

Atul Bhalla Vs. Anil Bhalla and Another

Atul Bhalla Vs. Anil Bhalla and Another

SooperKanoon Citation : sooperkanoon.com/948445

Court : Delhi

Decided On : Aug-31-2012

Judge : Pradeep Nandrajog & Manmohan Singh

Appeal No. : FAO(OS) 402 OF 2012 & RFA(OS) 72 OF 2012

Appellant : Atul Bhalla

Respondent : Anil Bhalla and Another

Judgement :

PRADEEP NANDRAJOG. J.

1. We had heard arguments on admission of the above two captioned appeals on August 28, 2012 and while doing so the record of Probate Case No.4/2004 and CS(OS) No.273/2002 had been summoned and perused by us.

2. CS(OS) No.273/2002 filed by the appellant, seeking partition of property bearing Municipal No.7, Southern Avenue, Maharani Bagh, New Delhi, has been dismissed vide impugned judgment and decree dated November 22, 2010 and Probate Case No.4/2004 filed by respondent No.1, Anil Bhalla, has been allowed granting probate of the will Ex.PW-1/2, dated October 22, 1989 executed by the mother of the parties, late Smt.Chander Kanta Bhalla.

3. At the outset it may be noted that during arguments for admission of the two appeals, learned counsel for the appellant had made a feverish attempt to

question the probate being granted by urging that the respondent No.1 had failed to discharge the onus to prove the due execution of the will Ex.PW-1/2, but failed to point out any ground urged in FAO(OS) No.402/2012 wherein a ground was pleaded to said effect.

4. Grounds A to Q urged in FAO(OS) NO.402/2012 read as under:-

“A. Because the Order, Judgment (and Decree) dated 22.11.2010/08.06.2011 are bad in law and are perverse to the facts as well as to the law on the said subject.

B. Because the Learned Single Judge has failed to appreciate that the Memorandum of Family Settlement was merely to record the evidence of the parties for use and enjoyment of the joint Hindu family properties since the same was neither partitioned nor partitionable.

C. Because the Learned Single Judge failed to appreciate that the absence of a clear partition by metes and bounds, no actual partition ever took place qua the property in question.

D. Because the Learned Single Judge has been misled and has resultantly misconstrued the law and the facts applicable to the present controversy.

E. Because the Learned Single Judge failed to appreciate that in the absence of a ratio/share being ascribed to the respective coparceners a partition could never be affected.

F. Because the Learned Single Judge failed to appreciate that in the absence of the ground of a clear marketable title to an immovable property, a partition cannot be said to have been taken place.

G. Because the Learned Single Judge failed to appreciate that in relying upon the memorandum of Family Settlement, which was unregistered insufficiently stamped document, the Learned Court below had mis-conducted itself because the Memorandum of Family Settlement dated 11.04.1984 was a document compulsorily registerable.

H. Because the Learned Single Judge failed to appreciate that since the appellant had been paying the Property Taxes/Municipal Taxes jointly with his brother in equal shares, it only showed the intention of the parties that no formal partition had ever been effected.

I. Because in the absence of a partition qua the HUF property, Late Shri R.C.Bhalla and Smt.Chander Kanta Bhalla could not have executed a Will for the same.

J. Because the property in question being HUF property no Will could have been executed by Shri R.C.Bhall or Smt.Chander Kanta Bhalla.

K. Because assuming albeit not admitting that a partition may have been effected, the same was liable to be re-opened on the ground of fraud/mistake.

L. Because the Order, Judgment (and Decree) passed by the Learned Court below are based on surmises and conjectures.

M. Because the Learned Court below failed to appreciate that even as per Clause-8 of the memorandum of Family Settlement,

“..... The parties had also agreed that none of them shall assign, transfer, part with or in any manner alienate or charge the portion allotted to them”

N. Because the Learned Single Judge failed to appreciate that the arrangements arrived at by way of Memorandum of Family Settlement was merely an ad-interim arrangement for use and occupation of the joint family property towards maintaining a harmonious and peaceful co-existence of the various constituents of the Hindu Undivided Family and thus the will in question could not have been executed.

