

Daya Devi Vs. Angoori Devi and ors.

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SooperKanoon Citation : sooperkanoon.com/682120

Court : Delhi

Decided On : Feb-08-2002

Reported in : 2002IIAD(Delhi)697; AIR2002Delhi295; 96(2002)DLT639; 2002(63)DRJ68

Judge : J.D. Kapoor, J.

Acts : [Limitation Act, 1963](#) - Sections 110 - Schedule - Articles 57, 65 and 113; Evidence Act - Sections 65

Appeal No. : Suit No. 242/81

Appellant : Daya Devi

Respondent : Angoori Devi and ors.

Advocate for Def. : V.P. Chaudhary, Sr. Adv., ; Nitinjya Chaudhary and ; Saroj

Advocate for Pet/Ap. : Vijay K. Jain and; Baldev Atreya, Advs

Disposition : Suit dismissed

Judgement :

J.D. Kapoor, J.

1. Though this suit the plaintiff has sought the partition of the property bearing No. 3851, Gali Churiwalan, Prem Narain Road, Chawri Bazar, Delhi on account of her

being one of the legal heirs of the deceased owner Smt. Parwati Devi who was mother of the plaintiff. Defendant No. 1-Rajo Devi was another daughter. Defendants 2 to 7 are the legal heirs of Smt. Rajo Devi. Defendant No. 8 Bal Kishan who is the son of defendant No. 1 was imp leded on the plea raised by defendant No. 1 in the written statement that Smt. Parwati Devi had adopted him when he was hardly five years old and had executed a Willbequeathing the suit property in his favor on 31st January, 1976.

2. However, there is no dispute that Parwati Devi was the absolute owner of the suit property as defendants themselves have pleaded that Shri Basdev, the husband of Smt. Parwati Devi had executed a Will dated 24th June, 1949 in her favor. Parwati Devi executed the Will in favor of defendant No. 1 on 31st January, 1976 and got it registered on 4th February, 1976. Though the plea set up by defendant No. 1 regarding the adoption of defendant No. 8 was initially vehemently opposed and resisted by the plaintiff firstly on the ground that no such adoption ever took place and secondly that there was no such law or custom to adopt the child by maternal grand parents and as such the adoption is bad in law yet the fact remains thatthe plea of adoption was given up by the counsel for defendant No. 8 on 7.9.1988 as defendant No. 8 relied upon the Will dated 31.1.1976 and issue in this regard was also framed. This fact is reflected in the order dated 2.12.1997 also.

3. As regards the execution of the Will by Parwati Devi the same has also been disputed inasmuch as that Parwati Devi was not in sound and disposing mind during the month of January, 1996 and, therefore, could not have executed any such Will. In other words, the Will is a false and fabricated document as it is afflicted with highly suspicious circumstances.

5. However, defendants 2 to 7 who are legal heirs of Rajo, the deceased daughter of Parwati Devi did not chose to contest the suit and allowed themselves to be proceeded ex parte. Thus the main challenge is from defendant No. 8.

6. In the written statement the defendant No. 8 has averred that he had even applied for mutation of the suit property on the basis of the Will executed by Parwati Devi and the plaintiff had filed a complaint on 1st December, 1980 stating

that the defendant No. 8 had nothing to do with the property and as such was not entitled to get the property mutated in his favor and it was on her complaint that the office of the Municipal Corporation of Delhi called upon defendant No. 8 to furnish all necessary documents in support of his claim and the plaintiff was also asked to furnish the necessary documents in support of her objection. The MCD after being satisfied mutated the property in the name of defendant No. 8 vide order dated November, 1980. In spite of this order the plaintiff did not exercise her right to file a suit questioning the veracity of the Will. It is further averred that the plaintiff had come to know about the said Will and the factum of adoption on or before 6th December, 1981 as defendant No. 1 disclosed the above fact in the written statement and still the plaintiff did not implead the defendant No. 8 for a period of three years from the date of such knowledge and that her said claim against defendant No. 8 has become time barred.

