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

% **Judgment reserved on: 23 April 2025**  
**Judgment pronounced on: 15 May 2025**

+ **RFA 403/2018 & CM APPL. 31631/2023**

**RANI DUTTA**

.....Appellant

Through: **Mr. Arvind Kumar Gupta and  
Mr. Arun Bhattacharya, Advs.**

versus

**BABLI GHOSH @ SHARMILA  
GHOSH & ANR.**

.....Respondents

Through: **Mr. Dibyadyuti Banerjee and  
Ms. Sumedha Halder, Advs.**

**HON'BLE MR. JUSTICE DHARMESH SHARMA**

**J U D G M E N T**

1. The present regular first appeal is being preferred by the appellant under Section 96 of the Code of Civil Procedure, 1908<sup>1</sup> read with Section 10 of the Delhi High Court Act, 1966, thereby assailing the impugned judgment and decree dated 28.02.2018 passed by the learned Additional District Judge-04<sup>2</sup>, South East, Saket Courts in Suit bearing CS No. 207406/2016.

2. The appellant, Smt. Rani Dutta is the widow of Mr. K.P. Dutta who passed away on 21.12.1993 and respondent No.1 is the daughter of appellant and respondent No. 2 is the husband of respondent No.1.

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<sup>1</sup> CPC

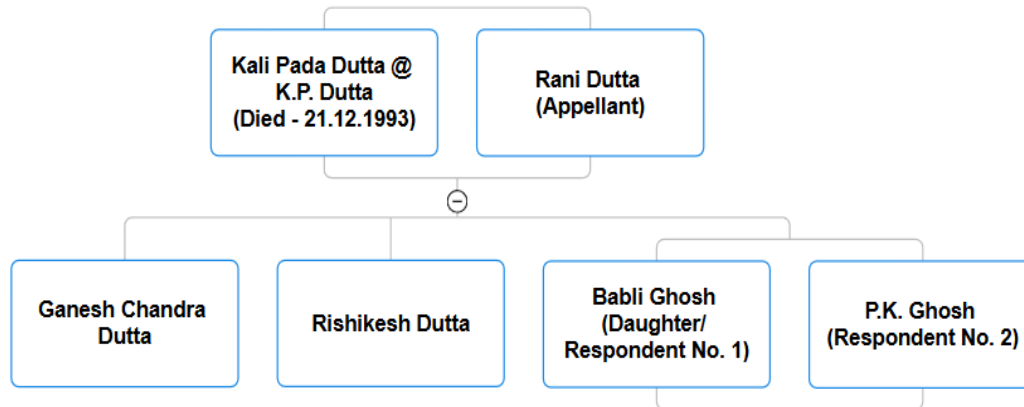
<sup>2</sup> ADJ



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3. The Family Tree of Mr. K.P. Dutta<sup>3</sup> is as hereunder:



4. Briefly stated, the suit property bearing no. E-828, Chittaranjan Park, New Delhi, 110019<sup>4</sup> built on a plot measuring 192 sq. yards was given on lease to the deceased by the Department of Rehabilitation and registered documents were duly executed in favour of the deceased. During his lifetime, the deceased raised construction on the said plot, which comprises of ground, first and second/*barsati* floor.

5. It is the case of the Appellant that the deceased had executed a Will dated 01.05.1990, whereby he bequeathed the entire suit property to the Appellant/wife, making her the absolute owner. Pursuant to the said Will, and with the consent of the legal heirs including the respondent No. 1, necessary formalities for transfer of the leasehold rights were completed, and the Land and Development Office<sup>5</sup>, New

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<sup>3</sup> Deceased

<sup>4</sup> Suit Property

<sup>5</sup> L&DO



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Delhi, executed a Conveyance Deed in the appellant/wife's favour on 22.09.2000. The same was registered on 24.10.2000.

6. According to the appellant, the respondent No. 1, being her married daughter, along with her husband, respondent No. 2, was permitted to reside on the second/*barsati* floor of the property on a license basis, purely out of love and goodwill since they were not able to find suitable residential accommodation. The said second/*barsati* floor consists of one living room, one bed room, one kitchen, one toilet etc. in addition to one small temporary room and open space. The occupation was stated to be permissive in nature, and the appellant contends that the license was later terminated. However, despite the requests to vacate, the respondents failed to vacate the suit premises, prompting the present legal action.

7. Consequently, the appellant then instituted the suit on 30.05.2008 seeking a decree of permanent and mandatory injunction against the respondents on the premise that inspite of the fact that their license to stay in the said suit property has since been terminated and respondents have not removed their belongings and themselves and/or vacated the suit property.

