

(2012) 02 DEL CK 0537

In the Delhi High Court

Case No : Regular First Appeal No. 319 of 2006

Surinder Kumar (Deceased) Through His Legal Heirs

APPELLANT

Vs

Smt. Sheela and Others

RESPONDENT

Date of Decision : 13-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2012) 02 DEL CK 0537

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Rajat Aneja, for the Appellant; P.R. Chopra, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—The challenge by means of this Regular First Appeal (RFA) filed u/s 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 25.3.2006 by which the suit of the respondents/plaintiffs for possession of the suit property being 1/3rd share of 2838-39, Gali Ashok, Mori Gate, Delhi was decreed against the original appellant/defendant. Mesne profits have also been granted against the original appellant/defendant. I may note that the original appellant/defendant has since expired and is now represented by his legal heirs.

2. The facts of the case are that the suit property belonged to the father Sh. Daryai Lal and which fact is not disputed. The case of the respondents/plaintiffs was that the father had executed a registered Will in favour of their predecessor-in-interest, Sh. Khairati Lal and who was the son of Sh. Daryai Lal, the other son being the original appellant/defendant. It was pleaded that on account of this registered Will dated 31.5.1988 (Ex.PW1/5), Sh. Khairati Lal became the owner of the suit property. Since Sh. Khairati Lal died intestate, it was pleaded that the respondents/plaintiffs, who are his widow and children, have thus inherited the suit property. The respondents/plaintiffs also pleaded that the appellant/

defendant had earlier filed a suit with respect to the suit property and which suit was not pursued and hence was dismissed in default.

3. The original appellant/defendant contested the suit and contended that there did not exist a valid Will of Sh. Daryai Lal dated 31.5.1988. It was pleaded that the fact that in spite of the Will dated 31.5.1988, the appellant/defendant was made as a seller of property being shop No. 3127, Mori Gate, Delhi, and which property belonged to the father- Sh. Daryai Lal, and which would not have been done if Sh. Khairati Lal was the owner by virtue of the Will dated 31.5.1988.

4. After completion of pleadings, the trial Court framed the following issues:-

1. Whether the plaintiff have become owner of the suit property by virtue of the will dated 31.5.1988?
2. Whether the suit of the plaintiff is not maintainable for want of cause of action?
3. Whether the suit is not maintainable without partition of the suit property in view of preliminary objection No. 3 of the WS?
4. Whether the suit is liable to be dismissed for non-joinder of necessary parties?
5. Whether the plaintiffs have not got any right, title or interest in the suit property in their individual capacity in view of the preliminary objection No. 10 of the WS?
6. Whether this court has no jurisdiction to try this suit in view of preliminary objection No. 11 and 12 of the WS?
7. Whether the defendant is the owner of 1/3 share in the suit property by virtue of sale deed dated 14.12.1965 in view of preliminary objection No. 5(2) of the WS?
8. Whether the plaintiffs are entitled for possession of ground floor of the suit property?
9. Whether the ground floor of the suit property was given to the defendant as a licensee on compassionate ground?
10. To what relief the plaintiffs are entitled to in the suit?
11. Relief.

5. The trial Court has held that the registered Will dated 31.5.1988 has been proved and exhibited as Ex.PW1/5. The Will, Ex.PW1/5, was proved not only by summoning the record from the office of Sub-Registrar but also by calling the attesting witness Sh. V.P. Malik, PW3, who deposed with respect to not only drafting of the Will but also execution of the Will and registration of the same thereafter. The trial Court has also held that the name of Sh. Khairati Lal was mutated in the MCD records from 1989 and which documents were proved and exhibited as Ex.PW1/7 and Ex.PW1/8. The trial Court has also noted that if really

the appellant/defendant had a case, he would not have withdrawn his earlier suit bearing No. 460/1992 in which a claim was made for the suit property.

6. Before this Court, learned counsel for the appellants has very strenuously argued that the Will, Ex.PW1/5 was not a valid document and was given up by the parties inasmuch as if this Will, Ex.PW1/5 was there, there was no need to make the late defendant as a party to the sale deed with respect to shop No. 3127, Mori Gate, New Delhi.