7. Since the plaintiff has never accepted defendant No. 1 as an adopted son of Parwati Devi and Basdev nor had he accepted any such Will left by Parwati Devi it was ordered by the Court to implead defendant No. 8 as party to the suit as his presence was considered necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit. The plaintiff filed an application for amendment of the plaint in view of the disclosure made by defendant No. 1 with regard to the Will so as to avoid the future legal objection and to get all the questions involved in the suit adjudicated upon once for all.

8. On the pleadings of the parties the following issues were framed on 7.9.1988:-

1. Whether the suit is barred by limitation?
2. Whether Smt. Parwati Devi executed any valid WILL dated 31.1.1976 bequeathing the suit property of defendant No. 8?
3. If issue No. 2 is decided in favor of plaintiff, what are the shares of the parties?
4. Relief.'

Issue No. 1:

9. This issue stems from the preliminary objection of defendant No. 8 that the suit is barred by limitation qua him as he was impleaded vide order dated 7.5.1985 whereas Smt Parwati Devi who had executed Will in favor of defendant No. 8 died on 17.11.1979 i.e. much after the limitation period of three years.

10. Mr. V.P. Chaudhary, learned senior counsel for defendant No. 8 has contended that though the plaintiff had come to know about the Will in favor of defendant No. 8 in November 1980 itself when the property was mutated in favor of defendant No. 8 wherein she had filed objections before the authorities but even if it is assumed that she did not know about the said Will, she had come to know about the Will and the factum of adoption on or about 8th December 1981 when defendant had filed written statement wherein the said fact was mentioned in clear terms. Mr. Chaudhary further contended that since the plaintiff had not challenged this assertion within three years from such knowledge nor did she take steps to implead him within three years the cause of action against defendant No. 8 has become time-barred and therefore the suit is liable to be dismissed against defendant No. 8 on this ground alone. Apart from this, Mr. Chaudhary also contended that since the plaintiff had not come with any satisfactory Explanation as to the knowledge of the Will and the delayed impleadment of defendant No. 8 the suit is liable to be dismissed being barred by limitation.

11. On the contrary, Mr. V.K. Jain, learned counsel for the plaintiff has contended that there is a distinction between the suit for partition in respect of Joint Hindu Family (in short 'JHF') and the suit for partition based on inheritance and since the instant suit for partition is based upon title by virtue of inheritance, Article 65 of the Limitation Act governs the limitation. Mr. Jain contends that so far as the partition in respect of JHF is concerned it is always sought either by surviving parceners or excluded co-parceners as such a co-parcener claims his right on the basis of the jointness of the family, whereas the suit for partition based upon inheritance is filed when the absolute owner of the property expires or by a person in whose favor property is either built or gifted. In the former category of cases Section 110 of the Limitation Act applies. Both the Articles read as under:-

-----Description of Period of Time from which
periods
suit limitation begins to run
Article 65
For possession of Twelve years
When the possession of immovable property the defendant becomes on any interest
adverse to the therein based on plaintiff.
title.
Explanation:-
(a) Where the suit is by a remainderman, a revisioner (other than a landlord) or a devisee the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, revisioner or devisee, as the case may be, falls into possession.
(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies.
(c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.
Article 110:
By a person
Twelve years
When the exclusion excluded from a becomes known to the joint family plaintiff.
property to enforce a right to share therein.

12. Thus, according to Mr. Jain, it is immaterial whether the plaintiff had the knowledge of the Will when the proceedings for mutation were initiated or when the written statement by defendant No. 1 was filed because limitation in cases of the kind one in question as provided in Article 65 is 12 years. To fortify it further, Mr. Jain contended that since in the instant suit relief for declaration has not been sought it squarely falls in the category of suits filed under Article 65 of the Limitation Act.