8. In response, the respondents filed a written statement dated 25.07.2008. Notably, the written statement was not signed by the respondent No. 1, nor was it supported by her affidavit. It was accompanied only by an affidavit of respondent No. 2, who claimed to



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have authority to represent respondent No. 1. The appellant contends that, in the absence of due compliance, there is no valid written statement on behalf of the respondent No. 1.

9. In their defence, the respondents denied the existence of a licensor-licensee relationship and asserted ownership over the suit property. They challenged the validity of the Will dated 01.05.1990, *inter alia* contending that the deceased was not of sound mind in 1990 due to serious health conditions, and therefore, incapable of executing such a Will. They further submitted that the Will had not been probated, and thus had no legal force. The respondents also alleged that the suit property formed part of a Hindu Undivided Family<sup>6</sup>, and that the deceased was not the exclusive owner.

10. Further, the respondents denied having knowledge of the Will prior to receiving the legal notice from the appellant and disputed that respondent No. 1 had signed any affidavits or documents consenting to the transfer of ownership in favour of the appellant. It was alleged that documents were signed under misrepresentation by her brothers and were believed to be related to house tax matters. The appellant, in her Replication, denied the allegations made in the written statement and reiterated the averments in the plaint. She reiterated that the Will was validly executed, and that the respondents' possession was permissive,

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<sup>6</sup> HUF



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having no legal entitlement to the property.

### **PROCEEDINGS BEFORE THE TRIAL COURT**

11. Based on the pleadings, the learned Trial Court framed the following issues *vide* order dated 15.12.2011: -

1. Whether the property bearing No. E-828, Chittaranjan Park, New Delhi is the self-acquired property of late Sh. Kali Pada Dutta? OPP
2. Whether the property in question is HUP property, and if so, what is the share of defendant No. 1 therein? OPD
3. Whether late Sh. Kali Pada Dutta executed a Will dated 1.5.1990, and if so, Its effect? OPP
4. Whether the defendants are estopped from challenging the Will dated 1.5.1990? OPP
5. Whether the defendants have become owners in possession of the property by virtue of adverse possession? OPD
6. Whether the suit is barred by limitation? OPD
7. Whether the plaintiff is entitled to a decree of injunction, as prayed for? OPP
8. Whether the plaintiff is entitled to claim damages/mesne profit from the defendants, if so from what date and at what rate? OPP
9. Relief.

12. In order to prove their case, the appellant has examined PW-1/Shri Ganesh Chandra Dutta as special power of attorney holder, further PW-2/Shri Bhupesh Chandra Chakraborty as one of the attesting witnesses to the Will. Shri Rishikesh Dutta another son of the appellant was examined as PW-4 and PW-3/Shri Suman Kumar De was examined as he was a tenant on the *barsati*/second floor of the suit



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property. Appellant also examined handwriting expert as PW-5. The respondents examined Respondent No. 2 as DW-2 and examined handwriting expert as DW-3.

13. Eventually, the learned ADJ *vide* the judgment cum order dated 28.02.2018 decided issues no. 1, 2, 5 & 6 in favour of the appellant, but proceeded to dismiss the suit of the appellant/plaintiff on the premise that the execution of the Will dated 01.05.1990 has not been duly proven and the deceased was not in sound state of mind at the time of execution the said Will. Hence, this appeal by the appellant/plaintiff.

### **LEGAL SUBMISSIONS BY THE PARTIES**

14. Learned counsel for the appellant argues that the suit filed by the plaintiff is based on a conveyance deed executed by L&DO on a joint application made by all legal heirs, including the plaintiff. The legal heirs acknowledged the execution of the Will dated 01.05.1990 (Ex.PW-1/3). The conveyance deed (Ex.PW-1/6) was executed on 22.09.2000. DW-2 admitted in his evidence that his wife, Defendant No.1, signed the affidavit for transfer of ownership in favour of the plaintiff. Defendant No.1 never challenged the conveyance deed and, through affidavits, accepted the Will. Thus, the defendants are estopped from disputing the Will and conveyance deed.

15. It is highlighted by the learned counsel for the appellant that the learned Trial Court's finding that the Will dated 01.05.1990 was not duly proved is contrary to the record. The Court held that affidavits



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cannot replace the legal requirement of proving the Will's execution. However, the appellant points to PW-1/Ganesh Dutta's testimony (Ex.PW-1/4) and PW-4/Rishikesh Dutta's affidavit (Ex.PW-4/A) identifying defendant No.1's signatures. There was no cross-examination of PW-1 and PW-4, and defendant No.1 never entered the witness box. Further, DW-2/P.K. Ghosh admitted awareness of the conveyance deed and that the defendant No.1 signed affidavits based on representations by her mother/appellant. There was no challenge to the conveyance deed even after knowledge of its execution. Therefore, the learned Trial Court's findings are against the evidence on record.