7. To this argument of the appellants, the learned counsel for the respondents/plaintiffs countered that inasmuch as the Will, Ex.PW1/5 was not probated/established in a Court of law when the shop No. 3127 was sold it is very much possible that the buyer in order not to enter into controversy as to the person on whom ownership rights had devolved, would have insisted that all the legal heirs of Sh. Daryai Lal, including the appellant/defendant/son, be also made a party to the sale deed. It is argued that the appellant/defendant has failed to file the sale deed with respect to shop No. 3127 and which would have made the position clear that in fact no consideration would have actually been received by the appellant/defendant pursuant to the sale deed of the shop No. 3127. It is argued that in any case the said act of the appellant/defendant being a vendor with respect to shop No. 3127 will have the effect of, at the very best, an entitlement of the appellant/defendant to the shop, however, the suit property, which was another property, and which was bequeathed to Sh. Khairati Lal by the Will Ex.PW1/5, would remain unaffected and which would therefore devolve upon Sh. Khairati Lal and thereafter to his legal heirs, namely, respondents/plaintiffs.

8. I have gone through the impugned judgment passed by the trial Court, the pleadings and the evidence led by both the parties. The trial Court while dealing with issue No. 7 has recorded the fact that the appellant/defendant has failed to prove the alleged sale deed of the shop No. 3127 and therefore it cannot be said that the appellant/defendant was a party to the sale deed. I agree with this finding of the trial Court inasmuch as it was very vital for this sale deed with respect to shop No. 3127 to be filed on record to show that in fact the appellant/defendant was a vendor in his own rights and who had received sale consideration with respect to the said shop. I agree with the arguments as urged on behalf of the counsel for the respondents/plaintiffs that a buyer of an immovable property as an abundant caution many a times insists that all the legal heirs of the original owner of the property be made as vendors, once the Will by which the property is bequeathed only to some of the legal heirs has not been probated /established in a Court of law. In my opinion, what is argued by the counsel for the respondents/plaintiffs is normal course of human conduct, and considering that the Will, Ex.PW1/5 was not probated or proved in a Court of law by the time the sale deed was executed with respect to shop No. 3127, therefore the buyer would have insisted that the appellant/defendant be made party to the sale deed. Further, the sale deed having not been proved on record, it is not permissible for the appellant/defendant to argue that he had received

consideration for sale of the suit shop No. 3127 under that sale deed. Further, the counsel for the respondents/plaintiffs is also correct that at best the action of making the appellant/defendant as a vendor to the sale deed with respect to the shop, would only show an agreement, at the very best with respect to shop No. 3127 but will not affect the finality of the Will with respect to the suit property which is a separate and independent residential property.

9. Some of the relevant observations of the trial Court with respect to proof of the Will, Ex.PW1/5, which of course was not an issue argued before me, read as under:-

Issue No. 1

The plaintiff as PW1 has deposed that Sh. Khairati Lal, her husband died intestate leaving behind one immovable property situated at 2838-39, Gali Ashok, Mori Gate, Delhi which was bequeathed to him under the registered will dated 31.5.1988 by late Sh. Daryai Lal; the original of the said will is Ex.PW1/5. She has further deposed that by law of succession and by law of survivorship, the plaintiffs have become owners of the abovesaid property after the death of Sh. Khairati Lal on 15.7.1995 as the plaintiffs are the legal heirs of late Sh. Khairati Lal. It is also deposed that the defendant had earlier filed a suit against Sh. Khairati Lal, bearing suit No. 460/92 challenging the will Ex.PW1/5 and the said suit was dismissed on 25.9.1997 by the Court of Sh. A.K. Sapra, Ld. Civil Judge, Delhi and the certified copy of the plaint and the dismissal order has been proved as Ex.P-12; the defendant Sh. Surender Kumar as allowed to reside at the ground floor area shown in the red colour in the site plan annexed, as a licensee on compassionate grounds and is in permissive possession of the same; that late Sh. Khairati Lal had filed WS to the plaint of the suit No. 460/92 filed by the defendant asserting that defendant (Sh. Khairati Lal) has become absolute owner of the suit property in accordance with the registered will of late Sh. Daryai Lal in his favour and the certified copy of the said WS has been marked as PW1/16; since that suit has been dismissed, hence, the averments in the WS went unchallenged. It is further deposed that the property has been transferred in the name of late Sh. Khairati Lal vide letter of intimation and fees receipt dated 19.4.1989 of the MCD and the photocopy of the same has been proved as Ex.PW1/7 and Ex.PW1/8 (mark A and mark B). It is further deposed in the para No. 13 of the affidavit of the plaintiff that the plaintiff No. 2 and 3 have already made a release deed in favour of plaintiff No. 1 as Ex.PW1/6; the defendant Sh. Surender Kumar and Smt. Sanjogita Rani married daughter of late Sh. Daryai Lal (testator) had already taken their share as also mentioned in the will and the defendant was allowed to reside in the ground floor (suit property) as a licensee on compassionate ground. The PW1 has proved other necessary documents including the termination letter Ex.P8 and Ex.P9 and the photocopy of the legal notice Ex.P10 alongwith its postal receipt Ex.P13.