13. In support of the aforesaid proposition of law learned counsel has placed reliance upon the following cases:

1. Jangir Singh v. Ajmer Singh 1971 CLJ 809 (P & H)

2. Mohinder Singh (deceased by LRS) and Anr. v. Kashmira Singh .

14. In Jangir Singh's case, a suit for possession of immovable property was filed on the strength of title. Shri K.C. Puri appearing on behalf of the appellant did not contest the finding given on issue No. 1 by two Courts below that Smt. Kishno,

mother of the plaintiffs and defendant No. 2 were the real sisters of Bir Singh and contended that since the finding on that issue was finding of fact it cannot be reagitated in second appeal. As regarded issue No. 2, he contended that the finding given by the two Courts below that the suit was not barred by time was correct. It was held that the article which will govern the present suit is Article 65 of the [Limitation Act, 1963](#) and not Article 57. According to Article 65, the period of limitation to institute a suit for possession of immovable property or any interest therein based on title is 12 years commencing from the date, when the possession of the defendant becomes adverse to the interest of the plaintiff. The said suit filed by the respondents-plaintiffs was a suit for possession of immovable property based upon the title of their being heirs of Bir Singh, the last male-holder. According to the plaintiffs the estate of Bir Singh was, after his death, held by his widow Har Kaur as life estate and they were entitled to file the present suit for possession of the property after she died in 1964. The suit was filed on February 3, 1965.

15. It was held that Article 57 of the Limitation Act deals with a suit brought to obtain a declaration to the effect that an alleged adoption is invalid or never in fact took place. The principal relief was not the relief for obtaining declaratory decree as to the adoption of defendant No. 1 being invalid but it was a suit for the principal relief to recover possession on the ground of title as heirs and it was only incidentally that the adoption deed was sought to be avoided by the plaintiffs because of the stand taken by defendant No. 1 Jangir Singh saying that he was the adopted son of Bir Singh.

16. It was held that the suit for possession could be instituted within 12 years from the date, when the possession of the property in suit ceased to be the possession of Har Kaur and became the possession of Jangir Singh defendant adverse to the interest of the plaintiffs. Even if it was assumed that the land in suit came to be possessed by defendant No. 1 on January 27, 1956 when the deed of adoption is said to have been executed for which there is nothing on the record to show that soon after the execution of that document, the land was mutated in favor of defendant No. 1 and he came into possession of the property, the suit will still be within time.

17. In Mohinder Singh (deceased by LRS) and another's case, following view was taken:-

'It is well established principle of law that inheritance does not remain in abeyance and the heirs after the death of the last male holder succeed to the property of the deceased in accordance with law. Kashmira Singh, being the son of Niranjana Singh, he was not required to file any suit for possession on the basis of inheritance. He had become full owner of his share in the property on the death of the last male holder. For establishing his right as an heir, he was not required to file a suit. However, a situation may arise when the heir is not in possession of the property inherited. In that event a suit for possession may have to be filed and contest the same may fail on the defendant proving that he has perfected his title by adverse possession. It is such type of suit which is governed by the provisions of Article 65 of the Limitation Act. In this view of the matter, I find that the view taken by R.N. Mitta, J. in Naginder Singh's case 1983 Cri LJ 432 (supra) that it is well settled that a suit for possession on the ground of inheritance should be filed within period of twelve years from the date when the inheritance opens, does not lay down correct law. The decisions to which reference has been made in para 9 of the judgment by the learned Judge, do not lay down any such rule. On the other hand, in all those decisions it was the plea of adverse possession of the defendant which was upheld. Thus, I hold that no period of limitation is prescribed for filing a suit for possession on the basis of inheritance.'

18. According to Mr. Jain, in the instant case the deceased was absolute owner of the suit property though she had three daughters but no son. Plaintiff is one of the daughters of the deceased. It is also admitted that she was residing in the premises prior to the death of her mother and continues to be in possession. Defendant No. 8 was in occupation of the premises as tenant. The defendant No. 1 has set up his claim in his capacity as adopted son of the deceased owner. The very fact that the instant suit for possession is based upon inheritance neither the limitation of three years nor the limitation of 12 years as stated is applicable.