16. Lastly, it is submitted on behalf of the appellant that PW-1/Ganesh Dutta deposed regarding execution of the Will by the deceased and in the presence of attesting witness Ashim Kumar Banerjee (now deceased). PW-2/Bupesh Chandra Chakraborty, proved the attestation. PW-2's testimony was not challenged on the aspect of signature authenticity. The presence of both attesting witnesses at the same time is not legally required. The learned Trial Court erred in holding that PW-2 did not depose regarding the testator's sound mind, while PW-1 and PW-2 proved the Will per Sections 63 of the Indian Succession Act, 1925<sup>7</sup> and 68 of the Indian Evidence Act, 1872.

17. *Per Contra*, the learned counsel for the respondents argue that the appellant failed to produce the alleged license agreement that was

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<sup>7</sup> IS Act



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executed between the appellant and respondents for possession of the second floor (*Barsati*) in the suit property. During trial, thus being unable to prove the date of commencement, tenure, or termination of the license, the existence of a license itself remained unproven. In the absence of a license agreement, the suit lacks a valid cause of action and is not maintainable in law.

18. The learned counsel for the respondents further contends that the valuation of the suit in paragraph 16A of the suit was based on an assumed license fee of ₹10,000 per month, amounting to ₹20,00,000, despite no documentary evidence showing the duration or terms of such license, thereby rendering the basis of valuation speculative and unsupported. The reliefs sought by the appellant were also based entirely on the alleged license agreement, which was never produced before either the learned Trial Court or this Court, making the entire suit speculative and based on a document that is, in fact, non-existent.

19. It submitted on behalf of the respondent that the appellant claimed ownership solely based on a Will allegedly executed by her husband/deceased, without seeking a declaration of title. Although respondent no. 1 initially submitted a no-objection affidavit for the purpose of mutation based on mutual trust and familial understanding, it was never intended to relinquish her legal rights as a co-heir. Further, the Will itself states that the property would first devolve to the wife/appellant and, upon her death, to the two sons. It further clarifies





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that the property would be divided among the sons and daughter as follows: ground floor to Ganesh Chandra Dutta, first floor to Rishikesh Dutta, and the *Barsati* floor to Babli Ghosh/respondent no. 1. Therefore, even under the Will, respondent no. 1 is a beneficiary and entitled to the *Barsati* floor. The respondents have been residing on the second floor (*Barsati*) for over 30 years, uninterrupted, which also demonstrates long-standing possession and enjoyment of the property without interference.

20. Lastly, the learned counsel for respondents impressed upon the fact that the suit did not include any prayer for a declaration of title, which was essential since the appellant's claim to exclusive ownership was being contested. The learned Trial Court rightly noted that the plaintiff should have sought a declaratory decree based on the Will to establish absolute ownership before claiming possession and injunctions. In the absence of such a prayer, and with the Will's execution not proven as per law, the appellant's claim was unsustainable.

### **ANALYSIS & DECISION**

21. Having heard the learned counsels for the parties and on perusal of the record including the digitized Trial Court record, this Court has no hesitation in holding that the impugned judgment cannot be sustained in law.

22. First things first, it would be apposite to reproduce the findings



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of the learned Trial Court, so as to understand what prevailed in the mind of the learned Trial Court while passing the impugned judgment, that read as under:

**“13... In the facts and circumstances as discussed above the defendants, particularly defendant no: 1 as the class-I legal heir and defendant no: 2 through defendant no: 1 have every locus to challenge a testamentary disposition set up by the plaintiff and allege that Sh. K.P. Dutta, the predecessor in interest, the original allottee died intestate in respect of the suit property, and are not estopped by any previous purported admission of the existence of the Will in question where the question of the execution of the Will is rendered the subject matter of an adjudication, and the propounder of the will fails to discharge the onus in respect of the due execution thereof, from challenging the Will in question. Issue no: 4 is answered against the plaintiff and in favor of the defendants.**

