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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 17.04.2025**
Judgment pronounced on: 05.05.2025

+ **FAO 327/2022, CM APPL. 33013/2024 & CM APPL. 33014/2024**

SIMRAN GILL

.....Appellant

Through: **Mr. Rajesh Srivastava & Mr. Shantanu Bhowmick, Advs.**

versus

JAIWANT GILL ALIAS JAIWANT S.GILL ALIAS GUNU & ORS.

.....Respondents

Through: **Mr. Anurag Parashar, Adv. for R-1.**

Mr. Jivesh Mehta, Mr. Nihir Dalmia & Ms. Bhavya, Advs. for R-2.

Mr. Abhinav Sharma & Ms. Aakriti Jain, Advs. for respondent/GNCTD.

CORAM:

HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G E M E N T

1. The instant appeal has been preferred by the appellant under Section 384 {**which should be section 299**} of the Indian Succession Act¹, read with Section 104 and Order XLIII of the Code of Civil Procedure, 1908², assailing the impugned judgment dated 22.02.2022 passed by the learned Additional District Judge-06, Central District,

¹ ISA

² CPC



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Tis Hazari Courts. Delhi³, in PC No.42330/2016, whereby the petition filed by the respondent No.1 for grant of probate in respect of the Will dated 31.05.2001 left behind by their father has been granted.

FACTUAL BACKGROUND

2. Briefly stated, the appellant, respondent No. 1 and respondent No. 2, namely, Sh. Pradeep Gill, are siblings and a petition under Section 276 of the IS Act was filed on 21.03.2015 by the respondent no.1 herein/petitioner, stating that his father, Sh. Balraj Gill was the absolute owner of the property bearing No.R-526, New Rajinder Nagar, New Delhi⁴, who passed away on 17.06.2007, leaving behind the appellant, respondent No. 1, and respondent No.2/Sh. Pradeep Gill, as his legal heirs. It was further stated that the deceased had executed a Will dated 31.05.2001, being his **first and last Will**, thereby bequeathing all right, title, and interest in respect of the aforesaid property in favour of respondent No.1 and respondent No.3 out of sheer love and affection.

3. Suffice it to state that in the probate proceedings, notices were issued to respondent No.2, i.e., the appellant herein, and respondent No.3, Sh. Pradeep Gill. While respondent No.3 did not file any objections, respondent No.2/the appellant herein did file objections; however, the same were dismissed *vide* order dated 25.09.2019 on the ground that the objections had been filed after a delay of almost 1495 days. It is an admitted fact that the appellant did not challenge the said order, and accordingly, the order dated 25.09.2019 attained finality.

³ Probate Court

⁴ Subject Property



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4. During the course of the trial before the learned Probate Court, respondent No.1 examined himself as PW-1 and also examined the attesting witness, namely, Ms. Vimla Malik, as PW-2, who incidentally happens to be his mother-in-law. The learned Probate Court held that the execution and attestation of the Will dated 31.05.2001 (Ex. PW1/C) had been duly proved, and the said Will was held to be the last and final testament of the deceased, Sh. Balraj Gill. Accordingly, the probate petition was allowed in favour of respondent No.1.

GROUND OF APPEAL

5. The aforesaid order has been assailed in the present appeal primarily on the ground that the deceased testator, Sh. Balraj Gill, had entered into an Agreement to Sell in respect of the subject property, which forms the corpus of the impugned Will, on 03.12.1985 with the appellant herein and his grandson, namely, Sh. Gaurav Gill; and that the deceased testator had even executed a registered Conveyance Deed in favour of the appellant and her son, Sh. Gaurav Gill, in respect of the subject property on 10.12.1997, consequent to which the property also stood mutated in their names in the records of the MCD⁵.

LEGAL SUBMISSIONS

6. Learned counsel for the appellant has urged that the respondent No.1/petitioner had filed a suit for Permanent and Mandatory Injunction on 03.02.2012 in respect of the subject property, bearing CS No.13/12 (renumbered as Suit No.337/2014), seeking a permanent injunction to restrain the appellant from selling or dispossessing him



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from the first floor of the suit property, besides seeking a mandatory injunction restraining the appellant from creating any third party rights therein. It is however pointed out that there was no mention of any Will allegedly left behind by their father by the respondent no.1/plaintiff.