19. The contention of Mr. Chaudhary has no force that once it was known to the plaintiff that defendant No. 8 was seeking mutation in his favor on the basis of the

Will and particularly when the mutation was permitted despite objections raised by the plaintiff, the plaintiff could not have slumbered over the matter by not initiating action and in such an eventuality, the law of limitation applicable is as provided under Article 113. Similarly the contention that the written statement was filed by defendant No. 1 wherein the factum of execution of Will was disclosed and the least that was expected from the plaintiff was to initiate action forthwith has no substance.

20. If the law does not provide a specific period of limitation for initiating action or seeking possession by way of partition on the basis of inheritance any action by the party cannot be restricted through law of limitation unless there is specific provision in that regard. If the contention of Mr. Chaudhary is accepted then the party has to loose the right of inheritance and possession once for all if he or she fails for any reason whatsoever, take action for 3 years. Right of inheritance is of such a nature that cannot be taken away by inaction or incapacity of a person is taking the step well in time. This is why the different sets of articles have been prescribed for different suits. There is no law of limitation of 3 years or 12 years for every civil suit.

21. Thus, it is difficult to accept that qua defendant No. 8 the suit filed is barred by limitation merely on surmise that the latest knowledge about the Will was provided to the plaintiff in the written statement filed by defendant No. 1 some time in the year 1981 and still the defendant No. 1 did not take any action to implead defendant No. 8. Such an inaction does not amount to acquiescence even if the person had the knowledge of the Will or the mutation. Even if it is assumed for sake of argument that the limitation started from the date when the mutation proceedings were initiated or when the written statement by defendant No. 1 was filed the fact remains that the period of 12 years of limitation did not expire at the time of filing of the suit. Thus from any angle we may examine this aspect, one cannot escape from the conclusion that the suit is not liable to be dismissed on account of being barred by time. The issue is answered accordingly in favor of the plaintiff and against the defendant.

Issue Nos. 2 & 3:

22. These are taken up together as fate of issue No. 3 depends upon the decision on issue No. 2.

23. It is admitted that defendant No. 8 has not obtained probate or letter of administration till date. In order to discharge the onus, defendant No. 8 has examined six witnesses. One of them is the attesting witness of the Will. He is the only surviving attesting witness as the other witness expired long back. Since it is a registered Will the defendant has also examined an official of the Sub-Registrar Office, Narinder Kumar. DW 2, Sh. S.P. Pandey is an Advocate who had drafted the Will. DW 3 is a neighbour who deposed that the defendant was in sound and disposing mind at the time of execution of the Will. DW 4 is defendant No. 8. In support of the fact that the attesting witness Khacherumal was not available when the matter came up for evidence the defendant No. 8 has produced the death certificate.

24. D.8.W.1. Sh. Mam Chand Sharma deposed that he was one of the attesting witnesses of the Will; that the Will was brought to his residence by Smt. Parwati Devi and the Advocate who had written the Will had accompanied her; she was accompanied by another witness Khacherumal; he, the other witness Khacherumal and Parwati had all signed the Will in the presence of each other and at the same time. He also deposed that DW 8 Balkishan was adopted son of Parwati and that he was adopted in a ceremony performed in his presence. He also deposed that he had gone later to the office of the Sub-Registrar along with Parwati Devi for getting the Will registered. He identified his signatures on the Will as also the thumb impressions of Parwati Devi. He categorically stated that Parwati Devi was in sound and disposing mind when she signed the Will at his house as well as at the office of the Sub-Registrar.

25. However, he admitted that though the Will was typed in English but the same was read over and explained to him in Hindi by the Advocate Shri Pandey as he did not know English. He denied the suggestion that Smt. Parwati did not affix her thumb impression on the Will in his presence. He denied the suggestion that defendant No. 8 was not given in adoption by Suraj Bhan to Vasudev.

