

Mridula Mukherjee vs Ajay Mahajan And Anr on 23 November, 2022

Author: Anup Jairam Bhambhani

Bench: Anup Jairam Bhambhani

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CS(OS) 585/2018

MRIDULA MUKHERJEE

Through:

Mr. Gourab Bane
Kapur, Ms. Divy
Talukdar & Mr.
Mukherjee, Advo

versus

AJAY MAHAJAN AND ANR.

..... Defenda

Through: Mr. T.S. Ahuja, Mr. Varun S. Ahuja
& Ms. Ridhi Kapoor, Advocates for
D-1.

Mr. Abhik Chimni, Mr. Ch Animes
Prusty & Mr. Mukul Kulhari,
Advocates for D-2.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI
ORDER

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23.11.2022

(Released on : 02.12.2022)

I.A. No. 6266/2019 & I.A. No. 14770/2022

By way of I.A. No. 6266/2019 filed by the plaintiff under section 151 of the Code of Civil Procedure 1908, ('CPC' for short) the plaintiff claims the following reliefs:

"a) the Plaintiff and her family be permitted to reside in the first floor of Suit Property A, which is not being used by Defendant No. 2 for his residence, on such terms and conditions as this Hon'ble Court deems fit and proper; or

b) in the alternative to prayer (a) above, the Plaintiff be permitted to construct and use a floor on the roof on the first floor of Suit Property A for her residence, on such terms and conditions as this Hon'ble Court deems fit and proper.

c) Pass such further order/orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. By way of I.A. No. 14770/2022 filed by defendant No. 2 under Order XXXIX Rule 1 CPC, defendant No. 2 seeks the following reliefs.

"a. Pass an order allowing the Defendant no. 2 and her family to temporarily reside in one of the existing floors in the "Suit Property A" during the pendency of the suit.

b. Pass an order allowing the Defendant No. 2 to start construction of a floor above the first floor in order to accommodate her family.

c. Pass any other order as it deems fit and necessary in the interest of justice."

3. Notice on these applications was issued on 30.04.2019 and 09.09.2022 respectively. Reply has been filed to both applications, though it appears that by some inadvertence, reply to I.A. No.14770/2022 is not on record. Be that as it may, considering the order that this court proposes to make, the absence of a formal reply on record is irrelevant.

4. Briefly, by way of the present suit, the plaintiff, who is one of the daughters of late V.D. Mahajan, who is stated to have passed away on 10.07.1990 and late Savitri Mahajan, who statedly passed away on 15.05.2003, seeks a decree of partition and separate possession, alongwith other consequential and ancillary reliefs in respect of the estate of her late parents, in particular based upon registered Will dated 04.05.2001, which the plaintiff claims is the last and final Will of late Savitri Mahajan.

5. Defendant No. 1 is the plaintiff's brother and is the only contesting defendant; since defendant No. 2, who is the plaintiff's sister, is supporting the plaintiff in these proceedings.

6. Although the applications have been filed under section 151 and Order XXXIX Rule 1 CPC, reading the same meaningfully, these are, in essence and substance, applications seeking an order on admissions contained in the written statement dated 27.02.2019 filed by defendant No. 1 in respect of property bearing No. D-805 New Friends Co-operative House Building Society, New Delhi ('New Friends Colony property' for short) on the principles of Order XII Rule 6 CPC, which is extracted below for ease of reference:

" 6. Judgment on admissions.--(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."

7. Mr. Gourab Banerji, learned senior counsel appearing for the plaintiff and Mr. Abhik Chimni, learned counsel appearing for defendant No. 2 submit, that as is evident from the written statement filed by defendant No. 1, the said defendant has canvassed and relied upon a registered Will dated 17.10.2000, which defendant No. 1 claims is the last and final Will of late Savitri Mahajan.

8. Though, it is the plaintiff's case, as supported by defendant No. 2, that Will dated 04.05.2001 was the last and final registered Will of late Savitri Mahajan, at this stage and for purposes of the applications under consideration, the plaintiff and defendant No. 2 submit that they would proceed on demurrer, on the stand taken by defendant No. 1 himself, to seek the above-mentioned reliefs by way of these applications.

9. Now, without entering into the controversy as to which is the genuine last and final Will of the deceased, and proceeding on demurrer, it is evident that in his written statement, defendant No. 1 has propounded Will dated 17.10.2000 as the last and final Will of the deceased, and based upon that Will, defendant No. 1 has said the following in his written statement:

"9. That the suit is bad for non-joinder of necessary parties. It is submitted that the plaintiff has not included or referred to Ms. Lakshmi who was brought up by the mother of the parties since she was aged 7 and was given a right to construct over the garage in New Friends Colony house in the will of 17 October 2000 and the said right has been taken away in the alleged will of 04 May 2001.