7. It was urged that the appellant filed an application under Order VII Rule 11 of the CPC in the said, Suit No.337/2014, which application was allowed and the plaint was rejected by the learned Civil Judge, Delhi, for disclosing no cause of action *vide* order dated 28.05.2014, which has been assailed by respondent No.1/plaintiff, and the matter is presently pending before the learned Appellate Court, fixed for hearing on 11.08.2025.

8. It was further pointed out that another suit, bearing No.625/2014, was filed by respondent No.1 on 04.03.2014, seeking a declaration that the Conveyance Deed executed in favour of the appellant was illegal and void, and further seeking a declaration that respondent No.1/plaintiff had the right, title, and interest in the subject property, and even the second suit, i.e., Suit No.625/2014, was dismissed *vide* judgment dated 10.05.2016.

9. The sum and substance of the submission made by the learned counsel for the appellant was that the fact that two suits concerning the subject property had been dismissed by competent courts, and that no Will dated 31.05.2001 had been propounded in either of the said suits, was deliberately concealed, inasmuch as no averments were

⁵ Municipal Corporation of Delhi



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made in this regard in the probate petition instituted on 21.03.2015 by respondent No.1/petitioner.

10. It was also urged that even the probate case was dismissed for non-appearance and non-prosecution on 25.10.2016. Subsequently, an application under Order IX Rule 9 of the CPC was moved on 16.12.2016, which was dismissed on 20.01.2017. Thereafter, a review application seeking restoration of the application under Order IX Rule 9 of the CPC was filed, which too came to be dismissed vide order dated 17.01.2018. It was further contended that, surprisingly, the probate proceedings were revived without any notice being issued to the present appellant.

11. *Per contra*, learned counsel for respondent No.1/petitioner urged that the appellant had due notice of the pendency of the probate proceedings and that she never preferred any objections. It was further submitted that the probate proceedings were revived by the learned Probate Court *vide* order dated 12.01.2018 under its inherent powers under Section 151 of the CPC.

ANALYSIS & DECISION

12. I have given my thoughtful consideration to the submissions advanced by the learned counsel for the parties and I have also perused the relevant oral and documentary evidence on the record of the case. No case law has been cited by any of the counsels for the parties.

JURISDICTIONAL ERROR IN REVIVING THE PROCEEDINGS



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13. First things first, there is merit in the plea advanced by the learned counsel for the appellant that the revival of the probate proceedings by the learned Probate Court *vide* order dated 12.01.2018 was a patently erroneous exercise of jurisdiction, thereby rendering the entire subsequent proceedings a complete nullity in law. The record clearly reflects that the probate petition had been dismissed on 25.10.2016 due to the non-appearance of the respondent No.1/petitioner and his counsel, as well as for non-prosecution. It is borne out from the record that an application under Order IX Rule 9 of the CPC was subsequently filed on behalf of the respondent No. 1/petitioner on 16.12.2016, but the same too was dismissed on 20.01.2017 on account of continued non-appearance of the petitioner and his counsel.

14. It appears that the respondent no.1/petitioner thereafter filed an application dated 21.02.2017 seeking review of the dismissal order passed by the learned Court on 20.01.2017. The said application came up for hearing on 12.01.2018, and on that date, the following order was passed:

“1. Applicant Jaiwant Gill submits that he is withdrawing the application for review of order dated 20/01/2017 and seeks indulgence of the Court U/s. 151 CPC regarding the order dated 20/01/2017 *vide* which his application under Order IX Rule 9 CPC was dismissed as not maintainable. The application of plaintiff/applicant dated 10.12.2017 for review of order dated 20/01/2017 is dismissed as withdrawn.

2. As per record, the present suit was dismissed for non appearance of the plaintiff and for non prosecution on 25/10/2016. Counsel for respondent no.2 was present on the said date.

3. The plaintiff filed application under Order IX Rule 9 CPC on 16/12/2016 for restoration of the suit. However, the application



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was not accompanied by the application U/s. 5 of Limitation Act for condonation of delay. Hence, the application filed under Order IX Rule 9 CPC was held to be barred by limitation and was dismissed as not maintainable vide order dated 20/01/2017 of my Ld. Predecessor.

4. Thereafter, the applicant/plaintiff filed application dated 10/02/2017 for review of order dated 20.01.2017. As observed herein above, the applicant has withdrawn the application for review and seeks indulgence of the Court U/s. 151 CPC.