26. DW 1 Narinder Kumar is LDC in the office of the Sub-Registrar. He deposed from the record wherein there was a copy of the Will. The record of the Will is contained in Book No. 3 Volume 88. This contains the copy of the Will which was registered on 4.2.1996 at pages 74-75. According to him, the Will was presented for registration but he did not know who was the Sub Registrar at the relevant time. He also admits that registrar does not have any page numbers and there are thumb impressions at pages 2 and 3 of the Will but it is not written as to whose thumb impressions there are. On the back of it, it is mentioned that LTI is of Parwati Devi. He could not tell that the copy which was on the book was signed anywhere by the Registrar or not. He admitted that the said copy did not have the stamp of the Sub Registrar nor was there any rubber stamp on the back of the page No. 1.

27. DW 2, Mr. S.P. Pandey, Advocate, deposed that the Will was drafted by him at the instance of Parwati Devi, the testator. She gave the details of the property and the name of the person in whose favor she bequeathed the properties. According to him, he drafted the Will correctly as per her instructions. On her request, he accompanied her to the residence of Khacherumal and to the house of Mamchand where their signatures were obtained as attesting witness. Mr. Pandey also stated that the contents of the Will were explained to Parwati Devi and the witnesses where after they signed it. Mr. Pandey also testified that Parwati Devi was in sound and disposing mind at the time of the execution of the Will as also when she got it registered. The witness was cross-examined at great length. It as suggested that since the beneficiary of the Will had an old association with him being his tailor that the Will was drafted by him at the instance of Balkishan who introduced him to Smt. Parwati Devi.

28. DW 3 Rameshwar Nath is a neighbor. He deposed regarding health of the deceased Parwati. According to him in 1996 she was ill but did not suffer from any serious ailment and she had informed him that she had executed a Will in favor of Balkishan as he had been serving her. He was on visiting terms with Parwati Devi. Cross-examination of this witness was directed to discredit him being a professional witness as he was confronted with the cases in which he has been appearing as witness.

29. DW 4, Balkishan appeared as witness for himself and deposed that he was adopted by late Vasudev who died in 1950. After Vasudev he continued to live with Parwati Devi. It was Vasudev who had borne all his education expenses. Smt. Parwati Devi got him opened a tailoring shop. His marriage was also arranged by Parwati Devi which was solemnized by her. He performed her last rites as she had not other son. When she expressed that she wanted to execute a Will, he brought Mr. S.P. Pandey, Advocate as he had been stitching his clothes. She instructed Mr. Pandey that she wanted to execute a Will in his favor. Mr. Pandey also advised her to execute power of attorney which she did. Parwati Devi was told by Mr. Pandey that she may get back the documents from the Sub Registrar, Kashmere Gate after 3 weeks. After taking the delivery of the documents she came to him and insisted to keep the documents in his possession. Smt. Parwati Devi was in sound and disposing mind besides being in good health. He denied that his maternal aunt ever resided in the house in 1975 and shifted thereafter because the portion in his possession was got demolished. He also denied that Parwati Devi used to reside with him once in fortnight and thereafter would go to reside with other relatives. He emphatically stated that she had been residing with him throughout. He admitted that every one contributed for her treatment in hospital during her hospitalisation and that she was residing with him when Will was executed and he used to go to Sub Registrar Office to collect the Will.

30. However, plaintiff did not produce any witness either in support of the fact that the deceased Parwati was ailing or was not in sound and disposing mind or not residing with Balkishan. He only examined himself in affirmative and deposed that no such Will was ever executed. No evidence in rebuttal was produced. No witness was examined though the list shows that the plaintiff proposed to examine as many as 3 witnesses. Though Chhidlal, Khem Chand appeared for giving evidence but the plaintiff did not insist for their examination.