The PW1 was put to the lengthy cross examination on behalf of the defendant in which she deposed that Ex.PW1/6 was the release deed executed by her children

namely Sh. Rakesh Kumar, Sh. Radha Krishan and Smt. Sarina. In cross examination, the PW1 stated that the sale deed Ex.P1 in favour of late Sh. Daryai Lal qua suit property was found by her in almirah when the same was opened by Sh. Paras Ram son of paternal uncle of her husband; the Ex.P1 was handed over by Sh. Paras Ram to her husband in the year 1995 before he expired on 15.12.1995 and her husband never informed her about the said document as he could not speak due to cancer in his mouth. The PW1 further deposed that the document Ex.P1 was in her possession after death of her husband. She further deposed that the will Ex.PW1/5 was in respect of the suit property and she is in exclusive possession of the said property as owner. In a question as to in what capacity the defendant was residing in the suit property, the PW1 replied that the defendant has got his own house at Rohini and he should vacate the suit property. She further deposed in her cross examination carried out on 12.5.2004 that the house tax was continuously in the name of her husband. She further deposed during cross examination carried out on 16.4.2004 that her father in law Sh. Daryai Lal (testator) was all right when he executed and got registered the will.

The PW2 Sh. Rakesh Kumar and PW3 Sh. Radha Krishan have corroborated and supported the version of PW1. Another witness Sh. A.R. Rehman, UDC from the office of Sub Registrar I, Kashmere Gate, Delhi who has been inadvertently given No. as PW2 has proved the will Ex.PW1/5 and its registration vide document No. 8853, additional book No. 3, volume No. 610 on pages 65-66 dated 31.5.1988. Another attesting witness to the will is PW3 Sh. V.P. Malik, Advocate who has also proved the will Ex.PW1/5 stating that the same was drafted by him at the instance of Sh. Daryai Lal in May 1988; Sh. Daryai Lal signed in his presence at mark A, B and C. The PW3 Sh. V.P. Malik further deposed that he was attesting witness to Ex.PW1/5 and has signed at mark D in the presence of testator. He further deposed in examination in chief that Sh. A.C. Malik has signed in his presence before the sub Registrar, Kashmere Gate, Delhi. In cross examination Sh. V.P. Malik PW3 deposed that the will Ex.PW1/5 was drafted by him and the document in respect to property in question were shown to him at the time of drafting of the will while the instructions were given by Sh. Daryai Lal. The PW3 Sh. V.P. Malik has denied to a suggestion on behalf of defendant that the will Ex.PW1/5 was got executed from Sh. Daryai Lal by force. In the end of his cross examination Sh. V.P. Malik stated that he alongwith Sh. A.C. Malik another witness appeared before the Sub Registrar, Kashmere Gate, Delhi and he has also seen the sale deed in favour of Sh. Daryai Lal before preparing the will.