5. Ld. Counsel for applicant has explained that on 16/08/2016 the previous counsel of applicant/plaintiff had mistakenly noted the next date of hearing as 16/12/2016 instead of the correct date i.e. 25/10/2016 due to which he could not appear before the Court on 25/10/2016 and the suit was dismissed for non prosecution.

6. The applicant was under the bonafide belief that his application filed under Order IX Rule 9 CPC dated 16/12/2016 was within the limitation period and he was not required to file application U/s. 5 Limitation Act for condonation of delay. However, the Court was of the different view and dismissed the application under Order IX Rule 9 CPC as not maintainable.

7. The applicant has explained the reason for not filing application U/s. 5 Limitation Act alongwith application under Order IX Rule 9 CPC dated 16/12/2016 and has also explained the reason for non appearance in the Court on 25/10/2016. Now the applicant has already filed the application U/s. 5 Limitation Act for condonation of delay in filing of the application under order IX Rule 9 CPC dated 16/12/2016.

8. In view of the explanation and application, the delay is condoned and application filed under Order IX Rule 9 CPC is revived and is allowed, subject to cost of Rs.3,000/- upon the applicant, to be deposited in the office of DLSA/Central, Delhi.

9. It needs to be noted here that respondent Smt. Simran Gill was served with notice of application on 01/03/2017 but she did appear in pursuance of notice. In fact, as per record, she did not file any written statement or objection to the petition despite service of summons to her on 23/05/2015.

Subject to payment of cost, the petition be restored to its original form.

Put up for further proceedings on the date already fixed i.e. 11/04/2018.”



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15. *Ex facie*, the revival of the probate proceedings—despite the dismissal of the application under Order IX Rule 9 of the CPC and the subsequent withdrawal of the review application on 12.01.2018—appears to be a manifest illegality. The proceedings were purportedly revived under Section 151 of the CPC, without any formal application moved by respondent No. 1/petitioner, and more importantly, without notice to the appellant. In any case, once the revival of the petition under Order IX Rule 9 CPC had failed, the learned Probate Court could not have resorted to Section 151 CPC to circumvent the specific procedural bar. This procedural irregularity, in itself, vitiates the entire probate proceedings and renders the impugned judgment dated 22.02.2022—granting probate of the Will in favour of respondent No. 1/petitioner—liable to be set aside.

REVOCAION OR ANNULMENT OF THE WILL

16. Be that as it may, in the alternative, the probate of the Will granted *vide* judgment dated 22.02.2022 also warrants revocation or annulment for “just cause” under section 263 of the IS Act, which reads as under: -

“263. **Revocation or annulment for just cause.**— The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanation.—Just cause shall be deemed to exist where—

- (a) the proceedings to obtain the grant were defective in substance; or
- (b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or
- (c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or



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- (d) the grant has become useless and inoperative through circumstances; or
- (e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

Illustrations

- (i) The Court by which the grant was made had no jurisdiction.
- (ii) The grant was made without citing parties who ought to have been cited.
- (iii) The will of which probate was obtained was forged or revoked
- (iv) A obtained letters of administration to the estate of B, as his widow, but it has since transpired that she was never married to him
- (v) A has taken administration to the estate of B as if he had died intestate, but a will has since been discovered
- (vi) Since probate was granted, a later will has been discovered.
- (vii) Since probate was granted, a codicil has been discovered which revokes or adds to the appointment of executors under the will.
- (viii) The person to whom probate was, or letters of administration were, granted has subsequently become of unsound mind.”

17. A bare perusal of the aforesaid provision would show that the grant of Probate or Letters of Administration may be revoked or annulled on demonstrating “just cause”, which is explained to encompass various situations enumerated *vide* Clauses (a) to (e) under section 263 of the IS Act. The said situations are exhaustive and not merely illustrative. The question that arises for determination before this Court is whether the grant was obtained fraudulently by making a false suggestion, or by concealment of some material fact from the learned Probate Court.



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18. Unhesitatingly, the grant of probate deserves to be revoked on the grounds *vide* the aforesaid clauses (b), (c) & (d) of the Explanation to Section 263 of the IS Act. This is in view of the fact that a registered Conveyance Deed had already been executed by the deceased testator much prior to the purported Will dated 31.05.2001. The said deed continues to remain valid and operative, and the subject property has also been duly mutated in favour of the appellant and her son.