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16... What is the date to be reckoned as the commencement of the 3 decades continuous and uninterrupted occupation is not forthcoming, it is the undisputed case of the parties that the defendants are residing in the suit property after their marriage in the year 1974 i.e. during the life time of Sh. Kalipada Dutta and it is the own case of the defendants that it was the desire of Sh. Kalipada Dutta that the defendants should stay with Sh. Kalipada Dutta as he regarded the defendant no: 2 as his son. There is no hostility in the occupation, no animus to dispossess and enter occupation in denial of the title of Sh. Kalipada Dutta. The defendants allege adverse possession even before the date of the execution of the Will date 01.05.1990, however, the defendants do not allege that their occupation after 1974 till 1990 was in denial and hostile and adverse to the title of Sh. Kalipada Dutta on the contrary it is the pleaded case of the defendants that they entered possession as per the desire and willingness of Sh. Kalipada Dutta. After his death, when did the possession turn hostile in respect of the other surviving class-I legal heirs of late Sh. Kalipada Dutta is not emphatically pleaded and proved by the defendants to substantiate their plea of having acquired title on the basis of adverse possession. Issue no: 5 is



therefore decided against the defendants and in favor of the plaintiff.

17. Before concluding the findings and parting with the discussion on issue no: 3, I must address issues no: 1 and 2 as whereas the plaintiff alleges the property to be the self-acquired property of late Sh. Kali Pada Dutta, the defendants dispute the capacity of the testator to make the bequest on the ground that the suit property was HUF property. The defendants admit the allotment in favor of Sh. Kali Pada Dutta and the lease deed executed by the Govt, duly registered, however, raise a bald half baked and half heated assertion that the property was HUF without even contending inter alia that the suit property though allotted in the name of Sh. Kali Pada Dutta was acquired from application exclusively of HUF funds or that though acquired by Sh. Kali Pada Dutta was subsequently thrown by him in the common hotch potch of joint family property and was always treated as joint family property. There is absolutely no basis to even embark upon any further discussion on issue no: 2. Issue no: 2 is decided against the defendants and issue no: 1 is decided in favor of the plaintiffs.

18. The defendants also raised a question mark on the sound disposing mind of the testator at the time of the execution of the Will dated 01.05.1990 again without leading any evidence worth consideration on the aspect. However, what cannot be lost sight of is that it is for the propounder of the Will to prove the due execution of the Will and it only thereafter that the party setting up a challenge to the due execution thereof is to be called upon to lead evidence raising suspicious circumstances surrounding the Will and it is again the bounden duty of the propounder of the Will to dispel such suspicious circumstances as emerge in evidence. De hors, the findings returned on issue no: 1, 2 & 4, I find that the plaintiff has failed to discharge the onus in respect of issue no: 3.

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20... The entire thrust of the claim of the plaintiff to an absolute entitlement to property bearing no: E-828, Chittranjan Park, New Delhi to the exclusion of the defendant no: 1, a class-I legal heir along with the plaintiff of the original allottee of property bearing no: E-828, Chittranjan Park, New Delhi is the Will dated 01.05.1990 of Sh. Kalipada Dutta, whereby the natural flow of succession is



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alleged to have been obstructed and deviated and the occupation of the defendant no: 1, class-I legal heir relegated to the status of a mere licensee with no right, title or entitlement over the suit property. **The foundation itself having been washed away, as a consequence of findings returned on issue no: 3, the claim of the plaintiff to the absolute entitlement of property bearing no: E-828, Chittranjan Park, New Delhi t the exclusion of the defendant no: 1 has no legs to stand on.** The case set up by the plaintiff is that the plaintiff had called upon the defendant in possession of the premises merely as a licensee to vacate the premises vide legal notice dated 28.03.2008 and in reply to the legal notice of the plaintiff, the defendant had sought a copy of the Will dated 01.05.1999 of Sh. Kalipada Dutta and that a copy of the Will as demanded was supplied vide letter dated 12.04.2008 to the defendants which was again replied to by the defendants vide letter dated 21.04.2008 questioning the Will of the deceased father and claiming 1/4th share in the suit premises. In such admitted facts and circumstances when it had come to the knowledge of the plaintiff that the defendants are interested and are in fact denouncing the absolute title of the plaintiff over the property bearing no: E-828, Chittranjan Park, New Delhi, it was incumbent upon the plaintiff, a cause of action having accrued in favor of the plaintiff, to seek a declaration of title in respect of the suit property in favor of the plaintiff on the strength of the Will of late Sh. Kalipada Dutt. The suit of the plaintiff is for permanent and mandatory injunction and not for declaration. The plaintiff one of the class-I legal heirs of the original allottee set up absolute entitlement in herself to the exclusion of the other class-I legal heirs including, the defendant no: 1 on the strength of the Will of the original allottee. A specific issue is framed in respect of the due execution of the Will dated 01.05.1999 of Sh. Kalipada Dutta, the original allottee and the onus is placed upon the plaintiff, which onus the plaintiff remains unsuccessful in discharging. In such facts and circumstances, no injunction restraining the defendant no: 1 in occupation of the premises and claiming title in herself as one of the class-I legal heirs of the original allottee is liable to be passed calling upon the defendant no. 1 and defendant no: 2 through her to forthwith remove their belongings and themselves from premises comprising of entire second floor barsati floor of premises bearing no: E-828, Chittranjan Park-New Delhi and handover possession of the said premises to the plaintiff or restraining the defendant no: 1 and defendant no: 2 claiming through the defendant no: 1 from