O. Because the Order, Judgement (and Decree) passed by the Learned Court below is an indulgence in mere ipsi-dixit.

P. Because the probate has been wrongly granted on surmises and conjectures by the Learned Court below.

Q. The Appellant herein craves leave of this Hon?ble Court to refer and rely upon such other and/or further grounds as may be available to them at the time of disposal of the present appeal.

5. Learned counsel had conceded that grounds B, C, D, E, F, G, H, I, J, K, M, and N pertained to the probate being granted with respect to the plea of the appellant that in the absence of the property being partitioned, late Smt.Chander Kanta Bhalla could not have bequeathed any specific portion of the property under the will and alternatively that the property was that of the Joint Hindu Family and she could not make a bequest more than her share upon the property being partitioned, i.e. the grounds do not pertain to the due execution of the will in question. Learned counsel had sought to urge that ground A, L, O, P and Q were sufficiently clear to infer that the appellant had raised a challenge to the impugned decision insofar it returned a verdict that the will Ex.PW-1/2 was proved to be duly executed.6. We do not agree. Ground A is speculative, loose and laconic. Similar is the position with ground L, O, P and Q. Due execution of a will being proved pertains to an issue of fact being decided, and needless to state a decision on a fact in issue would be with reference to evidence of the fact in issue or such facts as would be relevant under Sections 6 to Section 55 of the Indian Evidence Act 1872, which provisions deal with relevancy of facts. Thus, it is imperative to clearly plead grounds with reference to the evidence led at the trial and referred to by the learned Single Judge to return a finding on the fact in issue, i.e. whether late Smt.Chander Kanta Bhalla had duly executed the will Ex.PW-1/2.

7. No such ground has been urged in the pleadings, and indeed during arguments, except for saying that the will has not been duly proved as being executed, the counsel could point out nothing in the testimony of the two witnesses who were material on the subject of the bill being proved wherefrom even a discussion could commence of the will not being proved.

8. Trial in the suit and the probate being consolidated, and evidence led in the probate petition, we find that an attesting witness to the will, Sh.Ajay Balram appearing as PW-3 has deposed to his being present when Late Smt.Chander Kanta Bhalla appended her signatures to the will in question and that the other

witness to the will, Sh.G.P.S.Bhalla also appending his signatures as an attesting witness to the will in his presence. We further find that the will in question is a registered will and pertaining to it being registered, Sh.Ravinder Kumar PW-2, LDC, in the office of the Sub- Registrar-III has deposed of the will being registered as Serial No.2507, Book No.III, Vol.No.559 at pages No.48 to 50.

9. We do not find any ground urged to challenge the testimony of the said two witnesses and indeed nothing could be shown to us with reference to the cross-examination of PW-3 which could discredit his testimony, and as regards PW-2 we find that the witness was not even cross-examined. The will Ex.PW-1/2 which has been registered before the learned Sub-Registrar bears the photograph of Chander Kanta Bhalla and the endorsements would reveal that she was present in the office of the Sub-Registrar when the will was registered on July 05, 1990. Chander Kanta Bhalla died on March 09, 1994 and there is no evidence led by the appellant that she was of infirm mind. No suspicious circumstance with respect to the will has been pointed out to us save and except the exclusion of the appellant and the estate of the deceased being bequeathed to her grandsons i.e. the sons of respondent No.1.

10. It is settled law that a disproportionate bequest by itself is no ground to infer a suspicion in the will. With respect to wills which are registered, various Division Benches of this Court have consistently held that a presumption of due execution arises when a will is got registered before the Sub-Registrar and the onus is on the person challenging the will to rebut the presumption by bringing out something which casts a shadow with respect to the will being registered, or otherwise casts a doubt on the will being duly executed. We note only two decisions. The same are (22) 1982 DLT 301 DB Rajinder Nath Sharma and Ors. v. Rani Chander Kanta and Ors., and 157 (2009) DLT 769 DB Rajesh Kumar Gaur and Ors. v. Vipin Gaur.