***** "8. ... It is submitted that the late Smt. Savitri Mahajan of her own free will and accord and without any pressure or coercion had only executed a will dated 17.10.2000. It is further submitted that the alleged will dated 04.05.2001 is forged and fabricated documents. In any case the said alleged will dated 04 May 2001 is not a will executed in free disposing mind and even if the same was executed the same was got executed by emotional blackmail, using pressure, coercion and duress. Whereas when the answering defendant came across the will dated 17.10.2000 he provided the other legal heirs a photocopy of the will and even then neither the plaintiff nor the defendant no.2 stated that there was another will executed by late Smt. Savitri Mahajan dated 04.05.2001 and now the said will is being propounded after almost 15 years of the death of late Smt. Savitri Mahajan.

***** "9. ...It is submitted that the alleged will dated 04.05.2001 nowhere mentions about the revocation and cancellation of first Will dated 17.10.2000 or any reason for revocation of the earlier will and reason for execution of the alleged will dated 04.05.2001.It is submitted that the will of 17 October 2000 which is accepted by all the parties, expresses the true and free wishes of the mother of the parties and the answering defendant is willing for partition on the basis of will dated 17 October 2000.

***** "11. ...It is further submitted that to the knowledge of the answering defendant late Smt. Savitri Mahajan had only executed one will dated 17.10.2000 and this said

will was accepted by all the legal heirs of late Smt. Savitri Mahajan and the legal heirs have acted as per the will dated 17/10/2000.

***** "14. ...It is submitted that the answering defendant is owner of ground floor and first floor and garage of the suit property A as per registered Will dated 17.10.2000 and the plaintiff and defendant no 2 is the owner of the ROOF of the first floor of the property with right to construct upon the same. Lakshmi who was brought up by late Smt. Savitri Mahajan as her daughter since the time she was seven years old and is still residing in the New Friends Colony house has the right to construct over the garage as per the will of 17.10.2000. ... It is submitted that late Smt. Savitri Mahajan had only executed a will dated 17.10.2000 on which all the legal heirs are acting upon from last more than 15 years. ...

***** "15. ... There was no division required by metes and bounds as the will of 17.10.2000 is clear that the plaintiff and defendant no: 2 have the right to construct on the roof of first floor of New Friends Colony property. ... It is submitted that as per the will dated 17/10/2000 the answering defendant is exclusive owner of ground and first floor of the property and the plaintiff & defendant no 2 are the owners of the roof of the first floor of the property. ...

***** "22. ... It is submitted that the will dated 17.10.2000 is the last and final will of late Smt. Savitri Mahajan. The answering defendant has always been ready and willing to give the share of plaintiff and defendant no. 2 in accordance with the will of 17.10.2000."

(emphasis supplied)

10. Mr. Banerji submits that, at this stage, without delving into any further evidence in support of the plaintiff's case as to the authenticity of Will dated 04.05.2001, purely on admissions contained in the written statement of defendant No. 1, it is evident that insofar as the New Friends Colony property is concerned, the plaintiff and defendant No. 2 have the right to construct "on the roof of first floor of New Friends Colony property"; and as per extant building bye- laws, it is now permissible to construct two floors upon the terrace of that property. It is submitted that this very position is reflected in Will dated 17.10.2000, which reads as under :

"1. The House D-805, New Friends Colony, New Delhi-110065, I give it to my son Ajay (Ground Floor & 1st Floor both with garage also)

2. Two more floors can be constructed on the terrace of D-805, New Friends Colony, New Delhi, by Mridula and Sucheta."

11. On the other hand, opposing the reliefs sought by way of the present applications, Mr. T.S. Ahuja, learned counsel appearing for defendant No. 1 submits that since the plaintiff and defendant No. 2 are themselves denying the authenticity and validity of Will dated 17.10.2000, they cannot be

permitted to obtain any benefit under that document. Mr. Ahuja also points-out that while conducting admission and denial of documents, both the plaintiff and defendant No. 2 have denied Will dated 17.10.2000 propounded on behalf of defendant No.1. He submits that it is not permissible for a party to dispute a document and yet to attempt to gain benefit from such document.

12. It is also Mr. Ahuja's submission that until this court comes to a final decision as to which of the two Wills propounded by the contesting parties is the last, final and genuine Will of the deceased, no relief can be granted to any of the parties.

13. Mr. Ahuja also argues that, as is stated in the written statement of defendant No. 1, the plaintiff and defendant No. 2 are possessed of other properties in which they presently reside; and accordingly are not in any dire need of a place for residence.