creating any third party rights in any manner whatsoever in respect of the said premises or for paying damages or user and occupation charges. Issues no: 7 & 8 are therefore decided against the plaintiff and in favor of the defendants.

21. The suit of the plaintiff is for the preventive relief of permanent and mandatory injunction and the accrual of the cause of action is the refusal of the defendants in pursuance to legal notice of January 2008 and the suit calling upon the defendants as licensee to handover vacant possession and remove their belongings is instituted in 2008 itself. The issue in respect of Adverse Possession has been decided against the defendants. The defendants have failed to substantiate as to how the suit of the plaintiff is time barred as per what Article of the Schedule to the Limitation Act. The onus being upon the defendants, the issue no: 6 is decided against the defendants and in favor of the plaintiff.” {**Bold portions emphasized**}

23. In the light of the aforesaid reasons, the fundamental question that arises in the instant matter to be answered is as to whether the Will dated 01.05.1990 (Ex.PW-1/3) was the last and final Will of the testator/ Sh. Kali Pada Dutta. if so to what effect? But then it also needs to be answered if the appellant/mother has acquired an absolute interest or life interest in the subject property in case the will is held to be valid and effective?

24. In order to understand the controversy, it would be pertinent to reproduce the contents of the Will dated 01.05.1990 (Ex.PW-1/3) which read as under:-

“WILL

This Will is made at New Delhi on this 1<sup>st</sup> May, 1990 (First May, one thousand nine hundred ninety) by Shri Kali Pada Dutta, aged about 65 years, son of Late Shri Indra Mohan Dutta, resident of E/828 Chittaranjan Park, New Delhi 110 019.

Life is short. God knows when it may come to an end. At



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present, I am in a sound disposing mind and fully understand what is wrong and what is right.

Whereas I am the owner/Lessee and in possession of property No.E/828 Chittaranjan Park, New Delhi measuring 192 Sq.Yds. consisting of 1st floor, 2nd floor and Barsati floor, by virtue of Lease Deed issued by the Department of Rehabilitation and documents were registered in the office of Sub Registrar, New Delhi as No.3917, in Additional Book No.I, Vol. No.2661 on pages 113 to 116 dated 11.6.71.

In order to avoid litigation and dispute amongst my legal heirs after my death, I am making this Will of my own accord and without any pressure from outside.

Whereas I have a family consisting of:-

1. Self;
2. Mrs. Rani Dutta - wife;
3. Mrs. Babli Ghosh – daughter
4. Shri Ganesh Chandra Dutta - eldest son; and
5. Shri Rishikesh Dutta - youngest son.

Whereas my daughter and sons are well settled in their lives and they are living a very happy married life.

**As long as I am alive, I will remain the owner of the said property and after my death, my wife, Mrs. Rani Dutta will become the absolute owner of the said property and can use the same and enjoy all the benefits of this property as owner after my death and can transfer the said property in her name in the records of the Land & Development Officer/Municipal Corporation of Delhi and other concerned Departments. In the event of death of my wife, my two sons will become the absolute owners of the said property jointly and can use the same and enjoy all the benefits of this property as owners after her death and can substitute/transfer the said property in their joint names in the records of the Land & Development Officer/Municipal Corporation of Delhi and other concerned Departments. However, after the death of my wife, the said**



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**property can be shared by my sons and daughter as under:-**

1. Shri Ganesh Chandra Dutta - Ground floor;
2. Shri Rishikesh Dutta - first floor; and
3. Mrs. Babli Ghosh - Barsati floor.

That this is my last Will. I have not made any Will earlier to this.

I further declare that Mrs. Rani Dutta, my wife will be the executor of this Will after my death, and also declare that S/Shri Ganesh Chandra Dutta and Rishikesh Dutta will be the executors of this Will after my wife's death.

I have made this Will voluntarily, of my own accord, without any pressure from outside and in possession of full senses.

In witness whereof, I have signed this Deed of Will on the date, month and year first mentioned above in the presence of the witnesses.”