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It is not the case of the defendant that the Ex. PW1/5 does not bear the signatures of testator late Sh. Daryai Lal. The defendant has merely alleged that the said will was forged and fabricated and was a waste paper. As argued by the plaintiff, the will has been duly proved as per law of evidence and case relied by the plaintiff in this regard is also relevant and helpful to the plaintiff. The

attesting witness Sh. V.P. Malik, Advocate has duly proved the execution and registration of will Ex.PW1/5 and has also successfully withstood the test of cross examination. He has reiterated his stand even in the evidence when he was examined as DW6 by the defendant. The evidence and the material on record is such which has duly proved the execution and registration of will Ex.PW1/5 by the testator late Sh. Daryai Lal in favour of his son Sh. Khairati Lal husband of plaintiff No. 1 and father of plaintiff No. 2 and 3. Moreover, the suit filed by the defendant challenging the will Ex.PW1/5 was not pursued by him and was dismissed in default. The defendant, therefore, cannot challenge the validity and legality of will Ex.PW1/5 as the dismissal of his suit challenging the said will shall operate as estoppel by record. He is further estopped from raising the question of validity of will because of estoppel by conduct. The defendant has failed to give any explanation as to how he has built up the property in Rohini from his own funds. The will Ex.PW1/5 mentions about the fact that whatever is required has been given to other son Sh. Surender Kumar and daughter Smt. Sanjogita Rani of the testator. The deposition of the plaintiff in that regard is unchallenged. This fact proves the version of the plaintiff that the defendant was given his share by late Sh. Daryai Lal and from the funds provided by late Sh. Daryai Lal, the defendant has got built a separate house at Rohini. The fact that the plaintiff has proved the payment of the house tax in the MCD by late Sh. Khairati Lal qua the suit property also goes in favour of plaintiff to prove that late Sh. Khairati Lal has become the owner of the suit property because of bequeathing of the same by the owner late Sh. Daryai Lal in his favour. The plaintiff No. 1 and her children are the first class legal heir of late Sh. Khairati Lal who died intestate. As per the provision of Hindi Succession Act, 1956, after the death of Sh. Khairati Lal, his legal heirs the plaintiffs and the married daughter has become the owner of the suit property by way of succession and survivorship. Since, the plaintiff No. 2 and 3 and the married daughter of late Sh. Khairati Lal has executed a registered release deed in favour of plaintiff No. 1, it is, therefore held that they have released their share in favour of plaintiff No. 1 by registered deed of release dated 17.9.1997. Because of the evidence and the material on record, the issue No. 1 is decided in favour of plaintiffs. The plaintiff No. 1 Smt. Sheela is therefore, held to be owner of suit property. The issue No. 1 is accordingly decided in favour of the plaintiff.

10. A civil case is decided on balance of probabilities. In the present case, the Will Ex.PW1/5, and which is a registered Will, has been duly proved by the evidence of the attesting witness. Also the suit property was mutated in the name of the predecessor-in-interest of the respondents/plaintiffs, namely, Sh. Khairati Lal immediately after the death of Sh. Daryai Lal in the year 1988 i.e. the property was mutated in the property tax record from the year 1989 itself. Further, the appellant/defendant has failed to file the alleged sale deed with respect to the shop No. 3127, and which even if filed and proved in any case at best would have made out a case with respect to the shop No. 3127, leaving untouched the issue of ownership of the residential property/suit property, and

which residential property was bequeathed to Sh. Khairati Lal under the Will, Ex.PW1/5.

11. Merely because two views are possible, an appellate Court, in an appeal, will not interfere with the findings and conclusions of the trial Court unless the findings and conclusions of the trial Court are wholly perverse or illegal. I do not find any illegality or perversity in the impugned judgment.

12. In view of the above, the appeal is dismissed, leaving the parties to bear their own costs.

C.M. No. 1801/08

By this application, respondents/plaintiffs prayed that mesne profits be granted to them on account of illegal possession of the appellant/defendant of the suit property for the period after passing the impugned judgment and decree. The counsel for the respondents/plaintiffs agrees that his clients have not challenged the impugned judgment and decree by filing an appeal or cross objections. That being so the judgment of the trial Court denying mesne profits has become final, and the same cannot be disturbed by filing an interim application in an appeal.

Application is dismissed and disposed of accordingly.