14. Counsel further places reliance on the judgment of this court in Shri Gurmeet Singh Chopra vs. Smt. Taruna Chopra & Ors.¹ to say that a court in its ordinary original civil jurisdiction cannot decide the genuineness and validity of a Will; and it is purely the remit of a probate court to decide such genuineness.

15. Rejoining to the above, Mr. Banerjee submits that the decision in Gurmeet Singh (supra) has been distinguished by a Co-ordinate Bench of this court in Anil Somani vs. State and Anr.² In fact, Mr. Banerjee places reliance upon the decision of a Co-ordinate Bench of this court in Sh. Surjit Singh vs. Sh. H.N. Pahilaj (Deceased) Represented Through His Legal Representatives³, in which case, upon a similar factual matrix, the Co-ordinate Bench has ruled as follows:

"26. The object of Order 12 Rule 6 C.P.C. is to enable a party to obtain speedy judgment at least to the extent of the relief, which according to the admission of the opposite party, he is entitled to. In my view this provision should also be available where liability to pay is not denied but is being avoided on the pleas which are not valid and tenable in law and as such need no trial. In such cases power could also be exercised under Order 39 Rule 10 C.P.C.

2010 SCC OnLine Del 1271.

2019 SCC OnLine Del 10545 1996 SCC OnLine Del 754.

"27. Also Under Section 151 C.P.C. every court is constituted for the purpose of doing justice according to law and must be deemed to possess as a necessary corollary and as inherent in its very constitution all such powers as may be necessary to do the right and to undo a wrong in the cause of the administration of justice.

"28. In appropriate cases the Court can exercise powers under Section 151 C.P.C. where Order 12 Rule 6 or Order 39 Rule 10 C.P.C. may not be applicable for the purpose of doing justice or to prevent abuse of the process of the court."

16. Upon a conspectus of the averments contained in the pleadings and the judicial precedents cited, what weighs with the court is the following:

16.1 A plain reading of Order XII Rule 6(1) CPC shows that where an admission of fact has been made either in the pleadings or otherwise, whether orally or in writing, by any of the parties, the court may, at any stage of the suit, either on an application or even on its own motion, without awaiting the determination of any other question arising between the parties, make such order or judgment as it thinks fit in view of the admissions so made. The provision further says that if judgment is pronounced on admission, decree to that effect shall follow.

16.2 In the present case, without delving into the question of which of the two Wills is authentic, valid, genuine and the last and final Will of the testatrix, what is evident from a bare perusal of the contents of the written statement filed by defendant No. 1 as extracted above, is that defendant No. 1 pegs his entire defence in the matter upon Will dated 17.10.2000 claiming that to be the last and final, genuine Will of the testatrix.

16.3 Though Will dated 17.10.2000 also contains disposition relating to other properties and assets of the deceased, insofar as the New Friends Colony property is concerned, that Will clearly bequeaths certain portions of the said property upon the plaintiff and defendant No. 2 in a manner so as to say that the said two parties shall be entitled to construct two floors on the terrace of that property, with the clear aim and intent that the said two floors would belong to the plaintiff and defendant No. 2.

16.4 To be sure, an order/judgment on the principles of Order XII Rule 6 CPC follows not upon whether the plaintiff admits or denies any document but upon an admission on the part of the contesting defendant as contained in the written statement or otherwise, whether orally or in writing. Apropos defendant No.1's objection that the plaintiff and defendant No. 2 cannot be permitted to deny Will dated 17.10.2000 and at the same time claim benefit thereunder, in the opinion of this court, this objection proceeds on a misconceived notion, since it is a well settled principle of evidence, that a document can always be read against the party that has relied upon it. In the present case therefore, Will dated 17.10.2000 can always be read against defendant No. 1, since he himself places reliance upon it; and it is therefore irrelevant that the opposing parties are denying that Will.

17. In view of the foregoing discussion, the inevitable inference is that without awaiting further proceedings or trial in the suit, there can be no cavil that defendant No. 1 admits to the plaintiff and defendant No.2's right of ownership over two floors to be constructed on the terrace of the New Friends Colony property, since that is defendant No. 1's own case in his written statement.

18. In view of the above, both applications are allowed, limited to the extent that it shall be permissible for the plaintiff and defendant No. 2 to construct two floors on the terrace of property bearing No. D-805, New Friends Co-operative House Building Society, New Delhi, as may be permissible under extant building bye-laws, after obtaining requisite sanctions and permissions, as required from the concerned municipal authorities.

19. The applications stand disposed of in the above terms. CS(OS) 585/2018

20. List before the learned Joint Registrar on 13th and 14th February 2023, the dates already fixed.

ANUP JAIRAM BHAMBHANI, J.

NOVEMBER 23, 2022/uj