19. At this juncture, it would be apposite to refer to the Section 59 of the IS Act which reads as under: -

“59. Person capable of making wills. —Every person of sound mind not being a minor **may dispose of his property by will.**

Explanation 1.—A married woman may dispose by will of any property which she could alienate by her own act during her life.

Explanation 2.—Persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it.

Explanation 3.—A person who is ordinarily insane may make a will during interval in which he is of sound mind.

Explanation 4.—No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

Illustrations

(i) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be proper that he should make his will. A cannot make a valid will.

(ii) A executes an instrument purporting to be his will, but he does not understand the nature of the instrument, nor the effect of its provisions. This instrument is not a valid will.

iii) A, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes a will. This is a valid will.”



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20. A careful perusal of the aforesaid provision reveals that the use of the expression “*his property*” clearly implies that a person may execute a Will, much like any other instrument of transfer, only in respect of property that he legally owns. It is well-settled that a Will can have legal effect in determining inheritance only when it bequeaths rights, title, and interest in property over which the testator has a valid and subsisting legal right. This is, of course, subject to the understanding that the extent of the testator’s estate may expand or diminish between the execution of the Will and the time of his death, and in certain circumstances, even thereafter.

21. It is also pertinent to refer to Section 192 of the IS Act which provides as under: -

“192. Person claiming right by succession to property of deceased may apply for relief against wrongful possession.—(1)

If any person dies leaving property, moveable or immovable, any person claiming a right by succession thereto, or to any portion thereof, may make application to the District Judge of the district where any part of the property is found or situate for relief, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended.

(2) Any agent, relative or near friends, or the Court of Wards in cases within their cognizance, may, in the event of any minor, or any disqualified or absent person being entitled by succession to such property as aforesaid, make the like application for relief.”

22. A bare perusal of the aforesaid provision makes it evident that a beneficiary under a Will, whether in respect of movable or immovable property, has the right to seek appropriate relief concerning the properties left behind by the deceased/testator, provided such properties were held by the testator in his own right. Such relief may be sought not only where actual possession has been taken by another



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person but also in situations where forcible dispossession is reasonably apprehended.

23. However, it is a settled principle that no beneficiary under a ‘Will’ can claim or derive a right to property which the testator did not legally possess. It is pertinent to refer to the decision by this Court in the case of **Surender Patrick Lall v. State**⁶, wherein the Will in question had been propounded by the children of the deceased/testator in their own favour. Apart from examining the genuineness and validity of the Will, the Court had also framed an issue as to whether the properties forming the subject matter of the Will were, in fact, benami properties held by the testator. The Court held as under: -

“10. It is settled law that in a proceedings for probate or letters of administration with will annexed, issue of title cannot be gone into. **A limited exception to this wide proposition of law is where the testator has lost right to a property, a will in respect to the said property would convey nothing and if nothing is conveyed under a will due to the fact that the testator has no right, a court may decline probate.** But that would be limited to a circumstance where original title of the testator is not in dispute, what is in issue is the fact that at some stage during his lifetime, testator lost title to the property. But, where the issue of title is raised adverse to that of the testator, question of title cannot be adjudicated in a probate proceedings. (See *Nathon v. Nathon*, AIR 1930 Oudh 272; *AIR 1970 Orissa 28 Joga Joti v. Bavaruchi*; *AIR 1994 Kerala 85 K.M. Varghese v. K. M. Oman*; and *AIR 1952 Raj.51 Hukumi v. Bhanwari*.” {bold portion emphasized}

24. Reverting to the instant matter, a careful perusal of the averments and evidence led on the record by respondent No.1/petitioner reveals that he remained entirely silent about the filing of Suit No.337/2014 and the subsequent Suit No.625/2014 while

⁶ 2005 (81) DRJ 574



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pursuing the probate proceedings, and the judgments passed in such legal proceedings. Notably, both suits were dismissed during the pendency of the probate case.

25. At this juncture, it would be relevant to take note that the learned Trial Court in Suit No.625/2014 *vide* judgment dated 10.05.2016 held that respondent No. 1/plaintiff had failed to establish any right, title, or interest in the suit property. It was held that the plaintiff could not claim ownership merely on the basis that his late father, Sh. Balraj Gill, had allegedly purchased the suit property using funds derived from the sale of ancestral property. Furthermore, the assertion that the plaintiff was a co-owner by way of verbal mutual understanding, or that he had contributed more than 50% towards the construction of the suit property, was found to be unsubstantiated. Accordingly, the Trial Court concluded that the plaintiff was not entitled to a decree of declaration.