11. Pertaining to ground No.G, suffice would it be to state that no such contention with respect to the admissibility of the memorandum of family settlement, Ex.PW-1/3 was raised either in the pleadings or before the learned Single Judge i.e. the same being an unregistered document. Thus, such a plea cannot be urged in appeal. In any case, the memorandum in question refers to an earlier oral

settlement between the parties; the memorandum being a written record thereof. As held by the Supreme Court in the decision reported as (1976) 3 SCC 119 Kale and Ors. v. Deputy Director of Consolidation and Ors., a partition within the family which is oral is recognized by law and a subsequent written memorandum recording the terms of the settlement which had been given effect to was held not to be an instrument requiring registration.

12. We thus conclude that the learned Single Judge has rightly opined that the will Ex.PW-1/2 was duly proved and required to be probated.

13. Turning to the issues raised in the suit for partition, appellant had sought partition of the residential house bearing Municipal No.7, Southern Avenue, Maharani Bagh, New Delhi alleging the same to be the property of joint family. It was the case of the appellant that the mother of the parties had died intestate.

14. The suit was opposed on the ground that the HUF had been dissolved and under an oral settlement the residential house had been partitioned and later on to reduce the partition into a written memorandum the same was reduced into writing in a memorandum of family settlement executed by late Rattan Chand Bhalla, his wife Chander Kanta Bhalla and the two sons, Anil Bhalla and Atul Bhalla.

15. Appellant does not deny having executed Ex.PW-1/3 but took a stand that the same records a temporary arrangement amongst the family members to enjoy the use and occupation of the subject property till it was partitioned.

16. Recitals 3 and 7 in Ex.PW-1/3 were highlighted before the learned Single Judge in support of the plea urged by the appellant.

17. With reference to Ex.PW-1/3 and an affidavit marked D2X2 and an application marked D2X1 and an unmarked assessment order passed by the Income Tax Officer, the learned Single Judge has opined that the same establish the house being partitioned and has thus declined to pass a decree to partition the same.

18. We agree with learned counsel for the appellant insofar it was urged that the affidavit marked D2X2 and the application marked D2X1 as also the unmarked assessment order passed by the Income Tax Officer could not be considered as

evidence because the same were not proved as required by law by summoning an officer/official from the Income Tax Department and with reference to the originals, the photocopies being proved. We find that the marked documents are photocopies of attested documents and have been referred to in the testimony of respondent No.1.

19. Thus, everything turns on the written memorandum of family settlement Ex.PW-1/3.

20. Recitals 3 and 7 thereof to which learned counsel for the appellant had made a reference to need to be noted. We do so. They read as under:-

“3. Subsequent thereto the parties hereto constituted a Hindu Undivided Family (H.U.F.) of which Shri Rattan Chand Bhalla was the Karta and Manager. Shri Anil Bhalla and Shri Atul Bhalla were co-parceners and Smt.Chandra Kanta was a member. Under the law Smt.Chandra Kanta Bhalla being the wife of Shri Rattan Chand Bhalla and mother of Shri Anil Bhalla and Shri Atul Bhalla is also entitled to a share in the said property and each of the parties hereto is, therefore, entitled to 1/4th share.

Xxxxx

7. The disputes and differences had cropped up amongst the parties concerning their rights, use and occupation in relation to the aforesaid constructions for some time past and the parties have been living separately from one another. It was, therefore, considered expedient and beneficial and in the interest of the coparceners/ member to amicably resolve and maintain cordiality amongst the parties and avoid any controversy in future and realizing that the constructions are incapable of being completely partitioned by metes and bounds, the parties hereto had agreed amongst themselves to a settlement concerning their rights to use and occupy the constructions and are now desirous of recording the same in a memorandum of oral settlement amongst them on 5th April 1984.