31. Mr. V.K. Jain, learned counsel appearing for the plaintiff has pointed out the following suspicious circumstances afflicting the genuineness of the Will:-

i) Real brother of the testator lived hardly 100 yards away but he was not joined in the execution of the Will.

ii) The Will has been drafted by an Advocate who has interest in the sole beneficiary under the Will.

iii) There is no cause for disinheriting the other legal heirs.

iv) The active role of the beneficiary in getting the Will scribed, registered and collected.

v) There is no Explanation as to why power of attorney was executed. It was rather shows that the testator never intended to execute any Will.

vi) On the first page of the Will, there is no indication as to whose thumb impression it bears. Same is the position as regards page two of the Will.

vii) On first page of the Will, sufficient space for incorporating contents has been left. Page one does not disclose from the contents of the document as to the nature of the document which the testator intended to execute. Page two of the document has almost 30 lines typed where the entire details were mentioned and on page three only the signatures and the verification appear.

(viii) Instead of choosing her brother, the testator has chosen one neighbor and one 'Pujari' as attesting witnesses. She did not know the Advocate who drafted the Will and it was the beneficiary who knew the Advocate.

32. According to Mr. Jain the Will when read with the testimony of Narender Kumar from the office of Sub Registrar, Kashmere Gate leaves no manner of doubt that it is a case of clear manipulation and fabrication of the document as Mr. Narender Kumar has testified to the effect that there are three folios in the record but by mistake number has been given to only two folios.

33. Admittedly there is no mention on the first and second page as well as on the third page as to whose thumb impression there are. Pages 74 & 75 have not been signed anywhere by the Registrar. According to Mr. Jain, page 2 is interpolation as this alone relates to the disputes.

34. Mr. Jain also contended that it is not acceptable that the testator would have opted for ousting her other daughters and bequeathing the property in favor of only

one person who is the eldest son of the eldest daughter. The only reason set up by the defendant is that he had been looking after the deceased who had been living with him throughout. According to Mr. Jain that was no reason for the deceased to exclude the plaintiff from inheritance as the plaintiff has also been staying in the house in question with the deceased when the deceased was alive and continued to stay even after her marriage along with her husband and children. In this behalf, the deposition of PW.1 has not been challenged even by way of any suggestion. So much so the plaintiff along with his family continues to stay in the house in question. According to Mr. Jain, the effect of the aforesaid circumstances is that the signatures of the deceased might have been obtained by not explaining to her the contents of the documents or telling her that the document in question was the Will.

35. No suggestion was advanced by the defendant to the plaintiff that she had not been residing with deceased Parwati Devi even after her marriage Along with her husband and children. There is no suggestion that deceased Parwati Devi had no love and affection for the plaintiff. So much so the deceased had even not said in the Will as to why she was preferring the defendant over and above the other daughters and children. Nor has the defendant taken any plea in the written statement as to the reasons why the defendant was chosen nor is there any evidence in this regard produced by the defendant.

36. Advancing the cause of the plaintiff, Mr. Jain has further contended with all vehemence that initially the evidence had come on the plea of adoption and the person who performed the adoption ceremony also came in the witness box and not only he was cross-examined by the counsel for the plaintiff but the defendant No. 8 was also cross-examined on the plea of adoption but his plea was given up in the midstream and Will was set up. According to Mr. Jain, when defendant No. 8 sensed that his plea of adoption would stand exposed because of his failure to prove the adoption, he concocted the Will.

37. While canvassing the proposition that onus to explain suspicious circumstances creeping in the Will lies upon its propounder, Mr. Jain placed reliance upon *Sonam Topgyal Bhutia v. Gompu Bhutia AIR 1980 Sikkim 33*

wherein it was held that onus of explaining suspicious circumstances lies heavily on the propounder but if the execution of the Will is not challenged by coercion as alleged by the caveator then it is for the caveator to prove such undue influence or coercion.

38. According to Mr. Jain, in this case suspicion arises as in the Will, propounder had been described as adopted son by the testator in spite of the fact that the propounder admitted that neither any religious ceremony was performed nor was any document executed for such adoption.