**{bold portions emphasized}**

25. It is pertinent to mention here that Section 74 of the IS Act provides that where the terms of the ‘Will’ are clear then only such words must be interpreted to ascertain the intention of the testator. Section 82 of the IS Act further provides that the meaning of any clause in the Will has to be gathered from the entire instrument and all its parts are to be construed with reference to each other. Section 88 of the IS Act further provides that where the two clauses of the gifts in a Will are irreconcilable and cannot stand together, the latter clause shall prevail.

26. In the light of the aforesaid provisions, A careful and comprehensive reading of the aforesaid Will would reflect that the deceased/testator clearly intended that after his death, his wife i.e. the appellant, shall be the absolute owner of the property which she could



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conveniently transfer in her name in the records of the L&DO as well as MCD and other concerned Departments, and that it was only in the event of untimely death of his wife where no transfer has been effected in her name that his two sons would become the absolute owner of the property jointly and may deal with the property except that if they wish to share the property, they may do floor-wise as provided in the Will.

27. It is in the said backdrop, that upon the death of the testator each of the children i.e. two sons and daughter based on the command of their deceased father in the Will dated 01.05.1990 (Ex.PW-1/3) allowed their mother to fill up the application (Ex.PW-1/5) and submit it with the L&DO for converting the leasehold property into freehold, and in this regard they voluntarily submitted their affidavits Ex. PW-1/4 (collectively), and thus, the Conveyance Deed was executed in favour of their mother i.e. appellant dated 22.09.2000 (Ex.PW-1/6) without any demur and protest.

28. It is also borne out from the record that respondents no.1 & 2 shifted from the suit property in September, 1998, and thereafter, the second floor with *barsati* was let out by the appellant to PW-3/Sh. Suman Kumar De for the period September, 1998 to July, 1999 and the respondents no.1&2 were then allowed again to relocate themselves on the second floor in August, 1999. What inevitably follows is that the factum of execution of the will and its reliance for converting the subject property in the name of the appellant was very much in the knowledge of the respondent no.1/daughter as well as respondent





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no.2/her husband and at no point of time they raised any dispute about its genuineness.

29. Now, it is pertinent to indicate that as per the appellant, the cause of action arose for filing the suit when she sent a notice to the respondents dated 18.01.2008 (Ex.PW-1/8) and again on 28.03.2008 (Ex.PW-1/9) calling upon the respondents to vacate the premises which was declined by the respondents *vide* their reply dated 21.04.2008 taking various objections *inter alia* challenging the genuineness and validity of the impugned Will.

30. At the cost of repetition, the duly attested affidavit of the respondent no.1/daughter was submitted along with the application to the L&DO for converting the property into freehold in the name of the appellant on the strength of the Will dated 01.05.1990 and it is evident that at no stage till their reply dated 21.04.2008 to the aforesaid legal notices, there was raised any dispute about the genuineness and validity of the Will. It goes without saying that in both the notices Ex.PW-1/8 and Ex.PW-1/9, it was clearly asserted by the appellant that she has become the absolute owner of the property in question and she wanted them to vacate the premises in her favour as their possession being permissive in nature.

31. To my mind, issue no.3 was wrongly framed by this Court since the aspect of limitation which goes to the very root of the defence of the



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respondents no. 1 & 2 in terms of the Article 137<sup>8</sup> of the Limitation Act, 1963, was left out of consideration. Nonetheless, the issue is when did “the right to apply accrued”. Unhesitatingly, the right to apply accrued when the father i.e. the testator died on 21.12.1993 or for that matter when the appellant applied to the L&DO for conversion of the property in her name and execution of the Conveyance Deed in terms of the letter dated 15.02.1995 (Ex.PW-1/4) on the strength of the ‘Will’ which is left behind by the original lessee/testator.

32. The sum and substance of the above discussion is that the right of the appellant in the suit property stood crystalized soon after upon the execution of the Conveyance Deed in her favour dated 22.09.2000 (Ex.PW-1/6), the respondents, therefore lost any right to assail the impugned Will. Reference in this regard can be invited to a decision in case of **Sanjay Roy v. Sandeep Soni**<sup>9</sup> wherein on the death of the testator, his wife acquired the absolute interest in the premises by virtue of the Will left behind by the testator husband in her favour; and later the remaining LRs willingly and voluntarily executed ‘No objection certificates’ in favour of her mother resulting in mutation of the property and the conveyance deed in her favour. Subsequently, on one of the legal heirs challenging the genuineness of the will, it was held that right in favour of the mother stood crystalized; and that any

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<sup>8</sup> 137. Any other application for which no period of limitation is provided elsewhere in this Division. – Three years – when the right to apply accrues.

