissioner. Copy of the order be given dasti to the Local commissioner for information and compliance.