39. Let us scrutinize the Will on the anvil of aforesaid circumstances leading to 'suspiciousness'.

40. Perusal of the Will shows the existence of thumb impression of the testator, signature of one of the two attesting witnesses and the thumb impression of the second attesting witness. It also shows that the Will has been drafted by Mr. Shiv Prakash Pandey, Advocate, who himself appeared in the witness box. The Will itself is a registered document and in the presence of Registrar Smt. Parwati Devi again put thumb impression at two places indicated on the reverse of the Will. therefore, there can be no doubt about the authenticity of this document. One of the attesting witnesses was also present when the Will was registered and he was admittedly known to Smt. Parwati Devi for many years. There identity of the person making the Will is also not in doubt.

41. However, the deposition of Mr. Pandey is of great significance as he has in unequivocal terms deposed that Will was executed in his presence and the testator and both the attesting witnesses signed in the presence of each other at the same time and in his presence. Nothing has been brought in the cross-examination to create doubt any suspicion as to the truthfulness of the testimony of any of the witnesses or of Sh. Pandey. Both of them have also deposed that testator was in sound mind.

42. Another material document is the general power of attorney executed by Smt. Parwati Devi in favor of Sh. Bal Kishan, the beneficiary under the Will. This document is DW 2/A. This is also registered document and it was registered on

the same date as the Will. One of the testifying witnesses of the Will is also the witness who was present at the time of registration of this document. Both the witnesses of the Will are witnesses of this document also. This general power of attorney was also drafted by Sh. S.P. Pandey, Advocate and it is so stated in the document at the end. By means of these documents, Smt. Parwati Devi had appointed Sh. Bal Kishan as her attorney only to manage, control and supervise the suit property and nothing more.

43. Fact that Pt. Mam Chand, one of the attesting witnesses was very much known to Smt. Parwati Devi and to her family is a circumstances which goes in favor of proper execution of the Will rather against it. It shows that the identity of the person concerned who has executed the Will is not in doubt and the attesting witness has subscribed to the Will at the instance of the testator.

44. Again the fact that Pt. Mam chand was known to Sh. Bal Kishan is no ground for rejecting his testimony as interestedness is not a circumstance for disbelieving the witness. Unless and until, the credibility of the witness is shaken or marred by way of cross-examination, every witness has to be believed. In normal course of thing, a person who desires to execute a Will would like to go to a known person or an Advocate for getting such a sensitive document drafted.

45. In the Will itself Parwati Devi had stated that she and her husband adopted Bal Kishan as their son when he was five years of age and since then Bal Kishan had been living with them as their son and after the death of her husband, Bal Kishan has been living with her and serving her like a son.

46. This statement by the testator coupled with the fact that Bal Kishan appeared in the witness box and has given a graphic account of how he came to reside with the testator and what was the relationship with the testator and whatever they did to each other furnishes the reason for the testator to make a bequest in favor of Bal Kishan. Merely because the plaintiff has been residing in the suit premises ever after her marriage and during the life time of the testator to bequeath exclusively in favor of Bal Kishan as she did not want to create a distrust during her life time and wanted all of them to live peacefully together in their house but in the back of her mind it was Bal Kishan whom she had adopted as a son.

47. So much so it was Bal Kishan who had performed the last rites of the testator. Not only his entire education was arranged by the testator and the business premises were provided to him by the testator but his marriage was also performed by her. The main objection taken by the plaintiff was that Parwati Devi was not in sound and disposing mind when she executed the Will. Even though the plaintiff relied upon the evidence of some witnesses to be produced by him to show that Parwati Devi was not in sound disposing mind but no evidence was actually lead nor was any witness from the list was produced. On the other hand evidence has come on record that Parwati Devi was in sound mind when she executed the Will in the form of testimony of the Advocate, who drafted the Will, attesting Witness who is none else but a neighbor.

48. Another objection taken by the plaintiff is with regard to the paging of the documents in the office of the Registrar by the Clerk who appeared and stated that one page was not given the Serial number by mistake. But the perusal of the documents show that there is a continuation and it was not possible that any page could have been inserted later on. There is running matter between pages 1, 2 & 3 and, therefore, the possibility of interpolation of page No. 2 does not exist.