<sup>9</sup> 2022 SCC OnLine Del 1525



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challenge to the Will or to the mutation of the Conveyance Deed in her favour could have been taken within three years thereof and the matter cannot not allowed to be agitated after twenty-two years.

33. This Court relied on the three-judge decision reported as **Ramti Devi (Smt.) v. Union of India**<sup>10</sup> wherein it was observed that until the document is avoided or cancelled by proper declaration, the duly registered document remains valid and binds the party. In summary, the challenge to the Will could have been laid within three years from the date when the cause of action had occurred. It goes without saying that the registration of the Conveyance Deed on 22.09.2000 in favour of the appellant (Ex.PW-1/6) was an actual and constructive notice to the respondents about the absolute right, title or interest created in favour of the appellant by such instrument.

34. In summary, respondents are estopped from denying the genuineness and the validity of the impugned will left behind by the testator. It is pertinent to mention here that the respondents have not filed any cross appeal and they have not assailed the findings recorded by the learned Trial Court insofar as deciding issues no.1 to 5 and 6 in favour of the appellant and against them. All said and done, even insofar as the findings recorded by the learned Trial Court holding that the propounder i.e. the appellant has failed to prove that the Will dated 01.05.1990 had been validly executed, is also patently erroneous,

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<sup>10</sup> 1995 1 SCC 198



unconscionable and unsustainable in law. Section 63 of the IS Act provides for the mode of execution of the unprivileged Will which reads as under:-

**“63. Execution of unprivileged wills.—** Every testator, not being a soldier employed in an expedition or engaged in actual warfare<sup>11</sup> [or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:—

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

35. A careful perusal of the aforesaid provision would show that a ‘will’ is required to be attested by two or more witnesses, each of whom has seen the testator sign or affix the will or has seen some other person sign the will, in the presence and by the direction of the testator. In the same vein, the attesting witnesses must receive a personal acknowledgement of the testator that he or she has put his/her signature or mark or the signature on the will. *It also provides that it is not*

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<sup>11</sup> Ins. by Act 10 of 1927, s. 2 and the First Schedule (w.e.f. 4-4-1927).



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*necessary that all the attesting witnesses should be present at the same time.* Before we go any further, it would also be pertinent to refer to provisions of Sections 67 and 68 of the IS Act which provide as under:-

**“67. Effect of gift to attesting witness.—** A will shall not be deemed to be insufficiently attested by reason of any benefit thereby given either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband; but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them.

*Explanation.—*A legatee under a will does not lose his legacy by attesting a codicil which confirms the will.

**68. Witness not disqualified by interest or by being executor.—** No person, by reason of interest in, or of his being an executor of, a will, shall be disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.”

36. Therefore, the proposition of law is well established that the propounder of the will has to first and foremost establish the due execution of the will in terms of Section 63 of the IS Act and even one attesting witness may be sufficient to prove the due execution of the will if the other one has died or incapacitated or the whereabouts of the other are not known. Incidentally, both sons of the appellant *viz.* PW-1/Sh. Ganesh Chandra Dutta and PW-4/Sh. Rishikesh Dutta categorically testified that their father had left behind the impugned Will dated 01.05.1990. No cross-examination of PW-1 was conducted on behalf of the respondents despite granting an opportunity and since reliance was placed by them on the decision in the case of **Janki**



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**Vashdeo Bhojwani v. Indusind Bank Ltd.** <sup>12</sup>. The said decision is of no assistance to the respondents since the proposition of law is well settled that an attorney or agent cannot be appointed to depose in a matter until and unless he or she has a personal knowledge of the facts and circumstances of the case. In the instant case, the testimony of PW-1/ Sh. Ganesh Chandra Dutta was categorical and unimpeached that his father had executed a will in a sound disposing state of mind which was corroborated by PW-4/Sh. Rishikesh Dutta. The onus shifted upon the respondents to prove that the deceased was not in a sound disposing state of mind, which except for a bald allegation, they have woefully failed to discharge.

37. As regards the attesting witnesses, it appears that PW-2/Sh. Bhupesh Chandra Chakraborty, the surviving attesting witness, was examined before the local commissioner and his total testimony reads as under:-

“EXAMINATION IS CHIEF BY SHRI PRAKASH GAUTAM,  
COUNSEL FOR THE PLAINTIFF.

QUES. 1 Did you know late Shri K.P. Dutta and how ?

ANS We were office colleagues.