26. Therefore, once it was held that the deceased testator, being the absolute owner of the subject property, had validly executed a registered Conveyance Deed dated 10.12.1997 in favour of the appellant, and respondent No. 1/petitioner deliberately withheld this vital fact from the learned Probate Court, the grant of probate in respect of the Will propounded by him cannot be sustained. Even though the appellant was denied an opportunity to raise objections in the probate proceedings due to considerable delay in filing the same, respondent No. 1/petitioner was under a legal duty to inform the learned Probate Court about the dismissal of the suits instituted by him. At the cost of repetition, this obligation was particularly



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significant in relation to Suit No. 625/2014, wherein he had sought a declaration that the registered Conveyance Deed executed in favour of the appellant was illegal and void — a claim which was ultimately decided against him.

27. Reference in this regard can be made to the decision of the Supreme Court in the case of **Kavita Kanwar v. Pamela Mehta**⁷, wherein the questioned Will executed by the testatrix contained a provision for demolition of the entire property and subsequent new construction. However, it was found that the entire property did not belong to the testatrix, as a portion of it was owned and possessed by the appellant/objector. It was also a case where the ground floor of the building — which was the subject matter of the Will — had been gifted to the appellant by her father. In this backdrop, it was held that since the testatrix had no legal right, title, or interest over the portion of the property belonging to the appellant, she could not have conveyed any interest in it to respondent No. 1, based on the principle of *nemo dat quod non habet* (i.e., no one can convey a better title than what they possess). It was further held that the testatrix, being the mother of the parties, never had any right over the portion of the property owned by the appellant/objector, and therefore, could not have conveyed to respondent No. 1 (the second daughter) any part of that property — whether presently owned or that which might be acquired or constructed by the appellant in the future using her own funds. On this ground alone, it was held that the Will in question is liable to be declared void under Section 89 of the IS Act, as the



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principal bequeathing stipulation in the Will suffers from complete uncertainty.

28. Additionally, even if the grant of probate were allowed to stand, it would amount to a worthless piece of paper, conveying no interest whatsoever. Thus, since the findings rendered in Suit No. 625/2014 remain unchallenged, the grant of probate in favour of respondent No. 1/petitioner is liable to be revoked, not only under Explanation Clauses (b) and (c) to Section 263 of the IS Act, but also on the ground of having become ineffective and inoperative under Explanation (d) thereto.

SUSPICIOUS CIRCUMSTANCES UNEXPLAINED

29. Last but not least, grave suspicions have arisen regarding the execution of the Will dated 31.05.2001, allegedly made by the deceased testator, Sh. Balraj Gill. It bears repetition that the said Will was not brought on record at the time of filing the first suit bearing No. 337/2014. Rather curiously, it was only after a lapse of seven years from the testator's death that PW-2, Ms. Vimla Malik—mother-in-law of the respondent No. 1/petitioner—produced the Will, seemingly without any prior reference or disclosure, thereby enabling respondent No. 1/petitioner to propound it. No explanation has been furnished regarding the identity of the scribe, or as to why PW-2 retained custody of the Will throughout the intervening period without informing anyone, despite claiming to be an attesting witness. It is also significant that the Will was unregistered. These surrounding circumstances cast serious doubt on the genuineness of the Will,

⁷ (2021) 11 SCC 209



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which neither respondent No. 1/petitioner nor the witnesses have been able to satisfactorily explain.

30. Moreover, although the deceased testator was once the absolute owner of the property in question, he had, by the time of execution of the alleged Will, already been divested of any right, title, or interest therein. These circumstances strongly suggest that respondent No. 1/petitioner, in collusion with his mother-in-law, fabricated the impugned Will. The Will in question, therefore, cannot be held to be genuine.

31. In view of the foregoing discussions, the present appeal is allowed. The impugned judgment dated 22.02.2022, whereby probate of the Will dated 31.05.2001 [Ex.PW1/C] was granted in favour of respondent No.1/petitioner, is hereby set aside, and the grant of probate is hereby revoked.

32. All pending applications are accordingly disposed of.

DHARMESH SHARMA, J.

MAY 05, 2025

Ch/Sadiq