21. Operative clauses 1 to 8 are also relevant and thus we note the same. They read as under:-

“1. The portion of the existing constructions marked with hatching type „A?on the plan hereto annexed was allotted to Shri Rattan Chand Bhalla for his use and occupation. It was also agreed that the driveway adjacent to plot No.C-98 was allotted jointly to Shri Rattan Chand Bhalla and Smt. Chandra Kanta Bhalla.

2. The portion of the existing constructions marked with hatching type „B?on the plan hereto annexed was allotted to Shri Anil Bhalla for use and occupation by him and the members of his family with the right of passage therein of the portion allotted to him which is through a common entrance between the portion allotted to Smt.Chandra Kanta Bhalla and Shri Anil Bhalla. It was also agreed that Shri Anil Bhalla will have the right of passage from the driveway adjacent to plot No.C-96.

It was also agreed by Shri Anil Bhalla that the entire barsati portion and terrace on the second floor of the rear unit and the one servant quarter on the second floor of the servants?block allotted to Shri Anil Bhalla and marked with hatching type „B? will continue to be occupied for personal use by Mrs.Veena Sethi wife of late Mr.Ramesh Chandra Sethi and sister of Shri Anil Bhalla as she had been occupying this accommodation since 1974. It was also agreed that for use of this premises by Mrs.Veena Sethi no rent will be charged by Shri Anil Bhalla from Mrs.Veena Sethi and she will have full and free use of the premises therein mentioned during her life time or as long as she wishes to occupy the same and no objection will be raised by Shri Anil Bhalla.

3. The portion of the existing constructions marked with hatching type „C?on the plan hereto annexed was allotted to Shri Atul Bhalla for use and occupation by him and members of his family with the right of passage from the driveway adjacent to plot No.C-98.

4. The portion marked with hatching type „D?on the plan annexed hereto was allotted to Smt.Chandra Kanta Bhalla for use and occupation and also the driveway adjacent to plot No.C-96, and she will also have the right of rear entrance from the service lane.

It was also agreed by Mrs.Chandra Kanta Bhalla that the servant quarter marked with hatching type „D?of the annexed plan, on the second floor of Servants?

quarters Block hereto being occupied and used by Mrs.Veena Sethi w/o Late Shri Ramesh Chandra Sethi and daughter of Mrs.Veena Sethi during her life time or as long as she personally wishes to occupy the same and Mrs.Chandra Kanta Bhalla will not raise any objection and or change any rent.

5. The parties further agreed that the liabilities on account of the property in respect of Municipal taxes, Maharani Bagh Society, DDA charges shall henceforth be borne by the parties equally and each one of the parties shall pay and contribute his/her one fourth share as and when the amount is demanded by the concerned authorities and becomes payable and keep the others harmless and indemnified in respect thereof and all costs, charges or expenses pertaining thereto.

6. The parties had settled amongst themselves the accounts of their H.U.F. and confirmed that as on April 5th, 1984 Shri Rattan Chand Bhalla was entitled to receive `43,955.75 and Smt.Chandra Kanta Bhalla was entitled to receive `7,221.75 and it was agreed that the aforesaid credits shall be liquidated by payments of `23,647.25 by Shri Atul Bhalla to Shri Rattan Chand Bhalla and by payment of `20,308.50 by Shri Anil Bhalla to Shri Rattan Chand Bhalla and `7,221.75 by Shri Anil Bhalla to his mother Smt.Chandra Kanta Bhalla within a period of three years.

7. Parties had also agreed that in making use and enjoyment of the portions allotted to each one of them, they shall be bound to observe and adhere to the terms and conditions imposed on Shri Rattan Chand Bhalla under the perpetual sub-lease and other governing law, rules, regulations and bye-laws and do nothing which shall, in any manner, constitute or be treated as a breach of any of the terms of the perpetual sub-lease or any rule, regulation, law of bey-law governing the premises.

8. The parties had also agreed that none of them shall assign, transfer, part with or in any manner alienate or charge the portion allotted to them except that it shall be open to the parties to assign their rights in relation to the portion allotted to them to any one or more of the other parties here to or their blood relations/spouse.”