QUES. 2 On Ex. PWI/3, your signatures appear at point (A) as witness. Is it correct ? The witness is shown the signatures from the Court file.

ANS Yes.

QUES. 3 Have you signed this Will as witnesses in the presence of Late Shri Dutta after reading the Will ?

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<sup>12</sup> AIR 2005 SC 439



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ANS. Yes. However, I did not read the complete content as it was his personal affair.

At this stage, the Defendants who were present in person permits Shri Ajit Kumar Mishra, Advocate (Enrolment No. D-I777/II) despite the fact that his Vakalatnama is not on record. Counsel for the plaintiff does not object to the same, considering the health of the witness. Shri Ajit Kumar Mishra, Advocate submits that he will file his vakalatnama within two days before the Hon'ble High Court in the matter.

Today, he has filed before me Memo of Appearance duly signed by the Defendants who are present in person.

XXXXXXX by Shri Ajit Kumar Mishra, Advocate for the Defendants.

Q.1 When did you sign the Will and Where ?

ANS. I do not remember the exact date but it was somewhere in the year 1990. I signed at the residence of Mr. Dutta.

Q.2 Who all were present at the time of signing of the Will ?

ANS. Mr. Dutta and Mrs. Dutta were present at the time when I signed the Will.

Q.3 Did Mr. Dutta tell you about the contents of the Will ?

ANS. I have never interfered in any one's personal matter. So, I have signed without reading the document on the saying of Mr. Dutta.

Q.4 Did Mr. Dutta verbally inform you about the contents of the Will ?

ANS. I do not remember.

Q.5 Whether the second witness Shri Ashim Kumar Banerjee was present at the time you have signed the Will ?

ANS. No.

Q.6 Whether late Mr. Dutta described the division of property done by him in the Will ?

ANS. No.

Cross examination concluded.”



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38. A careful perusal of the aforesaid testimony would show that PW-2/ Sh. Bhupesh Chandra Chakraborty clearly brings to the fore that the testator had acknowledged that he had signed the will and upon which he attested in the nature of signing on the said will at point 'A'. The testimony of PW-2/Sh. Bhupesh Chandra Chakraborty is immaterial that he did not go through the contents of the will and rightly so, as he gave a plausible explanation that it was a private affair of the testator and he had no business to ask as to how and in what manner he was bequeathing right, title or interest his property.

39. It is but evident that the entire litigation has been foisted upon the appellant at the instance of her son-in-law i.e. respondent no.2 with ulterior motives considering that the written statement is neither signed by the respondent no.1/daughter nor by the respondent no.2/son-in-law and all sorts of baseless legal objections have been taken to deny the legal benefits arising out of the execution of the will dated 01.05.1990 besides the Conveyance Deed dated 22.09.2000.

40. Lastly, the observation by the learned Trial Court that the appellant should have sought a declaration to the effect of her being the absolute owner is flawed and cannot be sustained in view of the registered conveyance deed in her favour, which remains unchallenged and operative with all legal consequences. Further, licence or not, the possession and occupation of a part of the subject property by respondents is merely permissive in nature and they are duty bound to vacate the same on such permission being withdrawn.



**FINAL RELIEF:**

41. In view of the foregoing discussion, this Court hereby sets aside the impugned judgment cum decree dated 28.02.2018 passed by the learned Trial Court. The present appeal is allowed and the following reliefs are passed;

- a. a decree is passed in favour of the appellant/plaintiff and against the respondents/defendants thereby directing the respondents, their agents, servants, employees and assignees to forthwith remove all their belongings as well as themselves from the suit premises comprising of the entire second/*barsati* floor of the subject property i.e. E-828, Chittaranjan Park, New Delhi, 110019 and hand over the possession of the same to the appellant/plaintiff forthwith;
- b. a decree of permanent injunction is passed in favour of the appellant and against the respondents/defendants thereby restraining the respondents/defendants, their agents, servants, employees and assignees in creating any kind of incumbrance with respect to the suit premises or create any third party rights in respect of the entire second/*barsati* floor of E-828, Chittaranjan Park, New Delhi, 110019; and lastly
- c. a decree is passed in favour of the appellant/plaintiff thereby awarding her damages in the sum of ₹20,000/- and also with a further direction to the respondents/defendants to pay a sum of ₹10,000/- per month on account of use and occupation of



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the premises from the date of filing of the petition i.e. 30.05.2008 till its vacation. The appellant/plaintiff is also awarded the entire cost of the legal proceedings.

42. The appeal is decided accordingly. Pending application also stands disposed of.

**DHARMESH SHARMA, J.**

**MAY 15, 2025**

**Sa/Ch**