49. Will is to be proved like any other document except to the extent of Section 65 of the Evidence Act which requires the examination of attesting witnesses if available. However, in case there are suspicious circumstances existing, then the propounder has to lead evidence so as to remove the suspicion. The initial burden in the plea of suspicious circumstance is heavy upon the beneficiary and does not stand discharged by merely proving the execution or even registration of the Will. It is the test of satisfaction of judicial conscious which is to be satisfied.

50. The above position of law has been reiterated in several judgments one of the which is reported as H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors. : AIR 1959 SC443 . Observations of the Supreme Court in this regard are as under:-

'It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, on hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally

that a propounder of the will have to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicious from the view of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties.

It is no doubt true that on the proof of the signature of the deceased or his acknowledgement that he has signed the will he will be presumed to have known the provisions of the instrument he has signed; but the said presumption is liable to be rebutted by proof of suspicious circumstances. What circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated. That inevitably would be a question of fact in each case.'

51. While responding to the accusation that the plea of adoption was given up with ulterior motive, Mr. V.P. Chaudhary, learned counsel for defendant No. 8 contended that the defendant did not press the issue of adoption because the defendant was pressing the main issue of the execution of the Will and he was quite confident to succeed on that and the plea of adoption was an added plea fortifying the preferential claim of the defendant to the Will. Moreover by virtue of Will the entire property was bequeathed to him whereas by virtue of being an adopted son he was entitled to his respective share and therefore circumstance of having given up the plea of adoption is of no relevance.

52. It is beyond the pale of controversy that a description as to the legatee in the Will is neither fatal nor a circumstance creating suspicion as to the bequest. However, if the claim is set up on the strength of adoption, the adoption has to be proved independently. If at any subsequent stage, a party comes across a Will executed by the testator in his favor, he need not necessarily depend upon the adoption. Rather the factum of adoption provides genuineness to the Will itself and the reason for excluding others. Thus giving up or abandoning the plea of adoption after having based the claim on the Will is not at all a circumstance for looking at the Will with suspicion.

53. As regards the objection that there was no reason for the testator to exclude the other parties particularly the one who had been living throughout with her during her life time even after marriage and that the behavior of the testator was unnatural it holds no water as the propounder of the Will was living with the testator and it is the testator who had settled him in life and further there is also a tendency amongst the Hindus to see that the immovable property passes on to some male heir to perpetuate the progeny. Almost similar situation arose in *Sushila Devi v. Pandit Krishna Kumar Missir and Ors.* : AIR 1971 SC2236 wherein a view was taken that 'Non-bequest of property to children of testator does not make the Will invalid if the execution of will is satisfactorily proved.'

54. Last but not the least there is a presumption as to the regularity of execution of the Will if it is a registered Will. In *Baburajan v. Parukutty and Ors.* AIR 1999 Ker 274, it was held that registration being a solemn act, there is a presumption as to the regularity of execution of the will if no vitiating circumstances are made out to rebut presumption arising out of registration.

55. The mere fact that the defendant did not obtain probate of the Will does not ipso facto show that the Will suffers from the vice of invalidity or illegality. But in the instant case defendant No. 8 who has propounded the will got his name mutated in the record of the MCD on the strength of this Will and moreover these proceedings were contested by the plaintiff but to no avail.

56. The above facts and circumstances lead to the inescapable conclusion that Will was properly and validly executed firstly by way of getting it attested through two witnesses and that too in the presence of each other and secondly the testator was in sound and disposing mind and thirdly the Will was also got registered by her to provide indisputable validity to it.

57. Upshot of the aforesaid discussion answers the issue as to the validity of the Will in favor of defendant No. 8 and against the plaintiff. In view of this finding as to issue No. 2, issue No. 3 becomes redundant.

58. In the result, the suit is dismissed. No order as to costs.