22. Now, recital 3 records that Rattan Chand Bhalla was the karta of the HUF and his two sons Anil and Atul were the co-parceners and that Smt.Chander Kanta Bhalla is a member of the HUF being the wife of Rattan Chand Bhalla and the mother of Anil and Atul. It records that all four are entitled to an equal share in the assets of the HUF, a recital of facts and law which is conceded to be correct. Thus, nothing turns on recital No.3.

23. Recital No.7 records that disputes had cropped up amongst the parties concerning their 'rights, use and occupation' in relation to 7 Southern Avenue, Maharani Bagh, New Delhi.

24. We highlight that the recital uses three expressions: (i) rights; (ii) use; and (iii) occupation.

25. The recital records that the parties had been living separate from one another and that the property was incapable of partitioned by metes and bounds. The recital records that the parties had agreed to a settlement concerning their „rights to use and occupy' the property.

26. Picking on the expression 'right to use and occupy', it was urged by learned counsel for the appellant that the same sings the signature tune to the settlement recorded i.e. the parties had agreed only to the use and occupation of the property i.e. possessory rights and not the title being partitioned.

27. Now, recital No.7 commences by recording that differences have cropped up amongst the parties concerning their: (i) rights, (ii) use, and (iii) occupation. But thereafter in the same clause the word „right?has been used in conjunction with the words „to use?and literally read would mean the right to use and occupy. But, a document has to be construed not semantically but as a whole. After all, the intention of parties has to be gathered by reading the document as a whole and not in isolated parts.

28. The memorandum records the portion allotted to Rattan Chand Bhalla as per clause No.1, the portion allotted to Anil Bhalla as per clause No.2, the portion allotted to Atul Bhalla as per clause No.3 and the portion allotted to Chander Kanta

Bhalla as per clause No.4. As per clause No.5 it stands recorded that the four parties shall equally bear the house tax burden on the property and clause No.8 empowers the parties to assign their rights in the portions allotted to them, but not to outsiders. The right to assign has been curtailed to within blood relations. It is important to highlight that with respect to the portions allotted to Anil Bhalla and Chander Kanta Bhalla, clause No.2 and No.4 refers to certain portions occupied by Veena Sethi, the daughter of Rattan Chand Bhalla and Chander Kanta Bhalla and the sister of Anil Bhalla and Atul Bhalla. With respect to her, it stands recorded that notwithstanding the allotment made to Anil Bhalla and Chander Kanta Bhalla, Veena Sethi would have a right to occupy the portions in her possession during her lifetime.

29. Now, the distinction with respect to the possessory right given to Veena Sethi and the others is stark, and in our opinion brings out the intention of the parties. This coupled with clause No.8 which empowers the parties to assign '**their rights**' is sufficient indication that the oral partition, terms whereof were reduced into writing under the memorandum, was to partition the house not by metes and bounds but in the manner indicated in the document and that the partition was not only to enjoy the different portions of the property but to have independent title thereto. The severance is complete, the unity of title and possession has been severed and henceforth the parties have agreed to enjoy the property in individuality with respect to different portions allotted to them.

30. Ignoring the application, the affidavit and the income tax assessment order where the reference is to the word 'total partition', and construing Ex.PW-1/3 to ascertain the true intention of the parties, we concur with the view taken by the learned Single Judge that the property stood partitioned and thus there was no occasion to further partition the same as also the conclusion that Chander Kanta Bhalla was free to bequeath her share in the property, including the one she had inherited from her husband who had made a bequest in her favour of his share. We note that after the impugned order was passed, the appellant had sought a review which has been rightly dismissed by the learned Single Judge vide order dated May 01, 2012 and for which opinion the learned Single Judge has only referred to Ex.PW-1/3.

31. With reference to the evidence on record we find no case made out to issue notice in the two appeals to the respondents and would thus dismiss the two appeals in limine.

32. No costs.

CM No.14557/2012 and CM No.14558/2012 in FAO(OS) 402/2012 and CM No.14554/2012 and CM No.14555/2012

Since both the appeals stand dismissed, instant applications stand disposed of as infructuous.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com